

Reference/ Reading Material

on

COMPARATIVE PUBLIC LAW AND
HINDU PHILOSOPHY

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Arthur Schopenhauer On Reading and Books

“When we read, another person thinks for us: we merely repeat his mental process.”

Ignorance is degrading only when it is found in company with riches. Want and penury restrain the poor man; his employment takes the place of knowledge and occupies his thoughts: while rich men who are ignorant live for their pleasure only, and resemble a beast; as may be seen daily. They are to be reproached also for not having used wealth and leisure for that which lends them their greatest value.

When we read, another person thinks for us: we merely repeat his mental process. It is the same as the pupil, in learning to write, following with his pen the lines that have been pencilled by the teacher. Accordingly, in reading, the work of thinking is, for the greater part, done for us. This is why we are consciously relieved when we turn to reading after being occupied with our own thoughts. But, in reading, our head is, however, really only the arena of some one else's thoughts. And so it happens that the person who reads a great deal — that is to say, almost the whole day, and recreates himself by spending the intervals in thoughtless diversion, gradually loses the ability to think for himself; just as a man who is always riding at last forgets how to walk. Such, however, is the case with many men of learning: they have read themselves stupid. For to read in every spare moment, and to read constantly, is more paralysing to the mind than constant manual work, which, at any rate, allows one to follow one's own thoughts. Just as a spring, through the continual pressure of a foreign body, at last loses its elasticity, so does the mind if it has another person's thoughts continually forced upon it. And just as one spoils the stomach by overfeeding and thereby impairs the whole body, so can one overload and

choke the mind by giving it too much nourishment. For the more one reads the fewer are the traces left of what one has read; the mind is like a tablet that has been written over and over. Hence it is impossible to reflect; and it is only by reflection that one can assimilate what one has read if one reads straight ahead without pondering over it later, what has been read does not take root, but is for the most part lost. Indeed, it is the same with mental as with bodily food: scarcely the fifth part of what a man takes is assimilated; the remainder passes off in evaporation, respiration, and the like.

From all this it may be concluded that thoughts put down on paper are nothing more than footprints in the sand: one sees the road the man has taken, but in order to know what he saw on the way, one requires his eyes.



No literary quality can be attained by reading writers who possess it: be it, for example, persuasiveness, imagination, the gift of drawing comparisons, boldness or bitterness, brevity or grace, facility of expression or wit, unexpected contrasts, a laconic manner, naiveté, and the like. But if we are already gifted with these qualities — that is to say, if we possess them potentia — we can call them forth and bring them to consciousness; we can discern to what uses they are to be put; we can be strengthened in our inclination, nay, may have courage, to use them; we can judge by examples the effect of their application and so learn the correct use of them; and it is only after we have accomplished

“As the strata of the earth preserve in rows the beings which lived in former times, so do the shelves of a library preserve in a like manner the errors of the past and expositions concerning them.”

all this that we actu possess these qualities. This is the only way in which reading can form writing, since it teaches us the use to which we can put our own natural gifts; and in order to do this it must be taken for granted that these qualities are in us. Without them we learn nothing from reading but cold, dead mannerisms, and we become mere imitators.



The health officer should, in the interest of one’s eyes, see that the smallness of print has a fixed minimum, which must not be exceeded. When I was in Venice in 1818, at which time the genuine Venetian chain was still being made, a goldsmith told me that those who made the catena fina turned blind at thirty.



As the strata of the earth preserve in rows the beings which lived in former times, so do the shelves of a library preserve in a like manner the errors of the past and expositions concerning them. Like those creatures, they too were full of life in their time and made a great deal of noise; but now they are stiff and fossilised, and only of interest to the literary palaeontologist.



According to Herodotus, Xerxes wept at the sight of his army, which was too extensive for him to scan, at the thought that a hundred years hence not one of all these would be alive. Who would not weep at the thought in looking over a big catalogue that of all these books not one will be in existence in ten years’ time?

It is the same in literature as in life. Wherever one goes one immediately comes upon the incorrigible mob of humanity. It exists everywhere in legions; crowding, soiling everything, like flies in summer. Hence the numberless bad books, those rank weeds of literature which extract nourishment from the corn and choke it.

They monopolise the time, money, and attention which really belong to good books and their noble aims; they are written merely with a view to making money or procuring places. They are not only useless, but they do positive harm. Nine-tenths of the whole of our present literature aims solely at taking a few shillings out of the public’s pocket, and to accomplish this, author, publisher, and reviewer have joined forces.

There is a more cunning and worse trick, albeit a profitable one. Litterateurs, hack-writers, and productive authors have succeeded, contrary to good taste and the true culture of the age, in bringing the world elegantly into leading-strings, so that they have been taught to read a tempo and all the same thing — namely, the newest books order that they may have material for conversation in their social circles. Bad novels and similar productions from the pen of writers who were once famous, such as Spindler, Bulwer, Eugène Sue, and so on, serve this purpose. But what can be more miserable than the fate of a reading public of this kind, that feels always impelled to read the latest writings of extremely commonplace authors who write for money only, and therefore exist in numbers? And for the sake of this they merely know by name the works of the rare and superior writers, of all ages and countries.

Literary newspapers, since they print the daily smatterings of commonplace people, are especially a cunning means for robbing from the aesthetic public the time which should be devoted to the genuine productions of art for the furtherance of culture.

Hence, in regard to our subject, the art of not reading is highly important. This consists in not taking a book into one’s hand merely because it is interesting the great public at the time — such as political or religious pamphlets, novels, poetry, and the like, which make a noise and reach perhaps several editions in their first and last years

“One can never read too little of bad, or too much of good books: bad books are intellectual poison; they destroy the mind.”

of existence. Remember rather that the man who writes for fools always finds a large public: and only read for a limited and definite time exclusively the works of great minds, those who surpass other men of all times and countries, and whom the voice of fame points to as such. These alone really educate and instruct.

One can never read too little of bad, or too much of good books: bad books are intellectual poison; they destroy the mind.

In order to read what is good one must make it a condition never to read what is bad; for life is short, and both time and strength limited.



Books are written sometimes about this, sometimes about that great thinker of former times, and the public reads these books, but not the works of the man himself. This is because it wants to read only what has just been printed, and because *similis similibus gaudet*, and it finds the shallow, insipid gossip of some stupid head of to-day more homogeneous and agreeable than the thoughts of great minds. I have to thank fate, however, that a fine epigram of A.B. Schlegel, which has since been my guiding star, came before my notice as a youth:

“Leset fleizig die Alten, die wahren
eigentlich Alten
Was die Neuen davon sagen bedeutet
nicht viel.”

Oh, how like one commonplace mind is to another! How they are all fashioned in one form! How they all think alike under similar circumstances, and never differ! This is why their views are so personal and petty. And a stupid public reads the worthless trash written by these fellows for no other reason than that it has been printed to-day, while it leaves the works of great thinkers undisturbed on the bookshelves.

Incredible are the folly and perversi-

ty of a public that will leave unread writings of the noblest and rarest of minds, of all times and all countries, for the sake of reading the writings of commonplace persons which appear daily, and breed every year in countless numbers like flies; merely because these writings have been printed to-day and are still wet from the press. It would be better if they were thrown on one side and rejected the day they appeared, as they must be after the lapse of a few years. They will then afford material for laughter as illustrating the follies of a former time.

It is because people will only read what is the newest instead of what is the best of all ages, that writers remain in the narrow circle of prevailing ideas, and that the age sinks deeper and deeper in its own mire.



There are at all times two literatures which, although scarcely known to each other, progress side by side — the one real, the other merely apparent. The former grows into literature that lasts. Pursued by people who live for science or poetry, it goes its way earnestly and quietly, but extremely slowly; and it produces in Europe scarcely a dozen works in a century, which, however, are permanent. The other literature is pursued by people who live on science or poetry; it goes at a gallop amid a great noise and shouting of those taking part, and brings yearly many thousand works into the market. But after a few years one asks, Where are they? where is their fame, which was so great formerly? This class of literature may be distinguished as fleeting, the other as permanent.



“It would be a good thing to buy books if one could also buy the time to read them; but one usually confuses the purchase of books with the acquisition of their contents. To desire that a man should retain everything he has ever read, is the same as wishing him to retain in his stomach all that he has ever eaten.”

It would be a good thing to buy books if one could also buy the time to read them; but one usually confuses the purchase of books with the acquisition of their contents. To desire that a man should retain everything he has ever read, is the same as wishing him to retain in his stomach all that he has ever eaten. He has been bodily nourished on what he has eaten, and mentally on what he has read, and through them become what he is. As the body assimilates what is homogeneous to it, so will a man retain what interests him; in other words, what coincides with his system of thought or suits his ends. Every one has aims, but very few have anything approaching a system of thought. This is why such people do not take an objective interest in anything, and why they learn nothing from what they read: they remember nothing about it.

Repetitio est mater studiorum. Any kind of important book should immediately be read twice, partly because one grasps the matter in its entirety the second time, and only really understands the beginning when the end is known; and partly because in reading it the second time one's temper and mood are different, so that one gets another impression; it may be that one sees the matter in another light.

Works are the quintessence of a mind, and are therefore always of by far greater value than conversation, even if it be the conversation of the greatest mind. In every essential a man's works surpass his conversation and leave it far behind. Even the writings of an ordinary man may be instructive, worth reading, and entertaining, for the simple reason that they are the quintessence of that man's mind — that is to say, the writings are the result and fruit of his whole thought and study; while we should be dissatisfied with his conversation. Accordingly, it is possible to read books written by people whose conversation would give us no satisfaction; so that the mind will only by degrees attain high culture by

finding entertainment almost entirely in books, and not in men.

There is nothing that so greatly recreates the mind as the works of the old classic writers. Directly one has been taken up, even if it is only for half-an-hour, one feels as quickly refreshed, relieved, purified, elevated, and strengthened as if one had refreshed oneself at a mountain stream. Is this due to the perfections of the old languages, or to the greatness of the minds whose works have remained unharmed and untouched for centuries? Perhaps to both combined. This I know, directly we stop learning the old languages (as is at present threatening) a new class of literature will spring up, consisting of writing that is more barbaric, stupid, and worthless than has ever yet existed; that, in particular, the German language, which possesses some of the beauties of the old languages, will be systematically spoilt and stripped by these worthless contemporary scribblers, until, little by little, it becomes impoverished, crippled, and reduced to a miserable jargon.

Half a century is always a considerable time in the history of the universe, for the matter which forms it is always shifting; something is always taking place. But the same length of time in literature often goes for nothing, because nothing has happened; unskilful attempts don't count; so that we are exactly where we were fifty years previously.

To illustrate this: imagine the progress of knowledge among mankind in the form of a planet's course. The false paths the human race soon follows after any important progress has been made represent the epicycles in the Ptolemaic system; after passing through any one of them the planet is just where it was before it entered it. The great minds, however, which really bring the race further on its course, do not accompany it on the epicycles which it makes every time. This explains why posthumous fame is got

“During that period the errors have increased to such an extent that they fall under the weight of their absurdity; while at the same time the opposition to them has become stronger.”

at the expense of contemporary fame, and vice versâ. We have an instance of such an epicycle in the philosophy of Fichte and Schelling, crowned by Hegel's caricature of it. This epicycle issued from the limit to which philosophy had been finally brought by Kant, where I myself took it up again later to carry it further. In the interim the false philosophers I have mentioned, and some others, passed through their epicycle, which has just been terminated; hence the people who accompanied them are conscious of being exactly at the point from which they started.

This condition of things shows why the scientific, literary, and artistic spirit of the age is declared bankrupt about every thirty years. During that period the errors have increased to such an extent that they fall under the weight of their absurdity; while at the same time the opposition to them has become stronger. At this point there is a crash, which is followed by an error in the opposite direction. To show the course that is taken in its periodical return would be the true practical subject of the history of literature; little notice is taken of it, however. Moreover, through the comparative shortness of such periods, the data of remote times are with difficulty collected; hence the matter can be most conveniently observed in one's own age.

An example of this taken from physical science is found in Werter's Neptunian geology. But let me keep to the example already quoted above, for it is nearest to us. In German philosophy Kant's brilliant period was immediately followed by another period, which aimed at being imposing rather than convincing. Instead of being solid and clear, it aimed at being brilliant and hyperbolic, and, in particular, unintelligible; instead of seeking truth, it intrigued. Under these circumstances philosophy could make no progress. Ultimately the whole school and its method became bankrupt. For the audacious, sophisticated nonsense on the one hand, and the unconscionable praise on the other of Hegel and

his fellows, as well as the apparent object of the whole affair, rose to such a pitch that in the end the charlatanism of the thing was obvious to everybody; and when, in consequence of certain revelations, the protection that had been given it by the upper classes was withdrawn, it was talked about by everybody. This most miserable of all the philosophies that have ever existed dragged down with it into the abyss of discredit the systems of Fichte and Schelling, which had preceded it. So that the absolute philosophical futility of the first half of the century following upon Kant in Germany is obvious; and yet the Germans boast of their gift for philosophy compared with foreigners, especially since an English writer, with malicious irony, called them a nation of thinkers.

Those who want an example of the general scheme of epicycles taken from the history of art need only look at the School of Sculpture which flourished in the last century under Bernini, and especially at its further cultivation in France. This school represented commonplace nature instead of antique beauty, and the manners of a French minuet instead of antique simplicity and grace. It became bankrupt when, under Winckelmann's direction, a return was made to the antique school. Another example is supplied in the painting belonging to the first quarter of this century. Art was regarded merely as a means and instrument of mediaeval religious feeling, and consequently ecclesiastical subjects alone were chosen for its themes. These, however, were treated by painters who were wanting in earnestness of faith, and in their delusion they took for examples Francesco Francia, Pietro Perugino, Angelico da Fiesole, and others like them, even holding them in greater esteem than the truly great masters who followed. In view of this error, and because in poetry an analogous effort had at the same time met with favour, Goethe wrote his parable *Pfaffenspiel*. This school, reputedly capricious, became bankrupt, and was followed by a return

“But I wish some one would attempt a tragical history of literature, showing how the greatest writers and artists have been treated during their lives by the various nations which have produced them and whose proudest possessions they are.”

to nature, which made itself known in genre pictures and scenes of life of every description, even though it strayed sometimes into vulgarity.

It is the same with the progress of the human mind in the history of literature, which is for the most part like the catalogue of a cabinet of deformities; the spirit in which they keep the longest is pigskin. We do not need to look there for the few who have been born shapely; they are still alive, and we come across them in every part of the world, like immortals whose youth is ever fresh. They alone form what I have distinguished as real literature, the history of which, although poor in persons, we learn from our youth up out of the mouths of educated people, and not first of all from compilations. As a specific against the present prevailing monomania for reading literary histories, so that one may be able to chatter about everything without really knowing anything ...

But I wish some one would attempt a tragical history of literature, showing how the greatest writers and artists have been treated during their lives by the various nations which have produced them and whose proudest possessions they are. It would show

us the endless fight which the good and genuine works of all periods and countries have had to carry on against the perverse and bad. It would depict the martyrdom of almost all those who truly enlightened humanity, of almost all the great masters in every kind of art; it would show us how they, with few exceptions, were tormented without recognition, without any to share their misery, without followers; how they existed in poverty and misery whilst fame, honour, and riches fell to the lot of the worthless; it would reveal that what happened to them happened to Esau, who, while hunting the deer for his father, was robbed of the blessing by Jacob disguised in his brother's coat; and how through it all the love of their subject kept them up, until at last the trying fight of such a teacher of the human race is ended, the immortal laurel offered to him, and the time come when it can be said of him.

“Der schwere Panzer wird zum
Flügelkleide

Kurz ist der Schmerz, unendlich ist
die Freude.”

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Asian Indigenous Law

In Interaction with Received Law

Edited by
Masaji Chiba



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Preface

Western law is normally regarded as universal when considered from the fact that it has been received and utilized by non-Western countries as the basis of their own state legal systems. It is accordingly natural that jurisprudence, among both Western and most non-Western scholars as well, tends to observe the development of a non-Western legal system as a history of received Western law. In fact, because of their different underlying cultural histories, there have been countless incongruities and conflicts between received Western law and indigenous non-Western law. However, these points have rarely been taken seriously by orthodox jurisprudence – a situation which may seem reasonable from the Western point of view, but is certainly not from the non-Western.

Non-Western peoples have each cherished their indigenous law as an integral part of their cultural heritage. During their long histories their law has on occasions encountered foreign law, whether voluntarily or not, and these encounters have led sometimes to peaceful assimilation and sometimes to destructive struggle between indigenous and received law. The indigenous law may sometimes have failed to maintain itself, while at others it may have succeeded either by rejecting the encountered law or by adapting itself to conserve its cultural identity. Contemporary non-Western law is thus seen as one in a current state in an ongoing process of self-developing indigenous law whether successfully or not. Truly, the reception of Western law by non-Western countries in modern times is the most influential encounter of non-Western law with foreign law. However, it is still only one of many encounters in the long history of each non-Western law. The major portion of this book is a collection of descriptions of typical non-Western countries from this viewpoint by native scholars.

The scope of this collection is limited to only six Asian communities among many for two reasons: first, theoretically, because Asian cultures have maintained many established legal ideas in comparison with the Western in their great religious or philosophical traditions; and second, practically, because in the organizational stage of the work it was in these communities that I was able to reach collaborators who were in a position to carry through this joint project. Also, "Asia" here means not so much a geographical area as it does a collection of nations who maintain cultures which originated in Asia. In this respect, I regret that I was unable at that time to reach others such as the Chinese and Indonesian. This limitation in the scope of the project both necessitated and facilitated the construction of theoretical hypotheses for the accurate observation and analysis of working Asian law. The Introduction and Conclusion of this book were written for that purpose, and also in the hope that the scheme set forth herein may be enlarged to apply to non-Western situations in general.

This book could not have been completed without the continuing encouragement of many friends both foreign and Japanese, including Professor Adam Podgorecki of Carlton University, Ottawa, Professor Peter G. Sack of the Australian National University, Canberra, Professor Marc Galanter of the University of Wisconsin, Madison; and the timely assistance of several agencies. Among the agencies, the International House of Japan, Tokyo, chaired by Mr Shigeharu Matsumoto, extended invaluable moral efforts and assistance which helped me to gain financial support from other sources; the Mitsubishi Foundation, Tokyo, and the Ford Foundation, New York, both of whom were generous in bearing the research expenses of the collaborators; and the East-West Seminar, Tokyo, chaired by Mr Masahide Shibusawa, provided grants which covered the major part of the expense of completing the manuscript. To them, and to many others too numerous to list, I tender my heartfelt thanks.

In addition I record my deep respect for the enduring friendly co-operation of the collaborators during the ten-year duration of this project. Each of them was assailed by difficulties which might easily have discouraged him from cooperating. To cite just a few, Dr Yassin suffered the tragic loss of his wife after a protracted illness, Professor Nezami had to leave his beloved country because of the political upheaval, Dr Tiruchelvam was called upon several

times to participate in official business to tackle so-called ethnic affairs, and Professors Baxi and Preedee were for some years occupied with important duties connected with the presidencies of their universities. The factor which enabled them to overcome these difficulties was, I believe, their enthusiasm for our common purpose, backed by the encouragement of their wives. Finally I would like to mention my own wife, Mieko, who has been a source of constant encouragement and support to me.

Masaji Chiba

Masaji Chiba

I. Problem

There has been a long-established belief among both specialists and laymen that law is a special mechanism for social control isolated from other social mechanisms and, for this reason, that the scientific study of law should be confined to the special capacity of traditional, model jurisprudence. But since the beginning of the twentieth century this common belief has been challenged by new ideas concerning both the objectives and methods of the study of law. As a result it has become evident that law is so inseparably rooted in society as to be approachable by sociological methods. Furthermore, it has also become accepted that law must be recognized as an aspect of the total culture of a people, characterized by the psychological and ideational features as well as the structural and functional features of each fostering people, and may therefore be approached by anthropological methods.

The popular negligence of the cultural factor of law may have been partly caused by the alleged universal nature of traditional jurisprudence, prevailing as in *the* model science of law in the world. Contemporary model jurisprudence is indeed established on a universal basis. Its overwhelming prevalence in the world seems to leave little room either for serious consideration of its cultural specificity or for doubt as to its applicability to the different cultural specificities of other countries. But the Western conception of law, created and supported by model jurisprudence, has been bereft of its cultural specificity when comparatively

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analysed with the conceptions of law in other cultures (cf. David, 1975; Sawyer, 1975). Truly, contemporary model jurisprudence is a product of long Western history and is coloured by a Western culture based on the Hellenistic and Christian view of man and society. While we acknowledge the universalistic achievements of Western jurisprudence as the most advanced science of law ever accomplished by man, we cannot disregard its cultural specificity. That specificity may have been in some cases diffused by or assimilated into different specificities of different cultures, but in other cases it has conflicted with or been rejected by them. In all cases, model jurisprudence, convinced of its universality, will not pay due attention to the cultural problems which accompany such diffusion or conflict between Western specificity and non-Western specificities (Chiba, 1984).

At the same time it is true that the peoples and scholars of non-Western countries who have cherished their own jurisprudence with specificities quite different from the Western, have not succeeded nor even attempted to present the achievements of their jurisprudence before the world circle of legal science forcibly enough to cause the proponents of Western jurisprudence to doubt their conviction of its universality. Without presenting the achievements of their own jurisprudence before world bodies specifically aimed at self-reflection of model jurisprudence, they would be disqualified from criticizing the ethnocentricity of the latter, as recently pointed out by some Western scholars (Chiba, 1980: 37), and insisting upon the *raison d'être* of their own jurisprudence. Such a negative or passive attitude may be another reason why model jurisprudence has in general disregarded the jurisprudence of different cultures – jurisprudence with due respect to indigenous law in non-Western countries. Vital to the proper understanding of law in non-Western culture is, firstly, for native scholars to present their own data and views positively in order not to negate the significance of model jurisprudence, but to maintain a sound understanding of its nature when utilized in different cultures.

We, the authors, from six countries with traditional cultures of Asian origin, want here to present the results of our joint project initiated by the above aspiration. Our purpose is, after all, accurately to identify the structural position and function of the indigenous laws of the countries concerned in terms of the state laws which are, by and large, based on received Western law.

Asian cultures have yielded a variety of philosophies and religions comparable to Western ones. Some of them have survived to our time with far-reaching influences upon the culture and society of various peoples. When they were confronted with the different systems of law received from Western countries, they must have struggled with that received law at the risk of their cultural identities. The general state of law found today in Asian countries is nothing but the result of those struggles. In some cases, the struggles may have ended earlier with happy or unhappy results; in others, the struggle may still be continuing. We wish to take a step forward in establishing how such struggles developed, or are developing, whether harmoniously or with conflict, and also to determine whether the results should be judged as successful or unsuccessful. We know that the answers to such questions cannot be given in an instant. We want to try, however, to begin our approach to the problem encouraged by the above aspiration, overcoming some admitted difficulties arising from our own different cultural and personal backgrounds. The countries here included are India, the Hindu society; Thailand, a Buddhist society; Egypt, a Sunni-Islamic society; Iran, an Islamic society; Sri Lanka, multi-religious society; and Japan, the peculiar Shinto society.²

II. Method

How then is it possible to observe and analyse the whole structure of law of a people as a phase of their culture and as a result of the struggles between received law and indigenous culture, particularly of the six countries here included? In other words, what frame of reference is effectively available for our purpose? We are disappointed to note that there is no ready-made scheme or framework on which we can rely. That one has never been presented is a reasonable result of the attitude of model jurisprudence on the one hand, which ignores the cultural nature of law by limiting its scope to the instrumental and technical nature, and of both sociology and anthropology on the other, which have thus far excluded investigation of the special mechanism of law. Accordingly, we first have to try to devise an appropriate frame of reference for ourselves.

Happily, we have some forerunners who have left us invaluable suggestions as to the cultural nature of law. In the nineteenth century, we find such scholars as Wundt, Savigny, Hegel, Maine, Post, and Kohler. Early in the twentieth century, Ehrlich (1936: 486-506) established the concept of "living law" in every human group to include in law a certain type of conventional social norm; and Weber (1967: 233) typified ideally "the particular principles underlying the religious ethics" which limit the structure and function of secular law. Malinowski (1926: 46-49) found the social mechanism of "publicity" and "reciprocity" to be the essence of law in a society without government and formal law. Hoebel (1954: 97-126) collected data concerning the function of "jural postulates" of primitive peoples. Pospisil (1971: 71-126) emphasized "the multiplicity of legal systems within a society". Some comparative scholars, derivating from model jurisprudence, noted differences in cultural factors among different peoples in discussing classification of different systems of law into the "families of law" (cf. David & Brierley, 1968: 9-17). And recently "legal pluralism" has come to be taken for granted not only in non-Western but also in Western countries (cf. Hooker, 1975).

The above suggestions are invaluable. The point is that the whole structure of law of a people is not limited to the monistic system of state law as maintained by model jurisprudence in accordance with its methodological postulates. The whole structure of law as an aspect of culture should include all regulations, however apparently different from state law, which the people concerned observe as law in their cultural tradition, including value systems; the very cultural identity of a people demands that we include all of them in a whole structure. Thus, the whole structure of law is plural, consisting of different systems of law interacting with one another harmoniously or conflictingly. Our first methodological requirement then is to frame a new conceptual scheme sufficient to allow us to observe the relevant facts accurately and to analyse them into theoretical formulations. Thus we arrive at our first working hypothesis: The three-level structure of law.

Cultural problems in the three-level structure of law of non-Western countries may be found in great variety. But the most conspicuous among them are those related to the cultural origin of law and which are inevitably related to the problem of reception of law. Reception of law is one of the topics frequently discussed by

the proponents and students of model jurisprudence. But their point of view is, generally speaking, limited to confirming how Western law has been adopted or permeated into the official legal systems of non-Western countries, with only occasional recognition of its conflict with or rejection by indigenous systems. In this view, main concern is given to the destiny of the received Western law rather than to the receiving indigenous systems. For the receiving peoples, in contrast, main concern must be given to the whole structure of their indigenous systems, with focus upon assimilation of the received law while firmly maintaining their cultural identities. Unfortunately, the point of view clearly centring on that concern has been neither established nor systematically attempted. This, then, would be second methodological requirement necessary for our purpose: Interaction between received law and indigenous law.³

III. Working hypotheses

1. THE THREE-LEVEL STRUCTURE OF LAW

The whole structure of law is seen from a formal aspect to be composed of three levels of law: official law, unofficial law, and legal postulate.

Official law is the legal system sanctioned by the legitimate authority of a country. *State law* is ordinarily understood as a typical official law or even the only official law. Truly, it is directly sanctioned by the legitimate authority of the government of a state to have overall jurisdiction over the country. But as a matter of nature it is only one among many official laws of a country, however dominant it may appear over the others. For instance, as in most contemporary countries with established religions, religious law may be partially included in or accommodated by state law, but partially functioning out of the jurisdiction of the latter, thus forming its own system different from state law. Canon law, Islamic law, Hindu law, Buddhist law, and Judaic law are among typical examples. Other examples may be found in the laws of marriage and family, land and farming, local organizations, professional guilds, castes and stratifications, ethnic minorities, and so on, insofar as officially sanctioned by state law in one form or another. Each of these official laws of a country is sanctioned first by an authority of its own. But all of them are required to

keep consonance with one another. To fulfil this requirement, each of them must, finally, be sanctioned by the state authority. However, as far as each of them forms an independent system of law, it may in actuality work in indifference to the other official laws and, accordingly, be in conflict with them.

Unofficial law is the legal system not officially sanctioned by any legitimate authority, but sanctioned in practice by the general consensus of a certain circle of people, whether within or beyond the bounds of a country. That general consensus may be either consciously recognized and expressed in formal rules, or unconsciously observed in particular patterns of behaviour. However, not all such unofficial practices supported by general consensus are to be included in unofficial law. Unofficial law is here limited to those unofficial practices which have a distinct influence upon the effectiveness of official law; in other words those which distinctively supplement, oppose, modify, or undermine any of the official laws, including state law. The effectiveness of the total system of official law is thus dependent upon the *status quo* of the unofficial law of the country concerned. One of the most important problems of unofficial law is therefore its positive or negative influence upon official law as well as its cultural background. While model jurisprudence has tended to disregard it, unofficial law has been treated in various rubrics in sociological and anthropological trends. For example, such rubrics are frequently found as customary law, living law, law in action, primitive law, tribal law, native law, and folk law⁴, although their specific connotations should be carefully distinguished from one another.

A *legal postulate*⁵ is a value principle or value system specifically connected with a particular official or unofficial law, which acts to found, justify and orient the latter. It may consist of established legal ideas such as natural law, justice, equity, and so on in model jurisprudence; sacred truths and precepts emanating from various gods in religious law; social and cultural postulates affording the structural and functional basis for a society as embodied in clan unity, exogamy, bilineal descent, seniority, individual freedom, national philosophy, and so on; political ideologies, often closely connected with economic policies, as in capitalism or socialism; and so on. The legal postulates of a country, whether official or unofficial, are as a whole required to keep a certain degree of consonance with one another. But complete consonance cannot be expected. First, because as each legal postulate is in support of a

particular system of official or unofficial law, the potential of conflict with other systems, as pointed out above, is high. Second, because the legal postulate may tend to upset the *status quo* of its supported official or unofficial law in order to improve or even replace the latter. Formally speaking, a minimum integration among the legal postulates of a country should be preserved if the people are to maintain their national identity. But the nature of integration, and accordingly its modes and degrees, may differ from culture to culture.

2. INTERACTION BETWEEN RECEIVED LAW AND INDIGENOUS LAW

The whole structure of law of a non-Western country is, seen from a cultural point of view, formed in the interaction between received law and indigenous law.

Received law is, in a broad sense, that law which is received by a country from one or more foreign countries. Reception may take place in a variety of forms or processes; for instance, partially or wholly, systematically or unsystematically, formally or substantially, rapidly or gradually, voluntarily or involuntarily, in one or more of the three levels, exclusively between Western or non-Western countries, or, finally, between Western *and* non-Western countries. Most crucial for our purposes, however, is the reception of Western state law by non-Western countries in modern times, which we might consider as the narrower sense of "reception of law". It is crucial because it is the one in which the cultural conflict between received law and indigenous law is most conspicuous, and because the reception process, in the truest meaning, has not yet been completed. The modern reception has taken place rather formally and systematically in the level of official state law, whether imposed by Western countries or voluntarily accepted by non-Western countries, and some might see the reception as completed by the formal enforcement of received law. But in the actual process of the history of the receiving countries, it is only the beginning of their struggles to assimilate the foreign systems of law of different cultures with their own indigenous law. Notable is the fact that in this struggle process the foreign law originally received can be more or less assimilated with existing indigenous law so that it may assume a character of indigenous law, while it may still be discriminated as a different system of law.

Indigenous law^o is, in a broad sense, law originated in the native culture of a people. But in consideration of the general trend of cultural diffusion in human society, it would be next to impossible to find purely indigenous law in contemporary society. The available concept of indigenous law should be limited by relative features useful for our purpose, that is, meaningful in dichotomy against received law, especially in its narrower sense. It may thus be defined as law existing indigenously in the native culture of a people prior to the reception of Western state law in modern times, although it may include some assimilated law which was originally received in earlier times. Whether and how indigenous law has developed in the struggles with received law in this process of reception is the most urgent problem to be here explored, as evidenced by the insistence of some scholars upon adopting the concept of "imposition" in place of "reception" (Burman & Harrell-Bond, 1979).

The actual interaction between received law and indigenous law differs widely from country to country. Generally speaking of the reception in a narrower sense, state law is framed after Western models in its formal structure, adopting into its substantial contents various rights, duties, and legal institutions and procedures originated in Western law. However, it has also adopted various indigenous laws such as those relating to marriage, family, status, land, etc. into its formal structure, and furthermore, some indigenous institutions and procedures by reformulating their essence in accordance with that formal structure. But interaction is not limited to such a static structure. It takes place rather in a dynamic process of mutual influences between both types of law, whether through institutional revisions at a long range, or through individual authoritative judgements and peoples' behaviour at a short range. It is a process of accommodation or conflict, with legal postulates for both types of law playing an important role as they ideationally encourage the peoples concerned to protect or reformulate the law they support against rivalling law. Official law other than state law may originate in indigenous law or in received law as in the case of established religious law, though generally assimilated as if indigenous. Unofficial law is mostly occupied with indigenous law, except in cases where new reformative ideas of rights, such as environmental or consumers' rights, or legal institutions such as socialist ones in capitalistic countries, come to have certain effective influence as unofficial law. And finally, legal

postulates constantly accompany all forms and cases of official and unofficial law, both received and indigenous.

Such are our initial working hypotheses: a frame of reference, against which the data in the following chapters should be considered and, where possible, verified.

THE CRISIS OF INDIAN LEGAL SYSTEM

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(1982)

THE COLONIAL NATURE OF THE INDIAN LEGAL SYSTEM

Introduction: Juristic Dependencia

The Indian legal system (ILS), in its cultural, normative, and institutional aspects offers a vignette of Indian development in the last quarter century. Although the constitutionally desired social order makes radical, and indeed in some respects revolutionary, normative departures from its pre-colonial and past colonial, it is, in its operations, still very much burdened with its colonial past.

It is astonishing, but true, that there has been no real debate in independent India on the nature and the future of the ILS. The only impulse towards sustained discussion has arisen in terms of "revivalists" and "modernists", between neo-Gandhians and neo-liberals, on the eve of the Constitution-making (see e.g. Austin, 1966: 26-46; Baxi, 1967: 339-44; Galanter, 1972 SJ). Large, and unproductive, questions have been raised concerning the suitability of the western legal system for a peasant Asian society and these too have mainly focussed on the restoration of some supposed aspect of the "genius of the Indian (mostly, Hindu) society and people". The genius, it has been argued, required a wholesale transformation of the ILS going back to some kind of communitarianism which prevailed in ancient (Hindu) India. Naturally, it has been possible for the 'modernists' to give a short shrift to all this by saying that history has, if anything, Indianized and socialized colonial legal system, indeed to a point that it suits the genius of the Indian people (Law Commission, 1958). It would perplex, if not shock, a future historian of India to find that there was comparatively a far more sophisticated and solicitous debate concerning the introduction of the western legal system in India, on and since independence, concerning its retention. The fact that in so many of its normative, institutional, and cultural aspects, the ILS remains burdened with its colonial past, even after nearly thirty years of independence, constitutes an indictment not of our past colonial masters but of the elite of independent India, who have over the years been content with the colonial mould and mode of law.

The word 'colonial' is a somewhat treacherous one and a fairly useful one for polemical purposes. We endeavour to use it here with a degree of clarity as regards its meaning. Historical continuities with the past are perhaps ineluctable; we should, therefore, expect to find certain

features which were predominant in the British Indian Legal System (BILS) to be so in the legal system of independent India. Institutional, normative, and cultural continuities may, however be of three types. The first type is where the norms, ideology (or values), and institutions of the BILS were consciously examined, accepted, and adapted to the needs of independent India (e.g., the structure of adjudication, adversary mode, *laissezfaire* structure of legal profession, vast bodies of legal norms). The second type of continuity arises out of sheer inertia. The third type is one where change away from the BILS is frequently demanded but the change is opposed, and the *status quo* defended, by political and professional elites of independent India through arguments and justifications which are either reminiscent or very much the same as were advanced by the operators of the BILS. The rhetoric and 'logic' of justifications for the *status quo* (or continuities between the BILS and the ILS) which almost regards the attainment of political independence as *immaterial* or *irrelevant*, deserves to be characterized as distinctively colonial rhetoric and logic. If this third type of continuity is substantially manifested, perpetuating the same element of colonial governance through the law, one should have no hesitation even in characterizing the entire legal system as colonial. We highlight in this chapter, some marked continuities between the BILS and the ILS.

Of course, the notion 'colonial' can be used more extensively to signify a number of wider/status of affairs. For example, one might wish to use the epithet 'colonial' to denote a state of dependency on the 'mother' country, even long after the liquidation of the historical phase of actual colonization. Continuous reliance on western legal systems (particularly the common law culture of England and America) by judges, legislators, administrators, and jurists could be tellingly documented in support of the view that the ILS in this sense is colonial. Thoughtless transplants of legislative models, inapposite borrowings of western institutional blueprints and the underlying ideologies, excessive judicial dependence on Anglo-American legal materials, and many other similar factors are easy enough to document. All this manifests the juridical counterpart of what Latin American theorists of development and underdevelopment have identified as *dependencia*, as a "situation in which the economy of a certain group of countries is conditioned by development and expansion of another economy which is subordinate to the first" and involves a " 'historical condition' which affects a given structure of economy in such a way that few countries can derive advantages to the detriment of other countries" and thereby restrict "the subordinate economy's opportunities for development" (Hellwege, 1978: 48). For the word

‘economy’ we have only to substitute the words “law” or “legal systems and cultures” to arrive at the situation of *juristic dependencia*.

The phenomenon of *juristic dependencia* manifests itself most strikingly in planning or initiating through legislative or judicial processes, evident in copycat drafting of laws or reliance on obsolescent Anglo-American decisional law (or legislative models) *which have undergone drastic changes* even in the countries of their own origin. In 90 per cent of the cases, the legislative draftsmen follow the model and language of English laws; judicial interpretation continues to rely heavily on Anglo-American decisional materials. The point is that through these processes legislative and judicial development remains conditioned by development and expansion of ‘overseas’ models (mainly Anglo-American) and the ILS became a subordinate, almost a vassal legal system, thereby only occasionally serving the needs of Indian society.

We do not further elaborate or use the notion of *dependencia*, or cognate forms of new colonialism in the wide ranging contemporary sense. The main reason for this denial in intellectual self-indulgence is that the Indian reality is far too complex to be captured by a mere invocation of the notion of *dependencia* which is itself not entirely unproblematic conceptually. For example, the demarcating line between ‘copycatism’ and cross-cultural diffusion is susceptible to confusion as well as to clever manipulation for specific ideological or political purposes. This is not to deny that the operators of the ILS (judges, legislators, administrators, or jurists) are excessively oriented to an Anglo-American legal culture. They are. But to call this situation colonial is, in the present opinion, unproductive of scientific understanding of the problems and processes which give rise to this phenomenon, which deserves to be studied on its own terms. As a general maxim, we have to remember that Indocentrism by itself is no answer to Eurocentrism.

Nor do we use the term colonial in a wider sociological sense to signify the relationship of domination and subjugation between the rulers, whether alien or indigenous, and the ruled. This state of affairs was clearly the core of colonialism as a historical phenomenon but it is doubtful whether denial of freedom to large masses of people by indigenous rulers after decolonization can be fruitfully looked upon simply as a colonial process, though in the literature on self-determination as .an aspect of contemporary international order this is precisely how the term is used (e.g., in the case of Bangladesh or Biafra). Once again, we do not deny the possibility of the

use (or abuse) of the legal system as an instrument of denial of freedom and subjugation of vast masses of people. Undoubtedly, it is possible to design and use a legal system to sustain favoured constellations of power distribution in such a way as to ensure the hegemony of certain ethnic or caste groups over others, or that of the propertariat over the proletariat or of the privileged few over the grossly deprived masses. Undoubtedly, too, the legal histories of colonial regimes do actually supply the normative and the institutional models which are 'apt' for such uses of the law. It is certainly possible, and some would say even desirable, to accentuate such features of the ILS in its critique from a 'radical' standpoint. But it remains doubtful whether the already overworked label helps much, except providing polemical wealth, in a sharp formulation and clear handling of the problems.

The ILS follows broadly the normative and the institutional features of the BILS. Let us look at some of the persistent colonial features (in the sense defined by us) of the ILS.

The Non-Participative, "Top-Down" Models of ILS

During the British Indian period, participation by broad masses of people, or even by the interests immediately affected by it, in the process of the making and implementation of laws was virtually unknown; unless, of course, we regard protest and disobedience as forms of group participation in law-making. The British Indian model of law-making was a top-down model: it was a paradigm of Austinian type. There was a group of determinate human superiors which issued commands, the political inferiors had the option either to comply or to risk the application of sanction.

The model of law-making adopted in free India is not much different, unless again you wish to regard periodic participation in the electoral processes by masses and collective protest as forms of participation. By and large, only the bureaucrats and legislators participate in law-making; the former predominate in any case as a large mass of rule-making is in effect delegated to the executive. Occasionally, other elite groups participate. The Law Commissions at the Centre (and in some states) attempt to offer guidance and elicit informed public opinion. These and other specialist law reform bodies tour sometimes throughout India and collect opinions and views. The Select Committees of the legislatures also receive the evidence of interested groups and citizens. In the sphere of delegated legislation, there is no insistence, either in law or in policy,

on prior consultation with the affected groups, a procedure considered to be both just and efficient. We do not as yet know whether, and how far, Indian legislatures function in response to “lobbies” converting policy into law; nor do we know as yet as to the interests which such groups represent, although it would be relatively safe to say that they would represent the resourceful and not the vulnerable and underprivileged groups of society.

Thus, law-making remains, more or less, the exclusive prerogative of a special cross-section of elites. This necessarily affects both the quality of the law enacted and its social communication, diffusion, acceptance, and effectivity. It also reinforces the highly centralized system of power. It is time that we considered the desirability and feasibility of building into the law-making processes a substantial amount of public participation. For example, the panchayati raj institutions as well as other dominant social institutions (universities, bar, media groups, voluntary bodies, etc.) should be given the fullest scope for structured participation in important legislative proposals. As regards delegated legislation, the requirement of consultation with the affected groups should be mandatory. The argument that this will take time and consume resources is misconceived: passage of legislation is in any case costly and time consuming.

And the overall gains—in terms of mobilization of mass consciousness, accessibility of legal information, social acceptability will far outweigh the costs. But so strong is the hold of colonial model of law making that such ideas have never been articulated with any degree of vigour. Even the neo-Gandhian thought including *Sarvodaya* ‘school’ has not moved beyond the inspiring but programmatically sterile grandiose conceptions of

Lokshakti (people's power) or *lokniti* (people-oriented politics) (that is why the proposed method of amendment of certain parts of the Constitution through referendum at which at least 51 percent of people should vote, constitutes an important innovation; after all, people should have a say in such a vital matter. The opposition by intellectuals and other elite groups take on a subtle form. It is argued that in a vast country like India this is not just feasible. People, 80 per cent of them living in villages, would not understand the complexities of amendment. The Constitution will then remain ultimately inflexible; This kind of argument betrays a non-egalitarian and even authoritarian approach: ‘people’ are not to be associated or involved in changes of the basic rules of the game of power. Only the ‘enlightened’ groups should have a say in the process. This is colonial logic.)

People's participation in the enforcement and implementation of the law is also not actively sought, sponsored, or structured by the state: Once again it is assumed that such tasks are more or less, the exclusive prerogative of the state. There are occasional sermons that people should help the state make the laws effective, that they should not withhold active cooperation from the law enforcement agencies, that they should develop a civic competence, a stake in maintenance of social control and promotion of social change. All this rhetoric is no doubt nobly inspired but the legal systems as structured provide little or no effective scope for public participation in the implementation of legislation. The idea that the beneficiaries of ameliorative legislation should have a role in the implementation of laws favouring them is still a new one: it was only at the stage of the formulation of the Fifth Five Year Plan that the proposal was seriously made, for example, that tenants should be involved through committees in overseeing the implementation of agrarian tenancy legislations. The Sixth Plan, ushered in after the "revolution" and the democratic "restoration" of 1977, is equally anemic in emphasis on its beneficiary participation in the implementation of redistributive legislation. Equally new is the idea that there should be a "social audit" of major legislations by the consumers of legal justice.

Broadly, the ILS also follows the colonial model of reactive mobilization of the law rather than pro-active mobilization (See Black, 1973). In the former, the citizen is left to initiate the legal process by filing a complaint. In the latter, the state initiate the process. Laws that attack certain segments of the social structure in the title of justice and equity obviously need proactive mobilization; this, however, is not the case in major areas of legal innovation in independent India despite the very obvious and stark fact that the vulnerable groups are in no position, by themselves, to activate the redistributive legislation (e.g., agrarian reform measures, protection of rural and urban unorganized labour, laws for socially and economically vulnerable populations). This may be due to resource constraints; but one does not know whether this is so simply because the patterns of mobilization of law have not engaged any systematic attention of the law-givers and the lawmen generally. The resource constraints could be somewhat offset by the organization at the local levels of the beneficiary groups and consumers of law; again this important beginning can only be made if participation in law-implementation as well as when law-making is accepted in the first place as an important social value, and as a crucial component of human and social development in India.

Access to Legal Information

The colonial model is also perpetuated in terms of access to law by citizens. Access to law means not just access courts as the lawyers generally think about it. It means, in a broader and socially more relevant sense, access to law-makers, to dispensers of legal services (legal profession) and to normative and to institutional information concerning the legal system. In all these dimensions of access value, we find that the ILS is based on rather clear violations of democratic legality. We have already seen how non-participation, which is a preferred value, renders the actual operation of the ILS, for a whole variety of situations, almost identical with that of the BILS. We now briefly turn to some other aspects of the problem.

One major way in which the Indian legal system violates the principles of democratic legality is that information concerning the norms of law is not accessible easily even to those who are affected by the law. The notorious axiom that “ignorance of the law is no excuse” casts a duty upon the citizen to know the law on the pain of sanction; however there is no right conferred upon the citizen to have access to legal information. Even the most generally formulated directive principle of state policy will not easily yield the proposition that the state is under a duty to make law accessible, even in bare terms of normative information, to the citizen. It would require several generations of juristic effort to, similarly, produce by sheer exegesis the proposition that the chapter on fundamental rights necessarily imports a fundamental right of the citizen to have access to legal information.

The requirement that Acts of legislatures be notified through the official gazettes ensures, theoretically at least, that the laws made by Parliament and state legislatures and in force from time to time are easily accessible. This is just not the case, although the situation is relatively (and that is really not saying much) better as regards the Union legislation. There is no all-India. Collection of laws in force throughout the territory of India; there is not even an Index. An Indian citizen in Delhi wishing to have, or affected by a need for, some information on relevant laws prevalent, say, in the state of Karnataka, may find this an uphill task even with the intervention of the professional intermediaries. The Indian parliament enacted from the period 1973 to 1977 a total of 302 laws; against this the total number of statutory order and rules (on rough count) passed in the same period was approximately 25,414.

The corresponding figures for states and union territories are just not available. While the Indian Supreme Court has, in a handful of decisions, required publication of delegated legislation as a pre-condition of its, validity, and the legislature usually requires some form of publication, mostly through the gazette (Jain & Jain, 1973: 66-67) the situation is that information concerning the rules is very hard to come by. The government of India has been unable to agree with the Lok Sabha Committee of Subordinate Legislation which recommended that there should be an annual publication, as in Britain, of statutory instruments and rules. The government advanced as reasons that the “government press cannot undertake such voluminous work”, that rapid changes would in any case made such publication obsolete, and that the costs involved would be too high. Obviously publication of laws of this kind by private entrepreneurs through government contracts or otherwise is also not encouraged, perhaps on the ground that this would intrude on the natural monopoly of the governments in this regard.

We have so far been referring only to a special strata of people in industry or business in urban India. If consumers, beneficiaries, and victims of law in urban India have such problem of accessibility to normative law, one might well despair of communication of law to the rural masses, even in situations where the law is ostensibly meant to protect their interests and rights. Normative law is virtually inaccessible to the most underprivileged and vulnerable groups in Indian society. Legal illiteracy of the beneficiaries of the law thus contributes to its ineffectiveness e.g., prisoners may not even get to see the Jail manuals when distinguished criminologists find it extremely hard to get a copy. Neither the bonded labour nor the contract labour nor the landless labour have much idea of the law and uses that can be made of it. .

Access to normative information concerning one’s legal status- rights and duties—is impeded not just by the legislatures and the executive but also by the judiciary. There is no comprehensive law reporting in India and the official reports of decisions of the High Courts are both inadequate and even irregular (see. Jam, 1966. 739). The highest court in the land, whose declarations of law are binding though all courts in the territory of India (Article 141 of the Constitution), retains and also exercises the power to classify certain of its decisions as “unreportable” or “non-reportable.”

There might have been perfectly proper reasons from the Court's managerial standpoint for the retention and exercise of this, perhaps “inherent”, power. But the question is whether such power

ought to exist in the first place in a democratic society. One may ask: does not such power violate what the Supreme Court has so seminally developed as the doctrine of the “basic structure” of the Constitution?

Access to institutional information concerning the law is as problematic as access to normative information. Reports of the state governments on administration of justice, as and when published are almost impossible to obtain; so are the reports of the state departments of law and justice. The Union government brings out the valuable *Crime in India*, giving immensely useful information, but for some reason this is a non-price publication, not easily available in most parts of India. Sometimes valuable reports are published; but they are regarded as confidential and are given restricted circulation. A classic example is that of the Justice J.C. Shah Committee Report on arrears in high courts, published in 1972. But for the courtesy of a high government official who was kind enough to loan a copy of this report to me, with some anxiety whether its contents could be properly used even in scholarly work, I would never have been able to obtain and use that invaluable report. In this democratic republic of ours, there may, in effect, exist not merely a regime of secret *laws* (clearly antithetical to civilized legal system) but of secret *reports* as well.

Access to Legal Services

If the citizen has difficulties in reaching the legislator with his advice and opinion on the laws which are enacted for his own benefit or detriment, these difficulties are compounded when he actually has to encounter the operations of the law enacted without any substantial participation and without even minimal awareness of his legal status. Clearly the value of access to legal services has not been taken seriously at all in India, although from time to time there has been a spurt of very genuine concern with the state of legal services.

The Constitution, both in its fundamental rights and in the directive principles of state policy, was construed to be silent concerning the provision of legal aid in deserving cases; it was only in 1976, and during the national emergency, when paradoxically even minimal human rights were totally denied to a large section of Indian masses, that the duty of the state to endeavour to provide legal services was accorded the status of the directive principle of state policy. Although the Law Commission in its famous Fourteenth Report (1958) suggested the provision of counsel at state expense in all cases triable by the sessions courts as an “immediate step”, it was only in

1973 that the Criminal Procedure Code was amended to so provide: A more callous attitude towards the rights of the indigent citizens—in a subcontinent of harrowing poverty—is hard to imagine. It was understandable, in these circumstances, that Madhu Limaye's bill (1960), to provide legal aid in 'all criminal cases to needy people, was consigned to dignified oblivion. However, the argument that there are not enough resources to operate legal services in criminal law contexts does not fit well when the state and its agencies are the most prominent litigants and when the state levies court fees which have been demonstrated to result in considerable profits, to the state for expenditure as general revenue. This is not to say that the resource constraint is entirely imaginary: surely the Indian state cannot meet all the legal needs of all its underprivileged and vulnerable sections. This would require a mind-boggling outlay of human and financial resources. The point is that it should not take a democratic nation twenty-three years to decide on priorities of legal services, in the most minimal sense of providing counsel to indigent accused at the sessions level. If this is the measure of urgency, one would wonder whether another quarter century would pass before action on any of the recommendations made in the deeply humanistic and luminous reports by the Krishna Iyer and Bhagwati Committees (1974 and 1978). To characterize the state's underlying attitudes towards the legal needs of the large masses of poor people as "colonial" would be stating the matter in the mildest possible terms.

Provisions for adequate legal services to meet the litigation-oriented legal needs of the poor have not caused as much excitement and commitment at the Bar as have the high "superstructure" issues such as the 'supersession of judges' or constitutional amendments narrowing the scope of the writ jurisdiction of the High Courts. Although there is now a degree of responsiveness at the Bar to the claims of legal services, the legal profession is so organized as to discourage, rather than foster, any worthwhile institutionalization of legal services programme. The fact remains, as pointed out so bluntly (and rightly) by the Krishna Iyer Committee that the "legal profession in India...enjoys a near monopolistic power", permitting no equalization of the "bargaining power between the consumers of legal services and the closed group of legal profession" and that the "legal services market is essentially a seller's market" where the demand for services is "backed by purchasing power". The Committee noted, by way of mild exoneration, that the legal profession is merely an aspect of "the capitalistic society" which is an "acquisitive society" where the "greatness of a lawyer is measured by the amount of the fees he

charges and not by the quantum of social service which renders as lawyer" (1974: 183-84). Interestingly the Committee saw a nexus between the legal profession and the state agencies: it found that it was "the Central and State governments, corporations managed and/or controlled by (these)..., governments and Private and Public Companies which are really responsible for inflating the standard of fees". It recommended that the government adopt a policy on maximum fees payable by its own agencies and thus dry up the "major feedstock of the senior lawyer": the Committees also suggested the creation of legal services in the "public sector". Even these modest recommendations have not been accepted. The recommendations are here characterized as "modest" simply because the Committee shares the liberal assumption that the "autonomy of legal profession" is as "invaluable" and "inalienable" a guarantee of "free society" as is the "independence of the judiciary". Not a single sub-group of the Indian Bar has, understandably, championed this specific recommendation, although the Bar as a whole may be quick to denounce the very idea of a "public sector" in the delivery of legal services as fatal to the "rule of law" values.

Access to legal services transcends, of course, litigation-oriented legal aid. The programming of legal services should include non-litigative services as the two recent Committees (the Iyer and Bhagwati Committees) have stressed. Non-litigative legal aid will include a whole range of functions—skilled counselling, mediation, arbitration, conciliation, and continual monitoring—in resolving potentially litigious situations. Legal services strategies would have to extend as well to a re-examination of the normative and institutional aspects of the ILS. Massive reform of substantive and procedural laws and of the administration of justice institutions may also be needed, as stressed by the Iyer Committee.

It is a strange paradox that while the Indian government both at the national and state levels has been prolific in enacting a very large number of laws making a determined attack on the inequities of the social structure, it should have been so quiescent on-the need for different types of mobilization of law for effective implementation of these very measures. In any case, the experience of over a quarter century has now clearly shown that such laws require not just bureaucratic and legal mobilization; what is needed is not just the spruce palliative of random provision of legal services. What is needed is a thoroughgoing attempt at increasing civic participation in the making and implementation of laws; the colonial idea that one can promote

social change by normative proclamations of objectives and random bureaucratic enforcement of legal provisions needs to be given a timely, and unceremonious, farewell.

Access to Courts: The “Misappropriated” Court Fees

Lord Macaulay condemned the preamble to the Bengal Regulation, which imposed in 1795 high court fees with the avowed objective of inhibiting litigation, as “the most eminently absurd preamble that was ever drawn”. In 1835, Macaulay launched a vigorous, though *futile*, attack on the justification of the continuation of court fees. In words still cogent today, he said:

If what the Courts administer be justice, is justice a thing which the Government ought to grudge to the people?... It is undoubtedly a great evil that frivolous and vexatious suits should be instituted. But it is an evil for which the Government has only itself and its agents to blame, and for which it has the power of proving a most efficient remedy. The real way to prevent unjust suits is to take care that there shall be just decision. No man goes to law except in the hope of succeeding. No man hopes to succeed in a bad cause unless he has reason to believe that it will be determined according to bad laws or by bad Judges. Dishonest suits will never be common unless the public entertains an unfavourable opinion of the administration of justice. And the public will never long entertains such an opinion without good reason... [The imposition of court fees] neither makes the pleadings clearer nor the law plainer, nor the corrupt judge purer, nor the stupid judge wiser. It will no doubt drive away dishonest plaintiffs who cannot pay the fee. But it will also drive away the honest plaintiffs who are in the same situation.

A case against this eminently absurd tax on litigation cannot be more cogently made. The colonial government duly ignored Macaulay’s rather inconvenient analysis. Although this analysis has been reiterated times without number by law reformers, including the Law Commission of India since independence, the Indian state has retained the colonial system of imposition of court fees and indeed made the fees nearly exorbitant over the course of the last twenty-seven years. The Fourteenth Report of the Law Commission did not merely invoke Macaulay's memorable observations; it went further (and by a thorough analysis of budgets on administration of justice) to show that the amount raised by court fees was not merely adequate for meeting the administration of justice but resulted in surpluses which were appropriated to the

general revenues of the concerned states (1958: 487-10). The Fifty-fourth Report of the Law Commission went out of the way to reiterate the unhonoured recommendations made in the Fourteenth Report. The Krishna Iyer Committee of Legal Aid was “cold and blunt” concerning state inaction:

Something must be done, we venture to state, to arrest the escalating vice of burdensome scales of court fee. That the state should not sell justice is an obvious proposition but the high rate of court fee now levied leaves no valid alibi is also obvious. The Fourteenth Report of the Law Commission, the practice of 2 per cent in the socialist countries, and the small standard filing fee prevalent in many Western countries make the Indian position indefensible and perilously near unconstitutional. If the legal system is not to be undemocratically expensive, there is a strong case for reducing court fees and instituting suitors fund to meet the cost directed to be paid by a party because he is the loser but in the circumstances cannot bear the burden (p. 35).

Interestingly, even the Bar has missed the hint that the levy of court fees could be challenged on the ground that it is “perilously near unconstitutional”. And such is the state of arrears, that eight years after the Gujarat High Court invalidated levy of court fees, we still await a final pronouncement by the Supreme Court in this matter! That aside the democratic governments of the states in India have just not bothered to respond to these stirring observations. How else can one characterize the attitude and approach to this question except as distinctly, and pejoratively, ‘colonial’?

What is worse, by any standards, is the fact that despite the huge collections by way of court fees, the amount thus realized (as in British India) is not put to service of administration of justice. Physical and administrative ‘facilities’ provided to the subordinate judiciary are, by and large, scandalous. The requirements for office space, for adequate maintenance of buildings, for furniture and office staff for subordinate judiciary are ignored with undemocratic nonchalance. Whenever pressed for reasons, the stock answer of the governments is: ‘lack of resources’ (“where have all the court fees gone?...”)

For example, the report on the administration of justice in Uttar Pradesh for 1969 contains revealing exposures. Out of thirty-one proposals for courtroom buildings (and some residential

quarters for judges) made in 1969-70 only four were sanctioned, Three such sanctioned proposals included electrification of the munsif's court at Bansi ia district Basti (Rs 5,900), extension of record room at Mirzapur (Rs 30,200), and construction of munsif's courtroom at Kashipur, Naini Tal (Rs 13,300). Of course, the sanction did not arrive till the end of the year and the work had yet to begin on any of these projects (one hopes that by now it has been completed!). Original allocations placed at the disposal of the High Courts for the expansion of physical facilities are abruptly curtailed in the middle of the period, causing great confusion and demoralization all round. The report humbly reiterates the need for providing fan coolers to civil courts in Uttar Pradesh as the khas tattis are more expensive to operate, The courts do not have enough typewriters and typists: 'from time to time the Court has been requesting Government in the interest of work to accord permission to the District Judges to take English typewriter wherever necessary on-hire, but that request too has been unheeded''. (Three cheers for the independence of the judiciary!) it is pointless to multiply examples.

Of course, our immediate purpose in referring to some details of the Uttar Pradesh report is to show that, even assuming that there is some kind of justification for the retention of court fees, there cannot be any justification whatsoever for what must be called "misappropriation" of the proceeds for purposes other than administration of justice. Surely, the minimum needs of the justice institutions should be met; neither equity nor expedition nor even excellence can be expected when judicial institutions are denied the bare physical and functional facilities. If this state of affairs continues, it is both conceivable and likely that judicial offices at the level of the subordinate judiciary may cease to be attractive to young and talented people, who might opt for other careers. Perhaps, this is already happening. To this extent, urgent attention needs to be given to more financial outlays being provided to coordinate courts, and the court system generally, lest the integrity of the legal process suffer.

The Uttar Pradesh report reveals another, and more insidious, aspect concerning the autonomy of the judiciary in its relations with the executive, The administration of subordinate judiciary is the responsibility of the High Court, which is at the apex of the state judicial system. If the High Court's carefully formulated demands for budgetary appropriation are treated callously by the executive, the legitimacy, dignity and prestige of the High Court concerned are likely to be adversely affected. More fundamental is the further point: is it not the height of the centralization

of power in our country that district judges, who have, substantial discretionary powers for the administration of justice, should have to await permission from some faceless bureaucrat even to hire typewriters for the expeditious handling of matters before the courts or to provide fan coolers instead of *khas tattis*? Some structural device has to be found to make administration of justice by the courts independent of stringent financial and bureaucratic controls, The crisis facing the Indian court system in terms of crushing arrears of work may be attributed partly to the inadequate infrastructural facilities compounded by the lack of adequate and timely funding and above all the lack of autonomy characterizing the present system.

**THE INTIMATE
ENEMY**

**Loss and Recovery of Self
under Colonialism**

ASHIS NANDY

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One

The Psychology of Colonialism:
Sex, Age and Ideology
in British India

I

Imperialism was a sentiment rather than a policy; its foundations were moral rather than intellectual. . .

D. C. Somervell¹

It is becoming increasingly obvious that colonialism—as we have come to know it during the last two hundred years— cannot be identified with only economic gain and political power. In Manchuria, Japan consistently lost money, and for many years colonial Indochina, Algeria and Angola, instead of increasing the political power of France and Portugal, sapped it. This did not make Manchuria, Indochina, Algeria or Angola less of a colony. Nor did it disprove that economic gain and political power are important *motives* for creating a colonial situation. It only showed that colonialism could be characterized by the search for economic and political advantage without concomitant *real* economic or political gains, and sometimes even with economic or political losses.²

This essay argues that the first differentia of colonialism is a state of mind in the colonizers and the colonized, a colonial consciousness which includes the sometimes unrealizable wish to make economic and political profits from the colonies, but

other elements too. The political economy of colonization is of course important, but the crudity and inanity of colonialism are principally expressed in the sphere of psychology and, to the extent the variables used to describe the states of mind under colonialism have themselves become politicized since the entry of modern colonialism on the world scene, in the sphere of political psychology. The following pages will explore some of these psychological contours of colonialism in the rulers and the ruled and try to define colonialism as a shared culture which may not always begin with the establishment of alien rule in a society and end with the departure of the alien rulers from the colony. The example I shall use will be that of India, where a colonial political economy began to operate seventy-five years before the full-blown ideology of British imperialism became dominant, and where thirty-five years after the formal ending of the Raj, the ideology of colonialism is still triumphant in many sectors of life.

Such disjunctions between politics and culture became possible because it is only partly true that a colonial situation produces a theory of imperialism to justify itself. Colonialism is also a psychological state rooted in earlier forms of social consciousness in both the colonizers and the colonized. It represents a certain cultural continuity and carries a certain cultural baggage.

First, it includes codes which both the rulers and the ruled can share. The main function of these codes is to alter the original cultural priorities on both sides and bring to the centre of the colonial culture subcultures previously recessive or subordinate in the two confronting cultures. Concurrently, the codes remove from the centre of each of the cultures subcultures previously salient in them. It is these fresh priorities which explain why some of the most impressive colonial systems have been built by societies ideologically committed to open political systems, liberalism and intellectual pluralism. That this split parallels a basic contradiction within the modern scientific-rational world view which, while trying to remain rational within its confines, has consistently refused to be rational *vis-*

¹ *English Thought in the Nineteenth Century* (New York: Longman Green, 1929), p. 186.

² I am for the moment ignoring the fact that the colonial societies in our times lost out in the game of political and economic power in the First World itself.

a-vis other traditions of knowledge after acquiring world dominance, is only the other side of the same explanation.³³ It also explains why colonialism never seems to end with formal political freedom. As a state of mind, colonialism is an indigenous process released by external forces. Its sources lie deep in the minds of the rulers and the ruled. Perhaps that which begins in the minds of men must also end in the minds of men. –

Second, the culture of colonialism presumes a particular style of managing dissent. Obviously, a colonial system perpetuates itself by inducing the colonized, through socioeconomic and psychological rewards and punishments, to accept new social norms and cognitive categories. But these outer incentives and disincentives are invariably noticed and challenged; they become the overt indicators of oppression and dominance. More dangerous and permanent are the inner rewards and punishments, the secondary psychological gains and losses from suffering and submission under colonialism. They are almost always unconscious and almost always ignored. Particularly strong is the inner resistance to recognizing the ultimate violence which colonialism does to its victims, namely that it creates a culture in which the ruled are constantly tempted to fight their rulers within the psychological limits set by the latter. It is not an accident that the specific variants of the concepts with which many anti-colonial movements in our times have worked have often been the products of the imperial culture itself and, even in opposition, these movements have paid homage to their respective cultural origins. I have in mind not only the overt Apollonian codes of Western liberalism that have often motivated the elites of the colonized societies but also their covert Dionysian counterparts in the concepts of statecraft, everyday politics, effective political methods and Utopias which have guided revolutionary movements against colonialism.

3 On this other contradiction see Paul Feyerabend, *Science in a Free Society* (London: NLB, 1978). In the context of India and China this point emerges clearly from Claude Alvares' *Homo Faber: Technology and Culture in India, China and the West, 1500-1971* (New Delhi: Allied Publishers, 1979). See also Ashis Nandy, 'Science, Authoritarianism and Culture: On the Scope and Limits of Isolation outside the Clinic', M. N. Roy Memorial Lecture, 1980, *Seminar*, May 1981 (261); and Shiv Viswanathan, 'Science and the Sense of Other', paper written for the colloquium on New Ideologies for Science and Technology, Lokayan Project 1982, Delhi, mimeographed.

The rest of this essay examines, in the context of these two processes and as illustrations, how the colonial ideology in British India was built on the cultural meanings of two fundamental categories of institutional discrimination in Britain, sex and age, and how these meanings confronted their traditional Indian counterparts and their new incarnations in Gandhi.

II

The homology between sexual and political dominance, which Western colonialism invariably used—in Asia, Africa and Latin America—was not an accidental by-product of colonial history. It had its correlates in other situations of oppression with which the West was involved, the American experience with slavery being the best documented of them. The homology, drawing support from the denial of psychological bisexuality in men in large areas of Western culture, beautifully legitimized Europe's post-medieval models of dominance, exploitation and cruelty as natural and valid. Colonialism, too, was congruent with the existing Western sexual stereotypes and the philosophy of life which they represented. It produced a cultural consensus in which political and socio-economic dominance symbolized the dominance of men and masculinity over women and femininity. During the early years of British rule in India, roughly between 1757 and 1830, when the British middle classes were not dominant in the ruling culture and the rulers came mainly from a feudal background, the homology between sexual and political dominance was not central to the colonial culture.⁴⁴ Most

4 Frantz Fanon was one of the first to point out the psychological dominance of the European middle-class culture in the colonies. See his *Black Skin, White Masks* translated by G. L. Markman (New York: Grove, 1967); also Gustav Jahoda, *White Man* (London: Oxford University Press, 1961), pp. 102, 123. Quoted in Renate Zahar, *Frantz Fanon: Colonialism and Alienation* (New York: Monthly Review Press, 1974), p. 45n. James Morris (*Heaven's Command: An Imperial Progress*, London: Faber and Faber, 1973, p. 38) says, in the context of India: 'By 1835 one detects a certain smugness among the islanders, and this superior tone of voice came not as it would later come, from an arrogant Right, but from a highly moralistic Left. The middle classes, newly enfranchised, were emerging into power: and it was the middle classes who would eventually prove, later in Victoria's reign, the most passionate imperialists of all.' It is

rulers and subjects had not yet internalized the idea of colonial rule as a manly or husbandly or lordly prerogative. I am not speaking here of the micro-politics of colonialism but of its macro-politics. Individual racialists and sadists were there aplenty among the British in India. But while British rule had already been established, British culture in India was still not politically dominant, and race-based evolutionism was still inconspicuous in the ruling culture. Most Britons in India lived like Indians at home and in the office, wore Indian dress, and observed Indian customs and religious practices. A large number of them married Indian women, offered *puja* to Indian gods and goddesses, and lived in fear and awe of the magical powers of the Brahmans. The first two governor-generals, renowned for their rapaciousness, were also known for their commitment to things Indian. Under them, the traditional Indian life style dominated the culture of British Indian politics. Even the British Indian Army occasionally had to pay respect to Indian gods and goddesses and there was at least one instance when the army made money from the revenues of a temple. Finally, missionary activity in British India was banned, Indian laws dominated the courts and the system of education was Indian.⁵

In Britain, too, the idea of empire was suspect till as late as the 1830s. Visitors to colonies like India often found the British authority there 'faintly comical'.⁶ The gentlemen of the East

in the context of this correlation between middle class culture and the spirit of imperialism that one must make sense of psychologist J. D. Unwin's reported proposition: 'only a sexually restrained society . . . would continue to expand' (*Heaven's Command*, p. 30). The political culture of British India was however a product of the dialectic between British feudalism and British middle class culture. I have avoided the details of this dialectic here.

5 E.g., Harihar Sheth, *Proem Kalkatar Paricay* (Calcutta: Orient Book, 1982), new ed; Binoy Ghose, *Kalkata Culture* (Calcutta: Bihar Sahitya Bhavan, 1953); Morris, *Heaven's Command*, pp. 75—6.

6 Morris, *Heaven's Command*, pp. 20, 24. Morris sums up as follows: 'All in all the British were not thinking in imperial terms. They were rich. They were victorious. They were admired. They were not yet short of markets for their industries. They were strategically invulnerable, and they were preoccupied with domestic issues. When the queen was crowned, . . . we may be sure she thought little of her possessions beyond the seas. She was the island queen. . . . Even the Welsh, the Scots and the Irish were unfamiliar to her then, when the world called her kingdom simply "England".... No, in 1837 England seemed to need no empire, and the British people as a whole were not much interested in the

India Company had not actually intended to govern India but to make money there,⁷ which of course they did with predictable ruthlessness. But once the two sides in the British-Indian culture of politics, following the flowering of the middle-class British evangelical spirit, began to ascribe cultural meanings to the British domination, colonialism proper can be said to have begun.⁸ Particularly, once the British rulers and the exposed sections of Indians internalized the colonial role definitions and began to speak, with reformist fervour, the language of the homology between sexual and political stratarchies, the battle for the minds of men was to a great extent won by the Raj.

Crucial to this cultural co-optation was the process psychoanalysis calls identification with the aggressor. In an oppressive situation, the process became the flip side of the theory of progress, an ontogenetic legitimacy for an ego defence often used by a normal child in an environment of childhood dependency to confront inescapable dominance by physically more powerful adults enjoying total

colonies. How can one be expected to show an interest in a country like Canada, demanded Lord Melbourne the Prime Minister, where a salmon would not rise to a fly' (pp. 25-6, 30.)

7 Morris, *Heaven's Command*, pp. 71-2.

8 After the Sepoy Mutiny of 1857, however, the 'universalism' which had powered the early British reformers of Indian society had to give way to a second phase of 'tolerance' of Indian culture due to the fears of a second mutiny. But this new cultural relativism clearly drew a line between Indian culture seen as infantile and immoral and the culture of the British public school products: austere, courageous, self-controlled, 'adult men'. Lewis D. Wurgaft, 'Another Look at Prospero and Caliban: Magic and Magical Thinking in British India', mimeographed, pp. 5-6. Wurgaft bases his analysis partly on Francis Hutchins, *The Illusion of Permanence, British Imperialism in India* (Princeton: Princeton University Press, 1967). This shift to tolerance however did not change the basic relationship between the colonized. As in Albert Memmi's Africa, the 'good' and the 'bad' colonizers were but two different cogs performing equally important functions in the same machine. See Memmi's *The Colonizer and the Colonized*, translated by Howard Greenfeld (New York: Beacon, 1967); also Wurgaft, 'Another Look at Prospero and Caliban', pp. 12-13. C. Northcote Parkinson in his *East and West* (New York: Mentor, 1965), p. 216, sums it up neatly: 'It was the knowledgeable, efficient, and polite Europeans who did the serious damage.' The whole process was part of a larger picture, which involved the rejection of Europe's pre-modern conceptualization of the East and reincorporation of the East into European consciousness according to the needs of colonialism. See Part Two below. It is interesting that for European philosophers of the eighteenth century, to men like Voltaire for example, China, perhaps, was the most advanced culture of the world. By the nineteenth century the Chinese had become, for the European literati, primitives.

legitimacy. In the colonial culture, identification with the aggressor bound the rulers and the ruled in an unbreakable dyadic relationship. The Raj saw Indians as crypto-barbarians who needed to further civilize themselves. It saw British rule as an agent of progress and as a mission. Many Indians in turn saw their salvation in becoming more like the British, in friendship or in enmity. They may not have fully shared the British idea of the martial races—the hyper-masculine, manifestly courageous, superbly loyal Indian castes and subcultures mirroring the British middle-class sexual stereotypes—but they did resurrect the ideology of the martial races latent in the traditional Indian concept of statecraft and gave the idea a new centrality. Many nineteenth-century Indian movements of social, religious and political reform—and many literary and art movements as well—tried to make Ksatriyahood the 'true' interface between the rulers and ruled as a new, nearly exclusive indicator of authentic Indianness. The origins and functions of this new stress on Ksatriyahood is best evidenced by the fact that, contrary to the beliefs of those carrying the psychological baggage of colonialism, the search for martial Indianness underwrote one of the most powerful collaborationist strands within the Indian society, represented by a majority of the feudal princelings in India and some of the most impotent forms of protest against colonialism (such as the immensely courageous but ineffective terrorism of Bengal, Maharashtra and Panjab led by semi-Westernized, middle-class, urban youth).

The change in consciousness that took place can be briefly stated in terms of three concepts which became central to colonial India: *purusatva* (the essence of masculinity), *narltva*

(the essence of femininity) and *klibatva* (the essence of hermaphroditism). The polarity defined by the antonymous *purusatva* and *narltva* was gradually supplanted, in the colonial culture of politics, by the antonyms of *purusatva* and *klibatva*; femininity-in-masculinity was now perceived as the final negation of a man's political identity, a pathology more dangerous than femininity itself. Like some other cultures, including some strands of pre-modern Christianity, India too had its myths about good and bad androgynes and its ideas about valuable and despicable androgyny. Now there was an attempt to lump together all forms of androgyny and counterpoise them against undifferentiated masculinity. Rabindranath Tagore's (1861-1941) novel *Car Adhyay* brilliantly captures the pain which was involved in this change. The inner conflicts of the hero of the novel are modelled on the moral and political dilemmas of an actual revolutionary nationalist, who also happened to be a Catholic theologian and a Vedantist, Brahmabandhav Upadhyay (1861-1907). Tagore's moving preface to the first edition of the novel, removed from subsequent editions because it affronted many Indians, sensed the personal tragedy of a revolutionary friend who, to fight the suffering of his people, had to move away from his own ideas of *svabhava* and *svadharma*. It is remarkable that twenty-seven years before *Car Adhyay*, Tagore had dealt with the same process of cultural change in his novel *Gora*, probably modelled on the same real-life figure and with a compatible political message.⁹

Many pre-Gandhian protest movements were co-opted by this cultural change. They sought to redeem the Indians' masculinity by

⁹ Rabindranath Tagore, 'Car Adhyay', *Raamdvali* (Calcutta: West Bengal Government, 1961), pp. 875-923; 'Gora', *Racanavali*, pp. 1-350. On Brahmabandhav Upadhyay see the brief article by Smaran Acharya, 'Upadhyay Brahmabandhav: Rabindra-Upanyaser Vitarkita Nayak', *Desk*, 49(20), 20 March 1982, pp. 27-32. On Tagore's response to the criticisms of his position on extremist politics in *Car Adhyay*, see his 'Kaifyat' (1935), reproduced in Shuddhasatva Bosu, *Rabindraniither Car Adhyay* (Calcutta: Bharati Prakasani, 1979), pp. 7-10. Bosu also provides an interesting, politically relevant, analysis of the novel. I am grateful to Ram Chandra Gandhi for pointing out to me that even Vivek-ananda, whose masculine Hinduism was a clear denial of the androgyny of his guru Ramakrishna Paramahansa, himself became painfully aware of the cultural changes his Hinduism represented towards the end of his brief life. On Indian traditions of androgyny and myths about androgynes, see Wendy D. O'Flaherty, *Sexual Metaphors and Animal Symbols in Indian Mythology* (Delhi: Motilal Banarsidass, 1980) and *Women, Androgynes and Other Mythical Beasts* (Chicago: University of Chicago, 1980).

defeating the British, often fighting against hopeless odds, to free the former once and for all from the historical memory of their own humiliating defeat in violent power-play and 'tough politics'. This gave a second-order legitimacy to what in the dominant culture of the colony had already become the final differentiae of manliness: aggression, achievement, control, competition and power.¹⁰ (I am ignoring for the moment the structural changes which gradually came to parallel this consciousness. Kenneth Ballhatchet has recently described the distant intimacy between British soldiers and administrators, on the one hand, and Indian women, on the other, which was officially promoted and in fact systematically institutionalized.¹¹ I am also ignoring the parallel process, reflected in the latent recognition by a number of writers,¹² that the white women in India were generally more exclusive and racist because they unconsciously saw themselves as the sexual competitors of Indian men, with whom their men had established an unconscious homoeroticized bonding. It was this bonding which the 'passive resisters' and 'non-cooperators' exploited, not merely the liberal political

10 This in spite of the fact that many of these characteristics were traditionally associated with femininity in India. See on this subject my 'Woman Versus Womanliness in India: An Essay in Political and Social Psychology', *Psychoanalytic Review*, 1978, 63(2), pp. 301—15. Also in *At the Edge of Psychology: Essays in Politics and Culture* (New Delhi: Oxford University Press, 1980), pp. 32-46. Thus, we find the well-meaning M. C. Mallik saying in his *Orient and Occident: A Comparative Study* (London, 1913), p. 183, quoted in Parkinson, *East and West*, p. 210: 'Europeans even of a friendly type lament the want of manliness in Indian nature and conduct. It would be strange if after so many centuries of coercion by religious, spiritual and political teachers, and of demoralizing social conditions, any manliness should survive, especially as when any sign of it is displayed by individuals, it is discouraged by parents, teachers, spiritual guides and political rulers as impertinence and disloyalty . . .' It is a minor tragedy of contemporary India that one of its finest products, Satyajit Ray, expresses the same consciousness in a more sophisticated way in his movie *Shatranj Ke Khilari*. Ray's ambivalence towards the dancing, singing poet-king who loses out to British statecraft based on *realpolitik* represents a sophisticated version of Mallik's awareness. See on this my review of the movie in 'Beyond Oriental Despotism: Politics and Femininity in Satyajit Ray', *Sunday*, Annual No., 1981, pp. 56-8.

11 Kenneth Ballhatchet, *Race, Sex and Class Under the Raj* (London: Weidenfeld and Nicholson, 1980). I have spelt out the relationship between Ballhatchet's work and the argument of this essay in my review of it in the *Journal of Commonwealth and Comparative Politics*, 1982, 20(2), pp. 29-30.

12 This latent recognition comes close to being manifest in E. M. Forster, who was himself a homosexual. See his *A Passage to India* (London: Arnold, 1967).

institutions. They were helped in this by the split that had emerged in the Victorian culture between two ideals of masculinity. To draw upon Ballhatchet and others, the lower classes were expected to act put their manliness by demonstrating their sexual prowess; the upper classes were expected to affirm their masculinity through sexual distance, abstinence and self-control. The former was compatible with the style of rulership of Spanish, Portuguese and, to a lesser extent, French colonialism in Latin America and Africa; the latter was compatible with, of all things, one strand in the traditional Indian concept of manliness. The Brahman in his cerebral, self-denying asceticism was the traditional masculine counterpoint to the more violent, 'Virile', active Ksatriya, the latter representing—however odd this may seem to the modern consciousness—the feminine principle in the cosmos. This is how traditional India imposed limits on Ksatriyahood as a way of life. To avoid confusion, I am avoiding here the languages in which hyper-masculinity includes withdrawal from sexuality or positive androgyny.)

In such a culture, colonialism was not seen as an absolute evil. For the subjects, it was a product of one's own emasculation and defeat in legitimate power politics. For the rulers, colonial exploitation was an incidental and regrettable by-product of a philosophy of life that was in harmony with superior forms of political and economic organization. This was the consensus the rulers of India sought, consciously or unconsciously. They could not successfully rule a continent-sized polity while believing themselves to be moral cripples. They had to build bulwarks against a possible sense of guilt produced by a disjunction between their actions and what were till then, in terms of important norms of their own culture, 'true' values. On the other hand, their subjects could not collaborate on a long-term basis unless they had some acceptance of the ideology

of the system, either as players or as counterplayers. This is the only way they could preserve a minimum of self-esteem in a situation of unavoidable injustice.

When such a cultural consensus grows, the main threat to the colonizers is bound to become the latent fear that the colonized will reject the consensus and, instead of trying to redeem their 'masculinity' by becoming the counterplayers of the rulers according to the established rules, will discover an alternative frame of reference within which the oppressed do not seem weak, degraded and distorted men trying to break the monopoly of the rulers on a fixed quantity of machismo. If this happens, the colonizers begin to live with the fear that the subjects might begin to see their rulers as morally and culturally inferior, and feed this information back to the rulers.¹³ Colonialism minus a civilizational mission is no colonialism at all. It handicaps the colonizer much more than it handicaps the colonized.

III

I now come to the subsidiary homology between childhood and the state of being colonized which a modern colonial system

almost invariably uses.¹⁴ Colonizers, as we have known them in the

13 I have briefly dealt with this in my 'Oppression and Human Liberation: Towards a Third World Utopia', in *The Politics of Awareness: Traditions, Tyranny and Utopias* (forthcoming); see an earlier version in *Alternatives*, 1978-9,4(2), pp. 165-80.' On this theme, see the sensitive writing of Memmi, *The Colonizer and the Colonized*. One of the best examples of the absence or erosion of civilizational mission in the colonizers is the Manchu conquest of China. The small group of conquerors became" integrated in Chinese society over one or two generations and what was colonialism quickly became a variant of internal oppression. The more recent Japanese conquest of parts of China, too, failed to produce a theory of civilizational mission, though there were some efforts to do so. It is interesting that one of the main themes in these efforts was the stress on Japan's greater modernization and on her 'responsibility' to modernize other Asian societies. The modern West's contribution to Japanese society has been more wide-ranging than many believe! The British conquest of India during its first phase showed all the signs of being similarly integrated into Indian society. What probably stopped the integration was mainly the digging of the Suez Canal, which allowed the British to have stronger links with their cultural base than they previously had, and the entry into the Indian scene of British women, which, combined with the Indian caste system and the cultural self-confidence of large parts of Indian society, ensured endogamy.

14 My over-all theoretical understanding of this homology is in 'Reconstructing Childhood: A Critique of the Ideology of Adulthood', in *The Politics of Awareness: Traditions, Tyranny and*

last two centuries, came from complex societies with heterogeneous cultural and ethical traditions. As already noted, it is by underplaying some aspects of their culture and overplaying others that they built the legitimacy for colonialism.¹⁵ For instance, it is impossible to build a hard, this-worldly sense of mission on the tradition to which St Francis of Assisi belonged: one perforce has to go back to St Augustine and Ignatius Loyola to do so. It is not possible to find legitimacy for the colonial theory of progress in the tradition of Johannes Eckhart, John Ruskin and Leo Tolstoy, based as it is on the rejection of the ideas of an omnipotent high technology, of hyper-competitive, achievement-oriented, over-organized private enterprise, and of aggressively proselytizing religious creeds operating on the basis of what Erik Erikson calls pseudo-species. One must find that legitimacy in utilitarians such as Jeremy Bentham and James Mill, in the socialist thinkers conceptualizing colonialism as a necessary step to progress and as a remedy for feudalism, and in those generally trying to fit the colonial experience within the mould of a doctrine of progress. (Childhood innocence serving as the prototype of primitive communism was one of Marx's main contributions to the theory of progress, which he conceptualized as a movement from prehistory to history and from infantile or low-level communism to adult communism. India to him always remained a country of 'small semi-barbarian, semi-civilized communities', which 'restricted the human mind within the smallest possible compass, making it the unresisting tool of superstition' and where the peasants lived their 'undignified, stagnant and vegetative life'. 'These little communities', Marx argued, '

Utopias (forthcoming). A briefer version in *Resurgence*, May 1982, and in *The Times of India*, 2, 3 and 4 February 1982. In the context of India, see a discussion of such a relationship in Bruce Mazlish, *James and John Mill: Father and Son in the Nineteenth Century* (New York: Basic Books, 1975), particularly Chapter 6, pp. 116-45. For a brief introduction to the over-all picture of the assimilation of new worlds by the West (which set the context for the homology among childhood, primitivism and colonial subjugation to emerge) see Michael T. Ryan, 'Assimilating New Worlds in the Sixteenth and Seventeenth Centuries', *Comparative Studies in Society and History*, 1981, 23(4), pp. 519-38. Ryan mentions 'the tendency to compare—if not confuse—ancients with exotics', as also its relationship with the existing body of demonological theory in Europe.

15 Memmi, in *The Colonizer and the Colonized*, has graphically described the process through which the new entrant is broken into the ruling culture of the colonizer.

. . . brought about a brutalising worship of nature exhibiting its degradation in the fact that man, the sovereign of nature, fell down on his knees in the adoration of *Kanuman* [sic], monkey, and *Sabbala*, the cow.' It followed, according to Marx, that 'whatever may have been the crime of England she was the unconscious tool of history'.¹⁶ Such a view was bound to contribute handsomely—even if inadvertently—to the racist world view and ethnocentrism that underlay colonialism.¹⁷ A similar, though less influential, cultural role was played by some of Freud's early disciples who went out to 'primitive' societies to pursue the homology between primitivism and infancy.¹⁸ They, too, were working out the cultural and psychological implications of the biological principle 'ontogeny recapitulates phylogeny', and that of the ideology of 'normal', fully socialized, male adulthood. Only, unlike the utilitarians and the Marxists, they did not clearly identify primitivism and infancy with disvalues like structural simplicity and 'static history'.¹⁹)

There was blood-curdling shadow-boxing among the competing Western schools of social philosophy, including the various versions of Western Christianity. But there can be no doubt about which sub-tradition in Europe was the stronger. There was an almost complete consensus among the sensitive European intellectuals that colonialism was an evil, albeit a necessary one. It was the age of optimism in Europe. Not only the arch-conservatives and the apologists of colonialism were convinced that one day their cultural mission would

16 Karl Marx, 'The British Rule in India' (1853), in Karl Marx and F. Engels, *Articles on Britain* (Moscow: Progress Publishers, 1971), pp. 166-72; see especially pp. 171-2.

17 These imageries provided the psychological basis of the theory of the Asiatic mode of production. I am grateful to Giri Deshingkar for pointing out to me that the Communist Party of China tried to escape this Marxian double-bind by passing an official resolution in 1927 that China was not an Asiatic society. Such are the pulls of scientific social sciences.

18 That another view of primitivism is possible, more or less within the same framework, is shown by the political use of Freud's concept of the polymorphous perverse infant in a contemporary Marxist, Herbert Marcuse, in *Eros and Civilization* (London: Sphere, 1969). Before him Wilhelm Reich in psychoanalysis, D. H. Lawrence in literature and Salvador Dali in art had explored the creative possibilities of primitivism within a meta-Freudian framework.

19 See on this theme O. Mannoni, 'Psychoanalysis and the Decolonization of Mankind', in J. Miller (ed.), *Freud* (London: Weidenfeld and Nicholson, 1972), pp. 86-95.

be complete and the barbarians would become civilized; even the radical critics of Western society were convinced that colonialism was a necessary stage of maturation for some societies. They differed from the imperialists, only in that they did not expect the colonized to love, or be grateful to the colonizers for introducing their subjects to the modern world.²⁰ Thus, in the eyes of the European civilization the colonizers were not a group of self-seeking, rapacious, ethnocentric vandals and self-chosen carriers of a cultural pathology, but ill-intentioned, flawed instruments of history, who unconsciously worked for the upliftment of the underprivileged of the world.

The growth of this ideology paralleled a major cultural reconstruction that took place in the West during the first phase of colonialism, the phase in which colonialism was becoming consolidated as an important cultural process and a way of life for the Spanish and the Portuguese. Philippe Aries argues that the modern concept of childhood is a product of seventeenth-century Europe.²¹ Before then the child was seen as a smaller version of the adult; now the child became—this Aries does not fully recognize—an inferior version of the adult and had to be educated through the newly-expanded period of childhood.

20 On the sense of betrayal which British colonialists had because of the 'ungratefulness' of Indians, seen as a cultural feature, see Wurgaft, 'Another Look at Prospero and Caliban'. Wurgaft obviously borrows from O. Mannoni, *Prospero and Caliban: The Psychology of Colonization*, trans. Pamela Powes (New York: Frederick A. Praeger, 1964), and edition.

21 Philippe Aries, *Centuries of Childhood: A Social History of Family Life*, trans. Robert Baldick (New York: Knopf, 1962). For a different point of view, see Lloyd deMause 'The Evolution of Childhood', in deMause (ed.), *The History of Childhood* (New York: The Psychohistory Press, 1974), pp. 1-73.

(A parallel and contemporary development in Europe was the emergence of the modern concept of womanhood, underwritten by the changing concept of Christian godhead which, under the influence of Protestantism, became more masculine.²²)

The new concept of childhood bore a direct relationship to the doctrine of progress now regnant in the West. Childhood now no longer seemed only a happy, blissful prototype of beatific angels, as it had in the peasant cultures of Europe only a century earlier. It increasingly looked like a blank slate on which adults must write their moral codes—an inferior version of maturity, less productive and ethical, and badly contaminated by the playful, irresponsible and spontaneous aspects of human nature. Concurrently, probably propelled by what many Weberians have identified as the prime mover behind the modernization of West Europe, the Protestant Ethic, it became the responsibility of the adult to 'save' the child from a state of unrepentant, reprobate sinfulness through proper socialization, and help the child grow towards a Calvinist ideal of adulthood and maturity. Exploitation of children in the name of putting them to productive work, which took place in the early days of the Industrial Revolution in Britain, was a natural corollary of such a concept of childhood.²³

Colonialism dutifully picked up these ideas of growth and development and drew a new parallel between primitivism and childhood. Thus, the theory of social progress was telescoped not merely into the individual's life cycle in Europe but also into the area of cultural differences in the colonies.²⁴ What was childlikeness of the child and childishness of immature adults now also became the lovable and unlovable savagery of primitives and the primitivism of subject societies. This version of the theory of progress is summarized below.

22 Nandy, 'Woman Versus Womanliness'.

23 See Nandy, 'Reconstructing Childhood'.

24 V. G. Kiernan says in the context of Africa in his *The Lords of Human Kind: European Attitudes to the Outside World in the Imperial Age* (Harmondsworth: Penguin, 1972), p. 243: 'The notion of the African as a minor, endorsed at times even by a Livingstone, took very strong hold. Spaniards and Boers had questioned whether natives had souls: modern Europeans cared less about that but doubted whether they had minds, or minds capable of adult growth. A theory came to be fashionable that mental growth in the African ceased early, that childhood was never left behind.'

<p>The <i>childlike</i> _ Indian: innocent, ignorant but willing to learn, masculine, loyal and, thus, 'cor-rigible'</p>	<p><i>Reforming the childlike</i> through Westernization, modernization or Christianization</p>	<p>Partnership in the liberal utilitarian or radical Utopia within one fully homogenized cultural, political and economic world</p>
<p>The <i>childish</i> Indian: ignorant but unwilling to learn, ungrateful, sinful, savage, unpredictably violent, disloyal and, thus, 'incor-rigible'</p>	<p><i>Repressing the childish</i> by controlling rebellion, ensuring internal peace and providing tough administration and rule of law</p>	

One element in the legitimization of colonialism through reconstruing the human life cycle has not been touched upon. Not that it was unimportant in the colonial culture; but it was, I suspect, specific to India and China and, to that extent, less generally applicable to modern colonialism. I shall briefly say something about it now.

Modern Europe had delegitimized not merely femininity and childhood but also old age.²⁵ Judaeo-Christianity always had an element which saw aging as a natural unfolding and result of man's essential sinfulness. The decomposition of the human body was seen as only an indicator of the evil in the one degenerating: according to the old South European saying, till youth a person looked the way god made him; after that he looked the way he really was. With increasing stress on the reprobate nature of man, it was this postulate which came to the fore in Europe's new ideology of male adulthood, completing the picture of a world where only the adult male reflected a reasonable approximation of a perfect human being.

25 See a brief statement of the problem in its interrelatedness with colonial encounters in my 'The Politics of Life Cycle', *Mazingira* (forthcoming).

The elderly (representing wisdom and the negation of 'pure' intellect) were now increasingly seen as socially irrelevant because of their low physical power and because their social productivity and cultural role could not be easily quantified. I need hardly add that, given the nature of available technology, the ideological changes neatly fitted the emerging principles of 'productive' work and 'performance' as they were monetized and enshrined in new political and social institutions.

This part of the ideology of male-adulthood too was exported to the colonies in a few chosen cases. Kiernan does refer to the ideological problem of British colonialism in India which could not easily grapple with the fact that India had a civilization, however strange by European standards. Newly-discovered Africa, with its strong emphasis on the folk, the oral and the rural could be more easily written off as savage. It was more difficult to do so for India and China which the European Orientalists and even the first generation rulers had studied and, sometimes, venerated. And, everything said, there were the traditions of four thousand years of civic living, a well-developed *literati* tradition (in spite of all its stress on oral cultures), and alternative traditions of philosophy, art and science which often attracted the best minds of Europe. The fact that India's past was living (unlike, say, pre-Islamic Egypt) complicated the situation. Some explanation had to be given for her political and cultural 'degradation'.

The colonial ideology handled the problem in two mutually inconsistent ways. Firstly, it postulated a clear disjunction between India's past and its present. The civilized India was in the bygone past; now it was dead and 'museumized'. The present India, the argument went, was only nominally related to its history; it was India only to the extent it was a senile, decrepit version of her once-youthful, creative self. As a popular myth would have it, Max Muller, for all his pioneering work in Indology and love for India, forbade his students to visit India; to him, the India that was living was not the true India and the India that was true had to be but dead.

Secondly and paradoxically, the colonial culture postulated that India's later degradation was not due to colonial rule—which, if anything, had improved Indian culture by fighting against its irrational, oppressive, retrogressive elements—but due to aspects of the traditional Indian culture which in spite of some good points

carried the seeds of India's later cultural downfall. Like a sinful man Indian culture was living through a particularly debilitating senility. (The very fact that Hinduism did not have in its concept of *papa* the strong inner-directed connotations of the Christian, post-reformation concept of sin was itself seen as one of the main proofs of India's fatal cultural flaw. Even a man like Albert Schweitzer did not remain uncontaminated by this ideology; he made it a central plank of his interpretation of Hinduism.²⁶) Thus, in this argument, there was a postulate of continuity but it applied more to sinfulness than to virtues; for an explanation of India's virtues one had to fall back upon her contacts with the modern world.

IV

What were the main dimensions of the efforts to reorder Indian culture in response to and as a part of these colonial categories? The answer is best given in terms of a few of the nineteenth-century figures who revalued the traditional Hindu orientations to the male and the female, and coped with the modern concepts of mature, adult normality as opposed to abnormal, immature, infantile primitivism.²⁷

Probably the person who most dramatically sought to redefine popular mythology to fit the changing values under colonialism was Michael Madhusudan Dutt (1824-73) whose Bengali epic *Meghnadvadh Kavya* was hailed, in his lifetime, as one of the greatest literary efforts of all time in Bengali.²⁸

²⁶ Albert Schweitzer, *Hindu Thought and Its Development* (New York: Beacon, 1959)

²⁷ The examples I shall use will be mainly from Bengal, not merely because the Bengali culture best illustrated—and dramatized—the colonial predicament in India's political, cultural and creative life, but also because it was in Bengal that the Western intrusion was the deepest and the colonial presence the longest.

²⁸ 'Meghnadvadh Kavya,' 1861, Kshetra Gupta (ed.), Madhusadan Racanavali, vols 1 and 2 (Calcutta: Sahitya Samsad, 1965) pp. 35-117.

Madhusudan, flamboyantly Westernized in life style and ideology—he had even embraced the Church of England's version of Christianity and declared that he cared only 'a pin's head for Hinduism'—first wanted to make his mark in English literature. But he returned to his mother tongue within a decade to write brilliant interpretations of some of the Puranic epics. *Meghnadvadh* was the greatest of them all.

As is well known, *Meghnadvadh* retells the Ramayana, turning the traditionally sacred figures of Rama and Laksmana into weak-kneed, passive-aggressive, feminine villains and the demons Ravana and his son Meghnad into majestic, masculine, modern heroes. It interprets the encounter between Rama and Ravana as a political battle, with morality on the side of the demons. The epic ends with the venal gods defeating and killing the courageous, proud, achievement-oriented, competitive, efficient, technologically superior, 'sporting' demons symbolized by Meghnad.

Meghnadvadh was not the first reinterpretation of the Ramayana. In south India, an alternative tradition of Ramayana, which antedated Madhusudan, had off and on been a source of social conflict and controversy. In Jainism, too, a version of the Ramayana had been sometimes a source of intercommunal conflicts.²⁹ In any case, Rama, however godlike, was traditionally not the final repository of all good. Unlike the Semitic gods, he was more human and more overtly a mix of the good and the bad, the courageous and the cowardly, the male and the female. Ravana, too, had never been traditionally all bad. He was seen as having a record of genuine spiritual achievements.

Madhusudan Dutt therefore was in the living tradition of dissent in India. (This dissent did not become a political absurdity because he lived towards the end of the period during which the British, though politically the most powerful, were still only one of many forces in India and the Western culture

29 At least one literary critic, it seems, has traced the source of Madhusudan's reinterpretation of Ramayana to his probable exposure to the Jain Ramayana while he was in Madras. Asit Bandopadhyay, *Adhunik Bangla Sahityer Samksipla Itivitta*, 1965, cited in Bishwanath Bandopadhyay, 'Pramilar Utsa', *Desh*, 49(18), 6 March 1982.

was a manageable vector within India; Westernism enjoyed the support of only small minorities of both the rulers and the ruled.) Simultaneously, Madhusudan's criterion for reversing the roles of Rama and Ravana, as expressed in their characters, was a direct response to the colonial situation. He admired Ravana for his masculine vigour, accomplished warriorhood, and his sense of *realpolitik* and history; he accepted Ravana's 'adult' and 'normal' commitments to secular, possessive this-worldliness and his consumer's lust for life. On the other hand, he despised 'Rama and his rabble'—the expression was his—because they were effeminate, ineffective pseudo-ascetics, who were austere not by choice but because they were weak.

There was an obvious political meaning in the contradiction Madhusudan posed in a culture which rejected most forms of competitive individual achievement, frequently underplayed sex-role differences, gave low status to high technology, granted equal status to myth and history, and rejected hedonism, including possessive individualism and consumerism. This is not to say that the values Ravana articulated were alien to the Indian traditions: in fact, they were sometimes associated with mythical figures who evoked admiration and respect. But on the whole they had been contained or marginalized as so many culturally-defined esoterica. Ravana himself, after all, was seen as someone who knew the Vedas well and had won his powers from sacred sources through years of *tapas*. His good qualities, however, were recognized within the constraints of his *rdksasa* self. Madhusudan now freed Ravana from these traditional constraints to give him a new stature as a scientific, learned, modern Ksatriya king, fighting the non-secular politics and anti-technologism of a banished pastoral prince.

Meghnadvadh was a tragedy. Madhusudan's heroes were, to a point, oddities in a culture which apparently had no tradition of tragedy. However, to get the full meaning of this deviation, one must recognize that in the Puranic tradition there was a distinctive concept of the tragic in life and letters. Tragedy in the Puranas did not centre around a grand final defeat or death of the hero, or around the final victory of the ungodly. Tragedy

lay in the majestic sweep of time and in the unavoidable decline or decay that informed the mightiest and the humblest, the epochal and the trivial, and the 'permanent' and the transient. In the Mahabharata, the self-chosen and yet fated *mahaprasthanas* or the great departure of the Pandavas after their climactic victory in the battle at Kuruksetra and the death of god Krsna—lonely, aged, nostalgic, and partly forgotten—are good examples of what I am trying to convey.

Meghnadvadh represented a different concept of tragedy. Not only were the good and the evil clearly separated in the epic, according to well-defined ethical criteria, but evil finally triumphed. Traditionally the *rdksasas* represented a demonic version of masculinity which was unfettered by dominant norms and traditions. Now aspects of this demonic masculinity were endorsed, for the Indians, by the new culture of colonialism and the variation on the myth of the Promethean man it popularized. By making *Meghnadvadh* a tragedy, by inducing his readers to identify with his heroes, Madhusudan legitimized the personality type portrayed by his heroes and underwrote the emerging ideology of modernity as well as compatible concepts of masculinity and adulthood in his community's world view. What was recessive and in fetters in traditional Indian masculinity was now made salient with the help of existing¹ cultural imagery and myths.

This is how Madhusudan updated the early cultural criticisms of Rammohun Roy (1772-1833).³⁰ Rammohun had introduced into the culture of India's expanding urban middle classes—for the sake of those alienated from the older life style and values by the colonial intrusion into eastern India—the ideas of organized religion, a sacred text, monotheism and, above all, a patriarchal godhead. Simultaneously he had 'misread' the nondualism of Sankaracarya to suggest a new definition of masculinity, based on the demystification of womanhood

³⁰ See Nandy, 'Sati: A Nineteenth Century Tale of Women, Violence and Protest', in *At the Edge of Psychology*, pp. 1-31, for a discussion of the psychological dimensions of Rammohun Roy's response to colonialism. The paper also discusses the personal and cultural ambivalence which powered Rammohun Roy's philosophy of social change.

and on the shifting of the locus of magicality from everyday femininity to a transcendent male principle. He had sought to liberate woman from the responsibility she bore in the shared consciousness—or unconsciousness—for failures of nurture in nature, politics and social life. Madhusudan, on the other hand, innocent of the questions Rammohun had raised in his philosophy of reform, tried to contain within the Indian world view Western concepts of the male and the female, and the adult and the infantile, and thus to make the Western presence in India seem natural in a context where the West had seemingly come to represent, for many Indians, the more valued aspects of Indian culture. The previously rejected hyper-masculine *raksasa* qualities of Havana became now the heroic qualities of a demon-king representing true, adult masculinity; and the many-faceted, open personality of Rama, on whom successive generations of Indians had projected their complex concepts of goodness, became a non-masculine, immature, effete godhead, representing a lower—perhaps even false—concept of goodness. This is not the place to discuss the Oedipal passions which pushed Madhusudan towards a new definition of masculinity and normality. The point to remember is that his efforts, on behalf of his culture, to 'tame' the Western concepts of manhood and womanhood were made when the full power and glory of British imperialism were not yet apparent. As a result, there was little defensiveness in him. His aggressive criticism of Indian traditions was in the style of the major reform movements of India: it was not merely an attempt to explain Indian culture in Indian terms, or even in Western terms, but was an attempt to explain the West in Indian terms and to incorporate it in the Indian culture as an unavoidable experience.

I now turn to the second stream of cultural criticism in response to colonialism, once again grounded in reinterpreted sacred texts but in reality dependent on core values borrowed from the colonial world view and then legitimized according to existing concepts of sacredness. Probably the most creative representative of this stream was Bankimchandra Chatterjee

(1838-94) whose novels and essays were an attempt to marginalize the earlier model of critical Hinduism and suggest a new framework of political culture which projected into the Hindu past, into a lost golden age of Hinduism, the qualities of Christianity which seemingly gave Christians their strength.

Anandamath, a novel which became the Bible of the first generation of Indian nationalists, particularly the Bengali terrorists, was a direct attempt to work out the implications of such a concept of religion.³¹ The order of the *sannyasis* in the novel was obviously the Hindu counterpart of the priesthood in some versions of Western Christianity. In fact, their Western-ness gave them their sense of history, their stress on an organized religion, and above all, their acceptance of the Raj as a transient but historically inevitable and legitimate phenomenon in Hindu terms.

But it was Bankimchandra's elegant essay on Krsna which provided the missing link—a reinterpreted traditional godhead—to the new model of Hinduism.³² What Madhusudan sought to do in the context of the Ramayana, Bankimchandra sought to do in the context of the Mahabharata and the five Puranas dealing with Krsna. He tried to build a historical and a historically conscious Krsna—self-consistent, self-conscious and moral according to modern norms. He scanned all the ancient texts of Krsna, not only to locate Krsna in history, but to argue away all references to Krsna's character traits unacceptable to the new norms relating to sexuality, politics and social relationships. His Krsna was not the soft, childlike, self-contradictory, sometimes immoral being—a god who could blend with the everyday life of his humble devotees and who was only occasionally a successful, activist, productive and chastising god operating in the company of the great. Bankimchandra did not adore Krsna as a child-god or as a playful—sometimes sexually playful—adolescent who was simultaneously an androgynous,

31 Bankimchandra Chatterji, *Racanavali*, with an introduction by Jogesh Bagal (Calcutta: Sahitya Samsad, 1958), vol. i, pp. 715—88.

32 Bankimchandra Chatterji, 'Krsnacaritra', 1886, in *Racanavali*, vol. 2, pp. 407-583.

philosophically sensitive, practical idealist. His Krsna was a respectable, righteous, didactic, 'hard' god, protecting the glories of Hinduism as a proper religion and preserving it as an internally consistent moral and cultural system. Bankim-chandra rejected as latter-day interpolations—and hence un-authentic—every trait of Krsna that did not meet the first requirement for a Christian and Islamic god, namely all-perfection.³³ His goal was to make Krsna a normal, non-pagan male god who would not humiliate his devotees in front of the progressive Westerners.

It was this consciousness which Swami Dayanand Saraswati (1824-83) and Swami Vivekananda (1863-1902) shared and developed further. The two Swamis entered the scene when the colonial culture had made deeper inroads into Indian society. It was no longer possible to give priority to cultural reform over mass politics without ignoring the fact that a psychological invasion from the West had begun with the widespread internalization of Western values by many Indians, and an over-emphasis on the reform of the Indian personality 'could only open up new, invidious modes of Westernization.

Yet, this is exactly what the two redoubtable Swamis did. They borrowed their fundamental values from the Western world view and, in spite of their image as orthodox revivalists, were ruthlessly critical of the Hindus. They also took the position that the Hindus had been great—which meant, in their terms, virile and adult—in ancient times and had fallen on bad days because of their loss of contact with textual Brahminism and true Ksatriyahood. Obviously, *iksatratej* or martial valour was the first differentia of a ruler, the ruler who had greater *ksatratej* deserved to rule. This was hardly a compliment to the living Hindus; if anything, it perfectly fitted the dominant structure of colonial thought,³⁴ as well as the ideology of some Western Orientalists.

Thus, Vivekananda and Dayanand, too, tried to Christianize Hinduism, particularly the dominant Hindu concept of the desirable person. In doing so, they identified the West with power and

33 This itself was modern. In an ahistorical or epic culture, temporality cannot be allowed to determine authenticity. See Section VII of the essay.

34 Kiernan, *The Lords of Human Kind*.

hegemony, which in turn they identified with a superior civilization. Then they tried to 'list' the differences between the West and India and attributed the former's superiority to these differences. The rest of their lives they spent exhorting the hapless Hindus to pursue these cultural differentiae of the West. And predictably they found out—Indian culture being the complex, open-ended system it is—that traditions supporting some of the valued Western traits were there in Hinduism but were lost on the 'unworthy' contemporary Hindus. Predictably, too, the main elements of their Hinduism were, again: an attempt to turn Hinduism into an organized religion with an organized priesthood, church and missionaries; acceptance of the idea of proselytization and religious 'conscientization' (*Suddhi*, the *bete noire* of the Indian Christians and Muslims, was a Semitic element introduced into nineteenth-century Hinduism under the influences of Western Christianity); an attempt to introduce the concept of The Book following the Semitic creeds (the Vedas and the Gita in the case of the two Swamis); the acceptance of the idea of linear, objective and causal history; acceptance of ideas akin to monotheism (Vivekananda even managed to produce that rare variant of it: a quasi-monotheistic creed with a feminine godhead as its central plank); and a certain puritanism and this-worldly asceticism borrowed partly from the Catholic church and partly from Calvinism.

Such a model was bound to lead to the perception that the loss of masculinity and cultural regression of the Hindus was due to the loss of the original Aryan qualities which they shared with the Westerners. There was a political meaning in Dayanand's decision to call his church Arya Samaj. It was also bound to lead to an emphasis on basic psychological and institutional changes in Hinduism and to the rejection of other forms of critical Hinduism, which stressed the primacy of political changes and sought to give battle to British colonialism by accepting the contemporary Hindus *as they were*. (For instance,

Gandhi later on organized the Hindus as Indians, not as Hindus, and granted Hinduism the right to maintain its character as an unorganized, anarchic, open-ended faith.) Not surprisingly, the second model gradually became incompatible with the needs of anti-colonialism and, by over-stressing exogenous categories of self-criticism, indirectly collaborationist. There was yet another political paradox in which the model was caught. While in the first phase of the Raj the rulers supported political participation of the Hindus (because such participation by the then pro-British Hindus was advantageous to the regime), in the second phase, the rulers discouraged it because of growing nationalism. Similarly, while in the first phase the regime frowned upon all social reform movements and often took decades to pass laws on any Indian social practice against which Indian reformers fought, in the second phase they promoted those schools of nationalism which expected political freedom to follow from social reform, particularly the reform of Indian national character.

Though there were instances of deviation even among those who accepted the second model of critical Hinduism, such as the great bravery and immense sacrifices made for the nationalist cause by the terrorists and by their larger-than-life versions like Vinayak D. Savarkar and Subhas Chandra Bose, the model *did* allow Western cultural ideas to percolate to the deepest levels of Hindu religious ideas and accepted Western cultural theories of political subjugation and economic backwardness. I The newly created sense of linear history in Hinduism—an internalized counterpart of the Western theory of progress—was a perfect instrument for this purpose. It allowed one to project into history the sense of inferiority *vis-a-vis* an imperial faith and to see the golden age of Hinduism as an ancient version of the modern West.³⁵

³⁵ In fact, the anti-Muslim stance of much of Hindu nationalism can be construed as partly a displaced hostility against the colonial power which could not be expressed directly because of the new legitimacy created within Hinduism for this power. Such a dynamic would seem to roughly duplicate the displacement of Oedipal hostilities in the authoritarian personality. Cf. T. W. Adorno, Else Frenkel-Brunswik, D. Levinson and R. N. Sanford, *The Authoritarian Personality* (New York: Harper, 1960).

In short, both streams of political consciousness, though seemingly hostile to each other, produced partly-colonial designs of cultural and political selfhood for the colonized. Actually the first, evolved by the likes of Rammohun Roy, was based, ex-'perientially at least, on greater self-esteem and autonomy, though later on it was to seem—as well as to become—more subservient to the Western world view, both to its opponents and its supporters.

It only slowly became obvious to those living with the full-grown culture of British colonialism that neither of the two models could provide an adequate basis for self-esteem and cultural autonomy. Yet, there was no alternative model in sight that could take a critical look at Indian traditions, evaluate the nature of the Western impact on them, and update Indian culture without disturbing its authenticity.

However, some scattered efforts were made to break out of this stagnation in the nineteenth century itself. Persons like Iswarchandra Vidyasagar (1820-91) *did* seek to create a new political awareness which would combine a critical awareness of Hinduism and colonialism with cultural and individual authenticity. It is thus that they emerged, as a biographer seems to recognize in the case of Vidyasagar, 'whole and enriched from the clash of cultures ... in the nineteenth century'.³⁶ Iswarchandra too fought institutionalized violence against Indian women, giving primacy to social reform over politics. But his diagnosis of Hinduism did not grow out of feelings of cultural inferiority; it grew out of perceived contradictions within Hinduism itself. Even when he fought for Indian women, he did not operate on the basis of Westernized ideals of masculinity and femininity or on the basis of a theory of cultural progress. He refused to Semiticize Hinduism and adopt the result as a ready-made theory of state. As a result, his society could neither ignore nor forgive him. (The pandit, when he was

³⁶ Amallesh Tripathi, *Vidyasagar: The Traditional Modernizer* (Calcutta: Orient Longman, 1974).

dying, could hear the bands playing outside his house, celebrating his approaching death.) Vidyasagar's Hinduism looked dangerously like Hinduism and hence subversive to the orthodox Hindus. Simultaneously, his cultural criticisms seemed fundamental even to those allegiant to the other two models of internal criticism and cultural change. He could be ignored neither as an apostate nor as an apologist.

Vidyasagar acquired this cultural embedding by eschewing some of the normative and institutional goals of the competing models. He refused to use the imagery of a golden age of the Hindus from which contemporary Hindus had allegedly fallen, he refused to be psychologically tied to the history of non-Hindu rule of India, he resisted reading Hinduism as a 'proper religion' in the Islamic or Western sense, he rejected the ideologies of masculinity and adulthood, and he refused to settle scores with the West by creating a nation of super-Hindus or by defending Hinduism as an all-perfect antidote to Western cultural encroachment. His was an effort to protect not the formal structure of Hinduism but its spirit, as an open, anarchic federation of sub-cultures and textual authorities which allowed new readings and internal criticisms.

Thus, Iswarchandra's anti-colonialism was not defined by the Western version of rationalism, the popular Bengali *bhadralok* stereotypes about him notwithstanding. It was also not heavily reactive, though that impression too was created by some elements of his everyday life (including his aggressively Indian dress, interpersonal style and food habits).³⁷ He was first and foremost a Brahman pandit, a man of learning and a polemicist with a clear position on sacred texts which he saw as congruent with his reforms.³⁸ He was not even a man of religion out to sell a new version of Hinduism and, unlike Gandhi, he did not face the imposition of any mahatmahood on

³⁷ Benoy Ghose, *Vidyasagar o Bangali Samaj*, vols. 1-3 (Calcutta: Bengal Publishers, 1973), 2nd ed; Indra Mitra, *Karundagar Vidyasagar* (Calcutta: Ananda Publishers, 1971).

³⁸ Tripathi, *Vidyasagar*, Chapter i. The problems involved in this reinterpretive mode have been touched upon by Asok Sen, *Iswarchandra Vidyasagar and His Elusive Milestones* (Calcutta: Riddhi India, 1977).

him. But, like Gandhi, he could have declared himself an orthodox Hindu and claimed his Hinduism better than that of his opponents because it encompassed the colonial experience. Though Iswarchandra came from a poor rural background, his times did not allow him to take his dissent outside the urban middle classes, to mobilize the peripheries of his society, or to make a more creative use of folk—as opposed to Sanskrit—Hinduism. But his model did resolutely resist the ideology of hyper-masculinity and 'normality'. Popular readings of Iswarchandra recognized this. Madhusudan Dutt once wrote that the obstinate fiery Brahman had 'a Bengali mother's heart' and during Vidyasagar's own lifetime the Sanskrit saying 'tougher than thunder and softer than flower' became a standard, if trite, account of his androgyny. There was an implicit awareness all around that his combination of aggressive defiance of authority and authoritative reinterpretations of authority challenged some of the basic postulates of the colonial theory of progress, particularly the joint construction of 'legitimate inequality' by the Indians and the British. If Iswarchandra failed to fully politicize this dissent, he at least sought to make instrumental use of the transient, 'unavoidable' oppression of colonialism to meet India's needs. And this, without accepting the Western utilitarian, social Darwinist, and radical conceptions of these needs.

V

The problem of colonization did not only concern the overseas countries. The process of decolonization—which is in any case far from complete in those countries—is also under way at home, in our schools, in female demands for equality, in the education of small children and in many other fields. ... If certain cultures prove capable of destroying others . . . the destructive forces brought forth by these cultures also act internally. . . .

O. Mannoni³⁹

The colonizer, who in order to ease his conscience gets into the habit of seeing the other man as *an animal*, accustoms himself to treating him like an animal, and tends objectively to transform

39 Mannoni, 'Psychoanalysis', pp. 93-4.

himself into an animal. . . . They thought they were only slaughtering Indians, or Hindus, or South Sea Islanders, or Africans. They have in fact overthrown, one after another, the ramparts behind which European civilization could have developed freely.

Aime Cesaire⁴⁰

The broad psychological contours of colonialism are now known. Thanks to sensitive writers like Octave Mannoni, Frantz Fanon and Albert Memmi we even know something about the interpersonal patterns which constituted the colonial situation, particularly in Africa.⁴¹ Less well-known are the cultural and psychological pathologies produced by colonization in the colonizing societies.

As folk wisdom would have it, the only sufferers of colonialism are the subject communities. Colonialism, according to this view, is the name of a political economy which ensures a oneway flow of benefits, the subjects being the perpetual losers in a zero-sum game and the rulers the beneficiaries. This is a view of human mind and history promoted by colonialism itself. This view has a vested interest in denying that the colonizers are at least as much affected by the ideology of colonialism, that their degradation, too, can sometimes be terrifying. Behind all the rhetoric of the European intelligentsia on the evils of colonialism lay their unstated faith that the gains from colonialism to Europe, to the extent that they primarily involved material products, were real, and the losses, to the extent they involved social relations and psychological states, false. To venture a less popular interpretation of colonialism—which I hope is relatively less contaminated by the ideology of colonialism—I shall produce examples from the experience of one of the world's stablest and most subtly-managed colonial polities of all times, British India. These examples will show that what Aime Cesaire calls the 'decivilization' of the colonizers is not an impotent fantasy after all, that it is an empirical

40 Aime Cesaire, *Discourse on Colonialism*, trans. Joan Pinkham (New York and London: Monthly Review Press, 1972), pp. 20, 57-8.

41 Mannoni, *Prospero and Caliban*; Fanon, *Black Skin, White Masks*; Memmi, *The Colonizer and the Colonized*.

reality of the kind on which even Mannoni and Fanon can agree.⁴² Fanon describes a police officer who, as he tortured the freedom fighters in Algeria, became violent towards his own wife and children.⁴³ Even from Fanon's impassioned political psychiatry, it becomes obvious that the officer *had* to do within his family—and within himself—what he did to the freedom fighters. Colonialism as a psychological process cannot but endorse the principle of isomorphic oppressions which restates for the era of the psychological man the ancient wisdom implied in the New Testament and also perhaps in the Sauptik Parva of the Mahabharata: 'Do not do unto others what you would that they do not do unto you, lest you do unto yourself what you do unto others.'

The impact of colonialism on India was deep. The economic exploitation, psychological uprooting and cultural disruption it caused were tremendous.⁴⁴ But India was a country of hundreds of millions living in a large land mass. In spite of the presence of a paramount

42 Cesaire, *Discourse on Colonialism*, p. 13. The psychological principle involved was recognized by Plato himself. As Iris Murdoch sums up in her *The Fire and the Sun: Why Plato Banished the Artists* (Oxford: Oxford University Press, 1977), p. 39: 'Whatever his [Plato's] dogma, there is little doubt about his psychology. . . . We cannot escape the causality of sin. We are told in the *Theaetetus* (176-7) that the inescapable penalty of wickedness is simply to be the sort of person one is.' It is surprising that Fanon, whom Peter Berger calls the 'Clausewitz of Revolution' had only limited awareness of the creative possibilities of such a philosophy of evil.

43 Frantz Fanon, *The Wretched of the Earth* (Harmondsworth: Penguin, 1967), pp. 215-17.

44 The political and economic dislocation is of course well known and well documented. For an early discussion of the economic exploitation under British colonialism, see for example R. C. Dutt, *Economic History of India in the Victorian Age* (London: Routledge and Kegan Paul, 1903) and Dadabhoi Naoroji, *Poverty and Un-British Rule in India* (1901), (New Delhi: Publications Division, 1969). For instances of cultural and psychological pathology produced by colonization in India, see R. C. Majumdar, A. K. Majumdar and D. K. Ghose (eds.), *British Paramountcy and Indian Renaissance*, part 2 (Bombay: Bharatiya Vidya Bhavan, 1965). For a case study of a specific cultural pathology under the Raj, see for instance, my 'Sati'. The political and economic dislocation is of course well known and well documented. For an early discussion of the economic exploitation under British colonialism, see for example R. C. Dutt, *Economic History of India in the Victorian Age* (London: Routledge and Kegan Paul, 1903) and Dadabhoi Naoroji, *Poverty and Un-British Rule in India* (1901), (New Delhi: Publications Division, 1969). For instances of cultural and psychological pathology produced by colonization in India, see R. C. Majumdar, A. K. Majumdar and D. K. Ghose (eds.), *British Paramountcy and Indian Renaissance*, part 2 (Bombay: Bharatiya Vidya Bhavan, 1965). For a case study of a specific cultural pathology under the Raj, see for instance, my 'Sati'.

power which acted as the central authority, the country was culturally fragmented and politically heterogeneous. It could, thus, partly confine the cultural impact of imperialism to its urban centres, to its Westernized and semi-Westernized upper and middle classes, and to some sections of its traditional elites. That was not the case for the rulers from a relatively more homogeneous small island. They were overwhelmed by the experience of being colonial rulers. As a result, the long-term cultural damage colonialism did to the British society was greater.

Firstly, the experience of colonizing did not leave the internal culture of Britain untouched. It began to bring into prominence those parts of the British political culture which were least tender and humane. It de-emphasized speculation, intellection and *caritas* as feminine, and justified a limited cultural role for women—and femininity—by holding that the softer side of human nature was irrelevant to the public sphere. It openly sanctified—in the name of such values as competition, achievement, control and productivity—new forms of institutionalized violence and ruthless social Darwinism.⁴⁵ The instrumental concept of the lower classes it promoted was perfectly in tune with the needs of industrial capitalism and only a slightly modified version of the colonial concept of hierarchy was applied to the British society itself. The tragedy of colonialism was also the tragedy of the younger sons, the women, and all 'the etceteras and and-so-forths' of Britain.

Nobody who wandered among the imperial gravestones, though, pondering the sadness of their separate tragedies, could fail to wonder at the waste of it all, the young lives thrown away, the useless courage, the unnecessary partings; and the fading image of Empire, its even dimmer panoply of flags and battlements, seemed then to be hazed in a mist of tears, like a grand old march shot through with melancholy, in a bandstand by the sea.⁴⁶

45 Some of these emphases are compatible with the 'standard' description of the authoritarian syndrome deriving from the Frankfurt School of Marxists, elaborated empirically in T. W. Adorno *et al.*, *The Authoritarian Personality*. On the culture of social Darwinism in Britain, see Raymond Williams, 'Social Darwinism', in *Problems in Materialism and Culture* (London: NLB, 1980), pp. 86-102.

46 James Morris, *Farewell the Trumpets: An Imperial Retreat* (London: Faber and Faber, 1978) p. 556.

Secondly and paradoxically, the ideology of colonialism produced a false sense of cultural homogeneity in Britain. This froze social consciousness, discouraging the basic cultural criticism that might have come from growing intellectual sensitivity to the rigid British social classes and subnational divisions, and from the falling quality of life in a quickly industrializing society. Colonialism blurred the lines of social divisions by opening up alternative channels of social mobility in the colonies and by underwriting nationalist sentiments through colonial wars of expansion or through wars with other ambitious European powers seeking a share of colonial glory. The near-total cultural dominance of a small elite in Britain was possible because the society shunted off to the colonies certain indirect expressions of cultural criticism: social deviants unhappy with the social order and buffeted by the stresses within it. I have in mind the criminality which comes from the rage of the oppressed, displaced from the rulers to the co-oppressed.⁴⁷ This process was recognized even by some apologists of colonialism. Here is one Carl Siger, speaking of the French experience:

The new countries offer a vast field for individual violent activities which, in the metropolitan countries, would run up against certain prejudices, against a sober and orderly conception of life, and which, in the colonies, have greater freedom to develop and consequently, to affirm their worth. Thus to a certain extent the colonies can serve as a safety valve for modern society. Even if this were their only value, it would be immense.⁴⁸

The British might not ever have put it that way, but this logic was always implicit in the ruling culture of Britain.

Thirdly, there was what E. M. Forster called the 'undevel-

47 Fanon in his *The Wretched of the Earth* seems to recognize this displacement.

48 *Essai sur la Colonisation*, Paris, 1907, quoted in Césaire, *Discourse on Colonialism*, p. 20. Césaire also quotes one straight-thinking Renan: 'The regeneration of the inferior or degenerate races by the superior races is part of the providential order of things for humanity. With us, the common man is nearly always a declassé nobleman, his heavy hand is better suited to handling the sword than the mental tool. Rather than work, he chooses to fight. ... Pour forth this all-consuming activity onto countries which, like China, are crying aloud for foreign conquest. Turn the adventurers who disturb European society into a *ver sacrum*, a horde like those of the Franks, the Lombards, or the Normans, and every man will be in his right role. Nature has made a race of workers, the Chinese race . . . : a race of tillers of the soil, the Negro . . . ; a race of masters and soldiers, the European race' (p. 16).

oped heart' in the British which separated them not merely from the Indians but also from each other.⁴⁹ This undevelopment came both in the form of isolation of cognition from affect—which often is a trigger to the 'banal' violence of our times—and in the form of a new pathological fit between ideas and feelings. The theory of imperialism did not remain an insulated political position in Britain; it became a religious and ethical theory and an integral part of a cosmology. -It not only structured the inner needs of the changing British society but also gave grotesque expression to a 'primitive' religious and social consciousness that had acquired immense military and technological power and was now operating on a global scale. Richard Congreve, Bishop of Oxford, once said, 'God has entrusted India to us to hold it for Him, and we have no right to give it up.'⁵⁰ And what Lord John Russel, a future prime minister of Britain, said about Africa applied to India, too. The aim of colonization, he declaimed, was to encourage religious instruction and let the subjects 'partake of the blessings of Christianity'.⁵¹ Both these worthies were articulating not only an imperial responsibility or a national interest but also a felt sense of religious duty. James Morris sums it up neatly. 'Never mind the true motives and methods of imperialism', he says; 'in the days of their imperial supremacy the British genuinely believed themselves to be performing a divine purpose, innocently, nobly, in the name of God and the Queen.'⁵² The other side of this sense of religious duty in the rulers was the growing and deliberately promoted sense of a religious duty to be ruled, including a cosmologically rooted political fatalism in some sections of the Indians. Even Bankimchandra Chatterji's novel *Anandamath* sought to legitimize this duty to be ruled on the basis of a new theory of stages of history.

49 Forster's *A Passage to India* of course examines this separation only in the context of the British society in India.

50 Quoted in K. Bhaskar Rao, *Rudyard Kipling's India* (Norman: University of Oklahoma, 1967), p. 26. See an interesting treatment of this moral dimension in Wurgaft, 'Prospero and Caliban', and Mannoni, *Prospero and Caliban*.

51 Quoted in Morris, *Heaven's Command*, pp. 37-8.

52 Morris, *Farewell to Trumpets*, p. 551.

Finally, as Francis Hutchins and Lewis D. Wurgaft have so convincingly argued in the context of India, colonialism encouraged the colonizers to impute to themselves magical feelings of omnipotence and permanence. These feelings became a part of the British selfhood in Britain too. And the society was sold the idea of being an advanced techno-industrial society where science promised to liberate man from his daily drudgery, an advanced culture where human reason and civilized norms had the greatest influence, and—for the sake of the radical internal critics of the society who took to the idea like fish to water—a polity farthest on the road to revolutionary self-actualization. Britannia not only ruled the waves; for its inhabitants and for its many admirers in Europe it also ruled the future of human self-consciousness. (Both British liberalism and the vaunted British insularity were also underwritten by colonialism in important ways. The full-blown theory of colonialism emerged exactly at the time when, for the liberals, Britain had replaced Napoleonic France as the hope of mankind.⁵³ Once the empire broke down, the liberalism revealed its racist underside. And the famous insularity, too, gave way to wholesale Westernization—Britain also has its own West—and threatened to leave, as Malcolm Muggeridge once said, some sections of Indians as the sole surviving Britons in the world.)

Jacques Ellul has argued that the two major myths of the modern world are science and history.⁵⁴ The contours of both these myths, their early 'developmental pathologies', and the magicality associated with them could be found in the dominant cosmology of nineteenth-century Britain.

These cultural pathologies invoked four distinct responses in British society. The more obvious of them were reflected in Rudyard Kipling (1865-1936) and George Orwell (1903-45), the former representing the pathetic self-hatred and ego constriction which went with colonialism, and the latter the relative

53 Morris, *Heaven's Command*, Chapter I.

54 Jacques Ellul, *The New Demons*, trans. C. Edward Hopkin (New York: Seabury Press, 1975), Chapter 4.

sense of freedom and critical morality which were the true antitheses of colonialism and which one could acquire only by working through the colonial consciousness. Both came from direct or indirect exposure to the colonial situation and both struggled, though in dramatically different ways, with ideas of authority, responsibility, psychological security, self-esteem, hierarchy, power and evangelism. The third response was indirect, unselfconscious and overtly apolitical. It was reflected in the chaotic, individuated, 'pathological' protests against hyper-masculinity and over-socialization by individuals like Oscar Wilde and many of the members of the Bloomsbury group and by aspects of the elite culture in institutions like Oxford and Cambridge. I have in mind not the formal radicalism of a few politically conscious intellectuals, but the half-articulated protest by more apparently apolitical intellectuals against the official ideas of normality and dissent gradually taking over the whole of the culture of Britain.

Lastly, there was the numerically small but psychologically significant response of many who wholly opted out of their colonizing society and fought for the cause of India. Some of them became marginal to the Western life style in the course of their search for an alternative vision of an ideal society outside technocratic Utopias and outside modernity. One may describe them as persons searching for a new Utopia untouched by any Hobbesian dream. Such persons as Sister Nivedita, born Margaret Noble (1867-1911), Annie Besant (1847-1933) and Mira Behn, born Madeleine Slade (1892-1982), found in Indian versions of religiosity, knowledge and social intervention not merely a model of dissent against their own society, but also some protection for their search for new models of transcendence, a greater tolerance of androgyny, and a richer meaning as well as legitimacy for women's participation in social and political life.⁵⁵ More relevant for us however are others like

55 Cf. Mira Richard's case, briefly touched upon in pp. 94-6, in this volume. It is also worth noting that many of these women were Irish. I leave it to the psycho-historians to work out the possible meanings of these relationships between womanhood, dependency and independence, Anglo-Irish political relationships, and Catholicism and its greater tolerance for premodern or nonmodern categories of thought.

C. F. Andrews (1871-1940) who never became marginal to the West, but found a richer meaning for Western Christianity and a new endorsement of traditional Christian virtues in some strands of anti-colonialism in India. India for them was both a place for Christian social intervention and a place which could be a mirror to organized Western Christianity which had become a cat's paw of British imperialism.

I shall very briefly describe the four responses in the rest of this section.

Kipling probably was the most creative builder of the political myths which a colonial power needs to sustain its self-esteem. The psychological co-ordinates of his imperialist ideology have often been the co-ordinates of the West's image of the non-West in our times.

Elsewhere in this book I have described Kipling's early experiences and world view to show that he was something more than a rabid imperialist with an integrated identity. He was, I have argued, a tragic figure seeking to disown in self-hatred an aspect of his self identified with Indianness—which in turn was identified with victimization, ostracism and violence—because of a cruel first encounter with England after an idyllic childhood in India.⁵⁶ In this state, Kipling reproduced in his personal life both the painful cultural changes that had taken place in his society and the history of British colonialism in India from Robert Clive to Winston Churchill.

Since about the seventeenth century, the hyper-masculine over-socialized aspects of European personality had been gradually supplanting the cultural traits which had become identified with femininity, childhood, and later on, 'primitivism'. As part of a peasant cosmology, these traits had been valued aspects of a culture not wedded to achievement and productivity. Now they had to be rejected as alien to mainstream European civilization and projected on to the 'low cultures' of Europe and on to the new cultures European civilization encountered. It was as part of this process that the colonies came to be seen as the abode of people childlike and innocent on the one hand, and

⁵⁶ See pp. 64-70 below.

devious, effeminate and passive-aggressive on the other. The positive qualities of childlikeness, Kipling argued, were the attributes of the good savages—for instance, the devoted, obedient martial races of India, the Gunga Dins—and those of the good-hearted, patriotic lower classes of Britain supplying the Raj with 'Tommyes' who dutifully went to their untimely death in distant lands. Childish or feminine passive-aggression was the attribute of the effete nationalists and fake sahibs or babus drawn from the non-martial races and that of the uninformed, shallow, British liberals supporting the former. It was also the attribute of whatever apparent civilization India, as opposed to the 'savage' Africans, seemed to have.

This was the ultimate meaning of the spirit of colonialism and its civilizing mission mounted on behalf of modernity and progress. Kipling merely produced new myths to consolidate these cultural ideas as a part of his own search for an integrated selfhood. To use an overworked expression of Herbert Marcuse's, it was an instance of internal repression mirroring an externally repressive system. Kipling's idea of the effeminate, passive-aggressive, and 'half-savage-half-child' Indian was more than an Anglo-Indian stereotype: it was an aspect of Kipling's authenticity and Europe's other face.

The *denouement* for Kipling came in his old age, when his literary success with generations of young readers had very nearly established his superiority over his critics in India as well as in the West. It came when his only son died defending the cause of the Empire Kipling held so dear. Kipling, neither a clear-cut product of the self-confident colonialism of the nineteenth century nor at home with modern wars based on mega-technology and mega-death, was broken. The fear of loss of nurture had always haunted him. The characters in his stories, mostly parentless like Wilde's, sometimes sought that nurture through a reversal of roles: they secured nurture from their wards, from children and from the childlike aliens they befriended or protected. In the process, they presumably ensured for their creator a similar nurture from the children among—and the children in—his readers. That fantasy world

of nurture from below, perhaps compensating loss or deprivation of parental nurture, collapsed with the death of Kipling's son.

Edmund Wilson sensitively captures the spirit of this Kipling, broken as much by the imperialism he so admired as by his self-repression.⁵⁷ Wilson does so by quoting the defeated imperialist—lonely, depressed, and fearful of insanity in his old age:

I have a dream—a dreadful dream—
A dream that is near done,
I watch a man go out of his mind,
And he is My Mother's Son.

George Orwell's response to the ideology of colonialism was the antipode of Kipling's; he worked with creative myths that were direct attempts to reassert some of the values which colonialism forced one to disown. He clearly sensed that British colonialism had created the demand for a 'mother culture'—and a production line for colonial rulers—which alienated the colonizers not only from their political subjects but also from their own selves. Orwell operated from an anthropocentric, socialist-humanistic rationalism which never allowed him to develop the full meaning of the continuity between the oppressor and the oppressed.⁵⁸ Nevertheless, he did sense that the subjugation of the ruled also involved the subjugation of the ruler, that the subjects in the colonies controlled their rulers as surely as the rulers controlled their subjects. He also was aware, perhaps to some extent against himself, that the first kind of control was the more difficult to defy because it was covert, subtle and involved

⁵⁷ Edmund Wilson, 'The Kipling that Nobody Read', in Andrew Rutherford (ed.), *Kipling's Mind and Art* (Stanford, California: Stanford University Press, 1964), pp. 17-69.

⁵⁸ See for instance Orwell's 'Reflections on Gandhi', in Sonia Orwell and Ian Angus (eds.), *Collected Essays, Journalism and Letters of George Orwell* (London: Seeker and Warburg, 1968), vol. 4, pp. 463-70. Orwell stresses the moral Gandhi and rejects Gandhi's world view as irrational and anti-humanist and his personality as aesthetically distasteful. In the same volume however is his 'James Burnham and the Managerial Revolution', pp. 160-81, which does show an acute sensitivity to the specific problem of modern oppression which Gandhi attacked.

within-person repression, whereas in the second case, the repression was overt and involved two cultures.

The most telling portrayal of this mutual bondage is in Orwell's 'Shooting an Elephant', an essay which graphically describes some of the anxieties and fears the colonizer lives with.⁵⁹ All the themes which can be identified with the present cultural crisis of the West are in the essay: the reification of social bonds through formal, stereotyped, part-object relationships; an instrumental view of nature; created loneliness of the colonizers in the colony through a theory of cultural stratification and exclusivism; an unending search for masculinity and status before the colonized; the perception of the colonized as gullible children who must be impressed with conspicuous machismo (with resultant audience demands binding the colonizer to a given format of 'play'); and the suppression of one's self for the sake of an imposed imperial identity—inauthentic and killing in its grandiosity. What Kipling articulated indirectly through his life and tried to hide through his writings, Orwell articulated openly through his self-aware political analysis.

Orwell was basically a critic of totalitarianism. But those who have read his *Animal Farm* and *Nineteen Eighty-Four* will recognize him also as a critic of the oppression which grows out of ideologies of egalitarianism and progress. It is this part of his self which is relevant to this essay, because much before the modern doctrines of progress came home to roost in the First and the Second Worlds, the colonized societies had to bear their full brunt.

Orwell was the scion of an old, quasi-aristocratic family in decline, with a history of colonial service and slave-owning. Like Kipling, he was born in India and brought up in England. But he left the country of his birth too early to have any memories. He had, thus, a standard English middle-class upbringing. In later life Orwell believed that he had had an oppressive childhood and he wrote about his journey through

⁵⁹ George Orwell, *Inside the Whale and Other Essays* (Harmondsworth: Penguin, 1957), pp. 91-100. See also his *Burmese Days* (Harmondsworth: Penguin, 1967).

a tyrannical school that was close to being a 'total' institution. His biographer Bernard Crick however argues that, objectively speaking, Orwell's childhood was not really oppressive after all, that Orwell 'rewrote' his memories to make them compatible with his later concerns.⁶⁰ But at the same time, Crick's account itself underscores three themes in Orwell's early life which are linked with the adult Orwell's understanding of oppression and his defiance of the colonial culture in Britain.

First, Orwell grew up in an essentially woman's world with imageries of men as dirty, violent and inferior. Like Kipling he showed an early predilection for a life of the mind; like Kipling, he felt handicapped in a school organized around conflicting ideas of asceticism, sexual (especially homosexual) puritanism, hard work, sportsmanship and hyper-masculinity.⁶¹ Like Kipling again, Orwell was a sensitive, seclusive boy and for that very reason unpopular in his school and subject to bullying. But the end-results of these experiences were very different for Orwell. The ambivalence towards maleness in his early environment deterred him from opting for the reigning culture of hyper-masculinity. He remained in essence an opponent of the patriarchal world view.

Secondly, young Orwell, according to Orwell the auto-biographer, learnt early in his life that he was 'in a world where it was *not possible* for him to be good'; that is, 'in a world . . . where the rules were such that it was actually not possible . . . to keep them.'⁶² This probably included the specific lesson that the inability to be good applied especially to the weak. All this can be explained away as a 'screen memory', as Crick seems to do, but it could be also read as a belief rooted in experience. Orwell was a bed-wetter, and had to learn to live with humiliation and corporal punishment in school for his 'crime'. Victorian morality taught him to recognize bed-wetting as wicked, but

60 Bernard Crick, *George Orwell, A Life* (Boston: Little, Brown, 1980), especially Chapters 1 and 2. It is not clear why Crick stresses this point because Orwell *does* admit it (pp. 344, 347).

61 George Orwell, 'Such, Such Were the Joys', in *Collected Essays*, vol. 4, pp. 330-69, see particularly pp. 351-3, 359.

62 *Ibid.*, p. 334.

the wickedness was outside his control. 'Sin was not necessarily something that you did; it might be something that happened to you.'⁶³

Third, it was in school that Orwell had the first intimation of a principle which took him, by his own admission, another twenty years to realize: 'the weak in a world governed by the strong' must 'break the rules, or perish.' The weak, he was to claim, had 'the right to make a different set of rules for themselves.'⁶⁴ Unless they had the 'instinct to survive', they had to accept the world in which 'there were the strong, who deserved to win, and there were the weak who deserved to lose and always did lose, everlastingly.'⁶⁵

Strange though it may sound, Orwell could have been, given the 'right' values, one of Kipling's heroes. He had the right approach to the 'natives' as well as to the English lower classes: deep empathy without total identification, a sense of moral responsibility, and an unencumbered spirit of the kind which enabled one to do the dirty work of one's time. But Orwell put this approach to a different use. He became a critic of the dominant, middle-class culture of modern Britain which had found in imperialism its final fulfilment.

The third form of internal response to colonialism protected the more feminine aspects of the British self through 'psycho-pathological'—and 'criminal'—modes of self-expression in a few confined geographical and psychological spaces such as Oxbridge and Bloomsbury and in persons in conflict about their sexual identities and seeking to make an indirect ideological issue out of the conflicts. Almost all these persons were unaware that their inner drives were a joint political statement as well as the elements of a common private conflict. Nevertheless, their personal lives and the ambience of their interpersonal relationships set apart such non-political figures as Oscar Wilde (1854-1900), G. E. Moore (1873-1958), John Maynard Keynes (1883-1946), Lytton Strachey (1880-1932), Virginia Woolf (1882-1941), Somerset Maugham (1874-1965), E. M. Forster

63 *Ibid.*, p. 334.

64 *Ibid.*, pp. 362-3.

65 *Ibid.*, pp. 359, 361.

(1879-1970) and W. H. Auden (1907-73) as living protests against the world view associated with colonialism.

Psychoanalyst Lawrence Kubie has explored in some detail the search for bisexuality that characterized gifted individuals like Virginia Woolf and the anguish that was associated with that search.⁶⁶ This anguish was sharpened in a cultural context that was trying to disown its own recessive traditions of androgyny and the psychological correlates of the biological fact of human bisexuality.⁶⁷ 'The ideology of higher sodomy', aestheticism and neo-Hellenism to which many creative persons subscribed in nineteenth and twentieth century Britain cannot be explained without reference to the way British society had devalued femininity as low-status, contaminating and anti-social, and rejected the presence of femininity in man as virtually the negation of all humanness. What the colonial culture was doing in India by stressing the antonymy between *purusatva* and *klibatva* had its collateral in the struggle to further consolidate the dominance of the principle of hyper-masculinity in Britain. Colonialism only helped marginalize, using the popular British sexual stereotypes, the strands of consciousness in Britain protesting against this antonymy.

Let me give the example of a remarkably creative person who was apparently far removed from the world of British-Indian politics, Oscar Wilde. Richard Ellmann's recent essay on Wilde's life at once reveals the extent to which Wilde's sexuality was a cultural phenomenon and a statement of protest.⁶⁸ The Marquess of Queensberry, the vindictive father of Wilde's lover

66 Lawrence Kubie, 'The Drive to Become Both Sexes' *Psychoanalytic Quarterly*, '974. 43(3). PP-349-426.

67 See also the autobiography of Noel Coward, *Future Indefinite* (London: Heinemann, 1954), for a flavour of how wit and pleasantness was often used to hide the pain and loneliness of sexual deviation within the mould of social acceptability and popularity. For a discussion of 'the structure of feeling' which interlinked critiques of existing man-woman relationship, attempts to relate to lower classes, anti-imperialism and anti-militarism, see Raymond Williams, 'The Bloomsbury Fraction', *Problems in Materialism and Culture*, pp. 148-69. Williams also provides a vague clue to the nature of the relationship between depth psychology and the Bloomsbury syndrome.

68 Richard Ellmann, 'A Late Victorian Love Affair', *New York Review of Books*, '977. 24(3) pp. 6-10.

Bossie (Lord Alfred Douglas) was not merely a flat-footed conservative, but a culturally typical counterplayer to Wilde's atypical sexual identity. Both Wilde and his lover saw themselves as the negation of the staid Marquess who sought constant endorsement of not only his but his culture's masculine self. As the inventor of the Queensberry rules of competitive boxing, it is this endorsement which the Marquess symbolically sought by defining and demanding rule-bound violence and conformity to that ultimate virtue of aggressive British masculinity, sportsmanship.⁶⁹ And this is the endorsement Wilde tried to deny him. Wilde's younger son, Vyvyan Holland, was to later write that Wilde had a 'horror of conventionality' and that this contributed to his destruction by his society.⁷⁰ He failed to recognize that imperialism was based on the pathology of existing conventionality and commonsense; it sought its legitimacy by selling the idea of a moral civilization based on these two elements of British folk culture. By defying conventionality—particularly stereotyped definitions of sexual norms—Wilde threatened, however indirectly, a basic postulate of the colonial attitude in Britain.

It is well known that Wilde's homosexuality would have been 'forgiven' had he been more discreet about it; had he, for instance, not instituted criminal proceedings against the Marquess. Victorian England was willing to tolerate Wilde's sexual identity as long as it was accepted as a part of the life style of a marginal sect and not openly flaunted.

But by demonstratively using his homosexuality as a cultural ideology, Wilde threatened to sabotage his community's dominant self-image as a community of well-defined men, with clear-cut man-woman relationships. What the elite culture of England could not tolerate was his blatant deviation from rigidly defined sexual roles in a society which, unknown to the hyper-aesthete Wilde, was working out the political meanings of these definitions in a colony thousands of miles away.

69 Geoffrey Gorer, 'The British National Character in the Twentieth Century,' *The Annals of the American Academy of Political and Social Sciences*, no. 370, March 1967, pp. 74-81, see especially pp. 77-8.

70 Quoted in H. Montgomery Hyde, *Oscar Wilde* (London: Methuen, 1976), p. 136.

Oscar Wilde 'childishly' defied respectability in yet another sphere. By stressing this part of Wilde's ideology, Ellmann, a literary critic, allows me to conceptualize the essentially apolitical Wilde as an unself-aware, but more or less complete, critic of the political culture which sired colonialism.⁷¹ Wilde rejected Matthew Arnold's dictum: 'The aim of criticism is to see the object as in itself it really is.' To him the aim of criticism was to see the object as it really was not. This may be seen as the other side of the old maxim, art for art's sake, but it could also be read, as Ellmann himself says, as an earlier version of Picasso's faith: art is 'what nature is not'. In that form it becomes an early critique of over-socialized thinking, of the kind later ventured by Theodor Adorno and Herbert Marcuse. The art which defies the existent is the art which is subversive; it 'undermines things as they are.' Thus, Wilde's admiration for historians who defy history:

He celebrates those historians who impose dominion upon fact instead of surrendering to it. Later he was to say much more boldly, 'The one duty we owe to history is to rewrite it.' It is part of his larger conception that the one duty (or better, whim) we owe nature, reality, or the world, is to reconstruct it.⁷²

Wilde, everything said, was a marginal man. His philosophy of life, too, was peripheral to his society. Neither his sexual deviance nor his critiques of everyday life and history made sense to the mainstream culture of Britain. Appropriately, the characters he created for his plays and stories were parentless.⁷³ They were not burdened by close authority and thus by any passionate conflict with such authority. The humour these characters produced arose out of distant defiance rather than proximate rebellion. Perhaps it is now time for us to turn to criticisms of Western culture which defied conventional masculinity and normal history as parts of a more articulate,

71 Richard Ellmann, 'The Critic as Artist as Wilde', *Encounter*, July 1967, pp. 29-37.

72 *Ibid.*, pp. 30-1.

73 *Ibid.*, p. 30.

culturally legitimate, ideology. In other words, I shall now discuss a mode of dissent which had parents.

Charles Freer Andrews, revered in India and forgotten in England, was born into an inheritance of religion and nonconformity.⁷⁴ Like Orwell, he was his mother's favourite and, like both Kipling and Orwell, his relationship with his father, a minister of the Catholic Apostolic Church, was distant. Andrews' childhood was deeply influenced by religious myths and imageries, and he was also exposed to more than the normal quota of classical literature. He was later to describe his early home life as 'a kind of backwater into which the current of modern thought has not been allowed to enter.'⁷⁵ Again like Kipling and Orwell, he was miserable in his school, partly because of the burden of his studies, but more so because, as a delicate, over-protected boy he was surrounded by older, bigger and 'coarser' boys whose object of homosexual attention he became. Andrews' response to them was not perhaps entirely passive and, throughout his life, he was to remember these experiences as 'an evil form of impurity' in him. Hugh Tinker, certainly not an overly psychological biographer, describes the consequences as follows:

Charlie was never to have a girl friend, and the enormity of this 'impurity' was to be buried deep in his psyche. Perhaps it was at school that he subconsciously turned, or was turned away from the possibility of the physical love of a woman. For some years there was an emotional struggle at school, and though as he grew older he mastered the situation, the sense of guilt remained.⁷⁶

Andrews may not have been easy with conventional heterosexuality but in spite of all his neurasthenia and nervous activism, he was always easy with children. Whether it was this combination that helped him see through the colonial ideology or not, he was to become the one person who, to many of his friends, 'was an Indian at heart, at the same time

74 Hugh Tinker, *The Ordeal of Love: C. F. Andrews and India* (New Delhi: Oxford University Press, 1979), p. 1.

75 *Ibid.*, p. 5.

76 *Ibid.*, p. 4.

a true Englishman.⁷⁷ It is thus that he bridged the classical universalism of Rabindranath Tagore and the folk-based, critical traditionalism of Gandhi. He saw both as valid alternatives to the modernism which informed colonial ideology and, though he probably found Tagore easier to understand, he based his critique of British colonialism, following Gandhi, on critical Christian ethics. (He would have certainly rejected the apolitical, non-critical traditionalism of some contemporary Christian missionaries, as he would have rejected its more impressive and touching version in someone like Mother Teresa today. He would have considered such anti-politics unacceptable.⁷⁸) Predictably, when in India, Andrews adopted many Indian and specifically Hindu social customs—in dress, food and social relations—but he also took care to see that nobody mistook him for a lapsed Christian. He even took pains during his last years to ensure a proper Christian burial for himself. Evidently, he owed his social and political activism not merely to his Indianized self, but also to his non-modern Western traditions. It is a comment on modern theories of dissent that the Westerner who perhaps came closest to the Indian cause in two hundred years of British colonial history operated on the basis of religious traditions, not on that of a secular ideology.

In a moment of terrible defeatism Vivekananda had said that the salvation of the Hindus lay in three Bs: beef, biceps and Bhagvadgita. The nationalist-chemist P. C. Ray, too, allegedly expressed similar sentiments once. Andrews, if he had come across such proposals, would have found them painful. He recognized the nexus between capitalism, imperialism and Christianity, in spite of his limited intellectual repertoire and his simple theology.⁷⁹ Nevertheless, his Christianity demanded

77 M. K. Gandhi, quoted in Pyarelal, *Mahatma Gandhi: The Last Phase* (Ahmedabad: Navajivan Publishing House, 1958), vol. 2, p. 100.

78 This I say in spite of his liking for Albert Schweitzer (Tinker, *The Ordeal of Love*, p. 206) whose subtle moral and cultural arrogance the simple Andrews was unlikely to notice.

79 C. F. Andrews, *Christ and Labour* (London: Student Christian Movement, 1923); and *What I Owe to Christ* (London: Hodder Stoughton, 1932).

from the Hindus not a masculine Christianity masquerading as Hindu nationalism. His Christianity sought to authenticate Gandhi's faith, enumerated in his sixteen-point thesis, that the East and West could—and did—meet outside the bounds of modernity.⁸⁰ It was modern Britain Andrews disowned, not the traditional West. When Gandhi described him as an Indian at heart and a true Englishman, it remained unstated that it was by being a true Englishman that Andrews became an Indian.

My account of the responses to colonialism in Britain—I find after having written it—differs from my account of the Indian responses in one respect. In the case of the Indians I seem to have stressed texts and myths; for the Westerners, persons. Is this accidental? Or is this an unwilling acknowledgement of the different ways in which cultures can be described? Are some cultures primarily organized around historical time intersecting with life-histories, and others around the timeless time of myths and texts? One of the following sections may provide a partial answer to these questions.

VI

The most creative response to the perversion of Western culture, however, came, as it must, from its victims. It was Colonial India, still preserving something of its androgynous cosmology and style, which ultimately produced a transcultural protest against the hyper-masculine world view of colonialism, in the form of Gandhi. Gandhi's authenticity as an Indian should not blind us to the way his idiom cut across the cultural barriers between Britain and India, and Christianity and Hinduism. Albeit a non-Westerner, Gandhi always tried to be a living symbol of the other West. Not only did he sense and 'use' the fundamental predicament of British culture caught in the hinges of imperial responsibility and subjecthood in victory, but he implicitly defined his ultimate goal as the liberation of the British from the history and psychology of British colonialism.

80 Gandhi, quoted in T. K. Mahadevan, *Dvija* (New Delhi: East-West Affiliated Press, 1977), pp. 118-19.

The moral and cultural superiority of the oppressed was not an empty slogan to him.

That is why Gandhi's spirited search for the other culture of Britain, and of the West, was an essential part of his theory of salvation for India. It is true that 'Gandhi was a living antithesis set up against the thesis of the English',⁸¹ but that antithesis was latent in the English, too. All through his adulthood, Gandhi's closest friend was an English cleric devoted not only to the cause of Indian freedom but also to a softer version of Christianity. C. F. Andrews was to Gandhi what Thomas Mann had been to Sigmund Freud: an affirmation of the marginalized reflective strain that must underlie—or, to protect one's own sanity and humanity, must be presumed to underlie—every 'homogeneous' culture that goes rabid. (That this may not be reduced to a merely moral posture in circumstances in which shared madness establishes its domination over history is best shown by Gene Sharpe's description of a successful peaceful resistance against the Nazi state in wartime Berlin.⁸²) Similarly, Gandhi's partiality for some of the Christian hymns and Biblical texts was more than the symbolic gesture of a Hindu towards a minority religion in India. It was also an affirmation that, at one plane, some of the recessive elements of Christianity were perfectly congruent with elements of Hindu and Buddhist world views and that the battle he was fighting for the minds of men was actually a universal battle to rediscover the softer side of human nature, the so-called non-masculine self of man relegated to the forgotten zones of the Western self-concept.

What was the constituency he was appealing to? Was it only a lunatic fringe or an ineffective minority? I suspect that there was in Gandhi not only a sophisticated ethical sensitivity but also political and psychological shrewdness. Here is, for in-

81 Rollo May, *Power and Innocence: A Search for the Sources of Violence* (New York: Delta, 1972), p. 112.

82 Gene Sharpe, *The Politics of Nonviolent Action*, vol. I (Boston: Porter Sargent, '973) pp. 87-90.

stance, a description of an aspect of British national character which the reader, if brought up on ideas of Indian and particularly Gandhian pacifism and Western aggressiveness, might find interesting:

With the exception of the anomalous members of the lower working class (who never came to the colonies in large numbers), the English are preoccupied with the control of their own aggression, the avoidance of aggression from others, and the prevention of the emergence of aggressive behaviour in their children ... In the English middle and upper classes this control of aggression would appear to have been a major component in their character for several centuries. In the context of games this control of aggression is called 'sportsmanship', a concept which the English introduced into much of the rest of the world. One aspect of 'sportsmanship' is controlling physical aggression by rules. . . . The other aspect of 'sportsmanship' is the acceptance of the outcome unaggressively, neither taunting the vanquished nor showing resentment against the victor. This concept of 'sportsmanship' has long been metaphorically extended from games to almost all situations of rivalry or competition; the reputation of being a 'good sport' is one that is very highly valued by the majority of the English.⁸³

Against this observation I want to offset the view of Nirad G. Chaudhuri, an internal critic of the Indian civilization, even though he would be rejected out-of-hand by many as hopelessly anti-Indian and as a lobbyist for the West in the East.

The current belief is that the Hindus are a peace-loving and nonviolent people, and this belief has been fortified by Gandhism. In reality few communities have been more warlike and fond of bloodshed. . . . About twenty-five words in an inscription of Asoka have succeeded in almost wholly suppressing the thousands in the rest of the epigraphy and the whole of Sanskrit literature which bear testimony to the incorrigible militarism of the Hindus. Their political history is made up of bloodstained pages. . . . Between this unnecessary proclamation of non-violence in the third century B.C. and its reassertion, largely futile, in the twentieth century by Mahatma Gandhi, there is not *one word* of non-violence in the theory and practice of statecraft by the Hindus.⁸⁴

Mine is not an attempt to substitute the existing stereotypes of the

83 Gorer, 'The British National Character', p. 77.

84 Nirad C. Chaudhuri, *The Continent of Circe* (London: Chatto and Windus, '965), pp. 98-9. A number of social scientists, too, have noticed that the aggressive needs repeatedly top the list among needs projected in projective, particularly thematic, tests and many of them have identified aggression as the Indian's major conflict area. For details see Ashis Nandy and Sudhir Kakar, 'Culture and Personality', in Udai Pareekh (ed.), *Research in Psychology* (Bombay: Popular Prakashan, 1980), pp. 136-67.

British ruler and Indian subject with the help of two partisan observers. What I am saying is that Gandhi's non-violence was probably not a one-sided morality play. Nor was it purely a matter of humane Hindus versus the inhuman Britons. The shrewd Bania, a practical idealist, had correctly seen that, at some levels of national consciousness in Britain, there was near-perfect legitimacy for the political methodology he was forging. On the other hand, he knew well that he would have to fight hard in India to establish his version of nonviolence as 'true' Hinduism or as the central core of Hinduism. After all, Gandhi himself said that he had borrowed his idea of non-violence not from the sacred texts of India but from the Sermon on the Mount. In the 150 years of British rule prior to Gandhi, no significant social reformer or political leader had tried to give centrality to non-violence as a major Hindu or Indian virtue. The closest anyone came to it was Rammohun Roy with his concept of *daya* or mercy. Many years before Gandhi, Swami Vivekananda had sarcastically said that the British had, following the 'real' injunctions of the classical Indian texts, excelled in their this-worldly, hedonic, manly pursuits, while the Indians, foolishly following the 'true' injunctions of Christianity, had become their passive, life-denying, feminine subjects.⁸⁵ It is not relevant whether Vivekananda's reading of Christianity and Hinduism was right. The important point is that Gandhi made a different use of the same awareness.

It was in this sense that Gandhi wanted to liberate the British as much as he wanted to liberate Indians. The panicky, self-imposed captivity of the dominant or ruling groups in their self-made oppressive systems, for the sake of values which Chaim Shatan has recently called bogus honour and bogus

⁸⁵ Vivekananda, *Pracya o Paicalya* (Almora: Aclvaita Ashrama, 1898). This aspect of Vivekananda comes out also from Sudhir Kakar's interpretation of Vivekananda in *The Inner World: Childhood and Society in India* (New Delhi: Oxford University Press, 1977), pp. 160-81.

manliness, is something which he never failed to notice or use.⁸⁶

To put this awareness to political use, he challenged first the ideology of biological stratification acting as a homologue of—and legitimacy for—political inequality and injustice. As already noted, the colonial culture's ordering of sexual identities assumed that

Purusatva > Naritva > Klibatva

That is, manliness is superior to womanliness, and womanliness in turn to femininity in man. I have also pointed out that the first Indian response to this was to accept the ordering by giving a new salience to Ksatriyahood as true Indianness. To beat the colonizers at their own game and to regain self-esteem as Indians and as Hindus, many sensitive minds in India did what the adolescent Gandhi at the ontogenetic level had tried to do symbolically with the help of a Muslim friend.⁸⁷ They sought a hyper-masculinity or hyper-Ksatriyahood that would make sense to their fellow-countrymen (specially to those exposed to the majesty of the Raj) and to the colonizers.

But in an unorganized plural society, with a tradition of only parochial, not absolute, legitimacy for warriorhood, such Di-onysian games with the colonizers were doomed. This is what the Bengali, Panjabi and Maharashtrian terrorists found out to their own cost during the early part of this century. They had isolated themselves from the society even more than the British when Gandhi entered Indian politics in the nineteen-twenties.

Gandhi's solution was different. He used two orderings, each of which could be invoked according to the needs of the situation. The first, borrowed intact from the great and little traditions of saintliness in India, and also probably from the doctrine

⁸⁶ Chaim F. Shatan, 'Bogus Manhood and Bogus Honor: Surrender and Transfiguration in the United States Marine Corps', *Psychoanalytic Review*, 1977, 64(4), pp. 585-610.

⁸⁷ On the young Gandhi's attempt to work out or pursue at the personal level the macho model to its logical absurdity see the sensitive account of Erik H. Erikson, *Gandhi's Truth: On the Origins of Militant Man-Violence* (New York: Norton, 1969)

of power through divine bi-unity in some of the *vamdhari* or left-handed sects, was as follows :

Androgyny > *Naritva Purusatva*

That is, manliness and womanliness are equal, but the ability to transcend the man-woman dichotomy is superior to both, being an indicator of godly and saintly qualities. To do this Gandhi had to ignore the traditional devaluation of some forms of androgyny in his culture.

Gandhi's second ordering was invoked specifically as a methodological justification for the anti-imperialist movement: first in South Africa and then in India. It went as follows:

Naritva > Purusatva > Kdpurusatva

That is, the essence of femininity is superior to that of masculinity, which in turn is better than cowardice or, as the Sanskrit expression would have it, failure of masculinity. Though the ordering is not inconsistent with some interpretations of Indian traditions, when stated in such a fashion it acquires a new play. This is because the first relationship (*naritva > purusatva*) often applies more directly to the transcendental and the magical, whereas the second relationship (*purusatva > kapurusatva*) is a more general, everyday principle. Perhaps the conjunction of the two sets makes available the magical power of the feminine principle of the cosmos to the man who chooses to defy his cowardice by owning to his feminine self.

There are a few implied meanings in these relationships. These meanings were culturally defined and, therefore, 'assumed' by Gandhi, but could be missed by an outside observer. First, the concept of *naritva*, so repeatedly stressed by Gandhi in nearly fifty years before the woman's liberation movement began, represented more than the dominant Western definition of womanhood. It included some traditional meanings of womanhood in India, such as the belief in a closer conjunction between power, activism and femininity than between power, activism and masculinity. It also implied the belief that the feminine principle is a more powerful, dangerous and uncontrol-

lable principle in the cosmos than the male principle. But even more central to this concept of womanhood was the traditional Indian belief in the primacy of maternity over conjugality in feminine identity. This belief specified that woman as an object and source of sexuality was inferior to woman as source of motherliness and *cantos*. Gandhi's fear of human sexuality, whatever its psychodynamic explanation in Gandhi's personal history, was perfectly consistent with this reading of Indian culture.

Second, while the dominant principle in Gandhian praxis is non-violence or avoidable violence, an implicit subsidiary principle is what K. J. Shah calls unavoidable violence. The principle of non-violence gives men access to protective maternity and by implication, to the godlike state of *ardhanarUvara*, a god half-man, half-woman. But given the cultural meaning of *ndritva*, non-violence also gives men access to the powerful, active, maternal principle of the cosmos, magically protective and carrying the intimations of an oceanic and Utopian beatitude. Along the same continuum, courage—what Lloyd and Susanne Rudolph call Gandhi's new courage⁸⁸—allows one to rise above cowardice or *kapurusatva* and became a 'man', on the way to becoming the authentic man who admits his drive to become both sexes. This courage is not definitionally wedded to violence as in Ksatriyahood, but it may involve unavoidable violence under some circumstances, particularly in circumstances where the alternative is passive tolerance of injustice, inequality and oppression—willing victimhood and acceptance of the secondary gains of victimhood—which are all seen as worse than violence.

In sum, Gandhi was clear in his mind that activism and courage could be liberated from aggressiveness and recognized as perfectly compatible with womanhood, particularly maternity. Whether this position fully negated the Ksatriya world view or not, it certainly negated the very basis of the colonial culture. The colonial culture depended heavily on Western

⁸⁸ Lloyd and Susanne Rudolph, *The Modernity of Tradition* (Chicago: University of Chicago Press, 1966), part 2.

cosmology, with its built-in fears about losing potency through the loss of activism and the ability to be violent. I have avoided discussing here the fantasies which underlie these fears— fantasies of rape and counter-rape, seduction and counter-seduction, castration and counter-castration—which have accompanied the Western concept of manhood whenever Western man has gone beyond his narrow cultural borders to civilize, populate or self-improve. (The depth of this linkage between activism and aggression in parts of the Western world is evident from the fact that the West's major ethnopsychology, Freudian psychoanalysis, locates the source of all activism and the concern with power in the instinctual patterning of aggression.)

VII

The past in history varies with the present, rests upon the present, is the present. . . There are not two worlds—the world of past happenings and the world of our present knowledge of those past events—there is only one world, and it is a world of present experience.

Michael Oakeshott⁸⁹

Gandhi's reply to the colonial homology between childhood and political subjugation was indirect. He rejected history and affirmed the primacy of myths over historical chronicles. He thereby circumvented the unilinear pathway from primitivism to modernity, and from political immaturity to political adulthood, which the ideology of colonialism would have the subject society and the 'child races' walk.⁹⁰ This was his way of grappling with colonial racism, a racism at least one psychiatrist has diagnosed as 'a historical ill, a disorder of the historical self

89 Michael Oakeshott, *Experience and its Modes* (Cambridge: Cambridge University Press, 1966), pp. 107-8. Oakeshott's classical conservatism is of course totally oblivious of the critical functions this orientation to history can be made to play. For an implicit awareness of those functions one might have to go back to a politically schizophrenic personality like Martin Heidegger in the modern Western tradition.

90 As already noted, the equation between childhood and primitivism received powerful support from psychoanalytic ethnography. In Freud's own lifetime, some of his followers were busy studying primitive cultures which supposedly displayed all the characteristics of childhood.

which 'reveals the fullness of that self even as it reveals its inadequacies'.⁹¹

(There was a direct component in Gandhi's defiance of the ideology of adulthood, but it was relatively trivial. Not only did every Westerner and Westernized Indian who came in touch with Gandhi refer at least once to his child's smile, his admirers and detractors dutifully found him childlike and childish respectively. His 'infantile' obstinacy and tendency to tease, his 'immature' attacks on the modern world and its props, his 'juvenile' food fads and symbols like the spinning wheel—all were viewed as planks of a political platform which defied conventional ideas of adulthood.⁹² One could offset these oddities against Bruno Bettelheim's view that under oppression, when survival is at stake, there is regression to infantilism. And against Lionel Trilling's observation, in the context of India, that 'generations of subjection can diminish the habit of dignity and teach grown men the strategy of the little child.'⁹³ An enterprising psychoanalyst probably could even be persuaded to argue that Gandhi's style of leadership was, in retrospect, a natural corollary of the culture of oppression with which his people lived. For the moment, however, I shall stress the other part of the story where a specific political position became in Gandhi a point of convergence between immediate social needs and metaphysical defiance.)

Gandhi's position on history was based on three assumptions, two of them derived from the traditional Indian orientations to time.⁹⁴ The first of these two was the salience given by

91 Joel Kovel, *White Racism: A Psychohistory* (London: Allen Lane, 1970), p. 232.

92 Ashis Nandy, 'From Outside the Imperium: Gandhi's Cultural Critique of the "West" ', *Alternatives*, 1981, 7(2), pp. 171-94.

93 Bruno Bettelheim, *Surviving and Other Essays* (New York: Alfred A. Knopf, 1979); Lionel Trilling, 'A Passage to India (1943)', in Malcolm Bradbury (ed.), *E. M. Forster: A Passage to India* (London: Macmillan, 1970), pp. 77-92, especially p. 80.

94 For an excellent detailed analysis of the traditional Indian concept of time as it relates to authority and change, see Madhav Deshpande, 'History, Change and Permanence: A Classical Indian Perspective', in Gopal Krishna (ed.), *Contributions to South Asian Studies*, vol. I (New Delhi: Oxford University Press, 1979), pp. 1-28.

Indian culture to myth as a structured fantasy which, in its 'dynamic of the here-and-the-now, represents what in another culture would be called the dynamic of history. In other words, the diachronic relationships of history are mirrored in the synchronic relationship of myths and are fully reproducible from the latter if the rules of transformation are known. In Gandhi, the specific orientation to myth became a more general orientation to public consciousness. Public consciousness was not seen as a causal product of history but as related to history non-causally through memories and anti-memories. If for the West the present was a special case of an unfolding history, for Gandhi as a representative of traditional India history was a special case of an all-embracing permanent present, waiting to be interpreted and reinterpreted. (This also indirectly coped with the subsidiary homology between old age and Indian civilization but, for the moment, I shall let that pass.)

Even to the critics of industrial capitalism in the West, history was a linear process sometimes with an implied cycle underlying it. Marx, for instance, following the Judaeo-Christian cosmology, conceived of history somewhat as follows:

Prehistory proper (ahistorical primitive communism)	Objective stage-bound history (class struggle)	False history as a part of false consciousness (History as ideology)
	End of history (class-less adult communism, based on scientific history)	

Gandhi, however, was a product of a society which conceptualized the past, as a possible means of reaffirming or altering the present :

Past as a special case of present	Fractured present (competing pasts)	Remaking of present including past	New past
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From such a viewpoint, the past can be an authority but the nature of the authority is seen as shifting, amorphous and amenable to intervention. Mircea Eliade puts it thus:

While a modern man, though regarding himself as the result of the course of universal history, does not feel obliged to know the whole of it, the man of the archaic societies is not only obliged to remember mythical history but also to re-enact a large part of it periodically. It is here that we find the greatest difference between the man of the archaic societies and modern man: the irreversibility of events, which is the characteristic trait of History for the latter, is not a fact to the former. . .⁹⁵

This is of course a less colourful way of paraphrasing T. S. Eliot in *Burnt Morton*:

Time present and time past
 Are both perhaps present in time future,
 And time future is contained in time past.
 If all time is eternally present
 All time is [unredeemable].

Borrowing from psychoanalysis, Jiirgen Habermas in another context uses the expression 'future-oriented memories' to describe the means through which one breaks the power of the past over the present.⁹⁶ Some strands of Indian culture would find this fully acceptable. But they would formulate the consequences of such a view differently. The Indian's past is always open, whereas his future is so only to the extent that it is a rediscovery or renewal.⁹⁷ For Freud, as for Marx, ill health follows from history; health either from the present or from the future. The psychoanalyst, like the Marxist historian, is an expert who anticipates the self's capacity to bare, and live with, the repressed other history which creates the crucial disjunction between the past and the present. For the Indian folk 'historian' —the *bhat*, *caran*, or the *kathakdr* for instance—there can be no real disjunction between the past and the

⁹⁵ Mircea Eliade, *Myths, Rites, Symbols*, Wendell C. Beane and William G. Doty (eds.) (New York: Harper Colophon Books, 1976), vol. i, p. 5.

⁹⁶ Jurgen Habermas, 'Moral Development and Ego Identity', in *Communication and the Evolution of Society*, trans. Thomas McCarthy (London: Heinemann, 1979), pp. 69-94.

⁹⁷ For a brief discussion of this attitude from a psychological point of view, see my *Alternative Sciences: Creativity and Authenticity in Two Indian Scientists* (New Delhi: Allied, 1980), Chapter i.

present. If ill health follows from the past, health too follows from the past. The idea of 'determination' could apply to the present or to the future, as the notorious Indian concept of fatalism implies; in the past there are always open choices.

Past as present	Fractured present	Remade past	New past
Determined future (Indian fatalism)			Alternative determined future (new 'fatalism')

While this position does not fully negate history and in fact anticipates a number of fashionable post-Gandhian philosophies of history and interpretations of myths as history, the Gandhian position does make a subsidiary anti-historical assumption that, because they faithfully contain history, because they are contemporary and, unlike history, are amenable to intervention, myths are the essence of a culture, history being 'at best superfluous and at worst misleading. Gandhi implicitly assumed that history or *itihasa* was one-way traffic, a set of myths about past time or the *atit*, built up as independent variables which limit human options and pre-empt human futures. Myths, on the other hand, allow one access to the processes which constitute history at the level of the here-and-the-now. Consciously acknowledged as the core of a culture, they widen instead of restricting human choices. They allow one to remember in an anticipatory fashion and to concentrate on undoing aspects of the present rather than avenging the past. (Myths widen human choices also by resisting co-optation by the uniformizing world view of modern science. In spite of recent attempts to show the rationality of the savage mind *a la* Levi-Strauss, the savage mind itself has remained on the whole unconcerned about its own rationality. Both the science of myth and the scientific status of the myth continue to be a predominantly modern concern. In this sense, too, the affirmation of ahistoricity is an affirmation of the dignity and autonomy of non-modern peoples.)

The reverse of the same logic, however, is that myths can be analysed, traced or reduced to history as the dominant tradition

of Western social analysis had tried to do throughout modern times. History here is seen as the reality, the myth being a flawed, irrational fairy tale produced by 'unconscious' history, meant for savages and children. The core of such a concept of time—produced in the West for the first time after the demise of medievalism—consists in the emphasis on causes rather than on structures (on 'why' rather than 'what'), on progress and evolution as opposed to self-realization-in-being, and on the rationality of adjustment to historical reality (pragmatics) and of change through constant dramatic action (rather than on the rationality of a fundamentally critical attitude towards earlier interpretations and change through only critical interventions and new interpretations). For the modern West, and for those influenced by its concept of time, history itself is a chronology of good and bad actions and their causes, and every revolution is a disjunction in time which must be either protected against counter-revolutions or reduced to the stature of a false 'coming' on the way to a real revolution.

The subsidiary assumption of the second approach is that the cultures living by myths are ahistorical and thus, representatives of an earlier, second-rate social consciousness. Historical societies are the true representatives of mature human self-consciousness and, therefore, their constructions of the ahistorical societies are more valid scientifically than those of these societies themselves. The latter must act out their ahistorical fates as understood by those who are historians to the world.

This is the paradigm of the adult-child relationship which was challenged in Gandhian theory as well as practice.⁹⁸ This

⁹⁸ It was at the level of practice that Gandhi introduced into Indian concepts of childhood and child-rearing something analogous to the concept of original sin. It is a moot psychological point whether, without this distortion of the Indian tradition of childhood (see Sudhir Kakar's 'Childhood in India: Traditional Ideals and Contemporary Reality', *International Social Science Journal*, 1979, 31(3)1 pp. 444-56), Gandhi personally could have given such a centrality to the concept of *seva* or service in the public sphere and to the idea of intervention in life situations for which there was very little place in the high cultures of India. Gandhi's concept of *seva* was essentially reparative; it was born of his own personal experiences, which partly underwrote a Western-style solution of his Oedipal conflicts. As a result, Gandhi built his concept of political and social work on an un-Indian concept of a sinful childhood which could be atoned for in adulthood only through the reparative gesture

was done in two ways: by reaffirming the language of continuity and by re-emphasizing the language of self.

The language of continuity took advantage of the deep ambivalence towards disjunction in the ideology of modernity. Modernity seeks to locate all 'true' creativity, including creative social action, in clear-cut breaks with the past. Yet, paradoxically, it strives hard to locate each such break in history. For instance, the rhetoric of revolution not only undervalues anything which is insufficiently disjunctive with the past; it positively disvalues reformism as a hindrance to revolution. At the same time, the effort of every modern history of revolutions and every revolutionary thought is to place all 'true' or 'false' revolutions in history. No explanation of, or call for, a revolution is complete unless it has spelt out the historical continuities which has or could lead to a revolution or would explain its career line.

The language of continuity re-legitimized the under-emphasis on disjunction in the Indian world view. It recognized that exactly as the language of revolution hid within it the message of continuity, the language of continuity too had a latent message of disjunction. Indian culture emphasized continuities so much that even major breaks with the past passed as minor reforms, till the full implications of the break became evident after decades or centuries, when the metaphors of continuity and permanence could no longer hide the fundamental changes that had already taken place in the culture. (The Bhakti movement is a reasonably good example of the process being described.) It therefore did not ultimately matter whether one used the rhetoric of disjunction or of continuity, as long as the feel for the immediacy of suffering was maintained and suffering was not reified through an ornate sophisticated intellectual packaging.

The reaffirmation of the language of self could be briefly described as a part of an old dialectic. The modern world view challenges the traditional faith that greater self-realization

of public service. See Erikson, *Gandhi's Truth*, 6.

leads to greater understanding of the not-self, including the material world. Modernity includes the faith that the more human beings understand or control the 'objective' not-self, including the not-self in the self (the id, the brain processes, social or biological history), the more they control and understand the self (the ego, praxis, consciousness). A non-modern person, if using Freudian or Marxian categories, would argue the other way round: the more he understands his ego or his praxis, he would say, the more he understands the universal primary processes of the id as well as the universal dialectic of history. It is possible that the non-modern civilizations had to some extent exhausted the critical or creative possibilities of this primacy given to self-realization when modernity began to stress the other side of the story. But modernity in turn had over-corrected for the staleness of the older vision when critical traditionalists like Thoreau, Tolstoy and Gandhi began to re-emphasize the world views which, through self-control and self-realization, sought to understand and change the world.

It was as a part of these two languages that Gandhi broke out of the determinism of history. His concept of a free India, his solution to racial, caste and inter-religious conflicts and his concept of human dignity were remarkably free from the constraints of history. Whatever their other flaws, they gave societies the option of choosing their futures here and now— without heroes, without high drama and without a constant search for originality, discontinuous changes and final victories. They were the Indian version of historians 'who impose dominion upon fact instead of surrendering to it'.⁹⁹ If the past does not bind social consciousness and the future begins here, the present is the 'historical' moment, the permanent yet shifting point of crisis and the time for choice. One can either call it an Oriental version of the concept of permanent revolution or a practical extension of the mystical concept of timeless time in some Asiatic traditions.

With this, Gandhi rounded up his critique of the colonial

⁹⁹ Ellmann, 'The Critic as Artist as Wilde', p. 30.

consciousness and proceeded to fight the organized aspects of colonialism. That second battle does not concern us here.

VIII

I started with the proposition that colonialism is first of all a matter of consciousness and needs to be defeated ultimately in the minds of men. In the rest of this essay I have tried to identify two major psychological categories or stratificatory principles derived from biological differences which gave structure to the ideology of colonialism in India under British rule and to show how these principles related the colonial culture to the subject community, and ensured the survival of colonialism in the minds of men. I have also, I hope, shown that the liberation ultimately had to begin from the colonized and end with the colonizers. As Gandhi was to so clearly formulate through his own life, freedom is indivisible, not only in the popular sense that the oppressed of the world are one but also in the unpopular sense that the oppressor too is caught in the culture of oppression.

One question now remains to be answered. In examining parts of the mindscape of British colonialism in India I have gone back into time. Has that time travel observed the rules of history or is it also a matter of a myth? Did Gandhi really construct human nature and society the way I have described? Or is mine a second-order construction—a secondary elaboration, as a psychoanalyst may prefer to call it—which imputes to a man a new structure in the manner of India's traditional commentators on persons and texts? Perhaps the question is irrelevant. As Gandhi so effortlessly demonstrated, for those seeking liberation, history can sometimes be made to follow from myths.

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THE SPIRIT OF HINDU LAW

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Abbreviations

BDh	<i>Baudhāyana-Dharmasūtra</i>
DhK	<i>Dharma-Kośa</i>
GDh	<i>Gautama-Dharmasūtra</i>
KA	<i>Kauṭīlīya-Arthasāstra</i>
MDh	<i>Mānava-Dharmaśāstra</i>
Medh	<i>Manubhāṣya of Medhātithi</i>
MNP	<i>Mīmāṃsānyāyaprakāśa</i>
NS	<i>Nārada-Smṛti</i>
PMādh	<i>Parāśara-Mādhavīya</i>
PMS	<i>Pūrva-Mīmāṃsā-Sūtras</i>
SC	<i>Smṛticandrikā</i>
VaDh	<i>Vasiṣṭha-Dharmasūtra</i>
YS	<i>Yājñavalkya-Smṛti</i>

Introduction (dharmaśāstra)

Law is the theology of ordinary life. It is both the instrument and the rhetoric by which the most familiar, repeated, and quotidian of human acts are first placed in a system or structure larger than individual experience. Law thus provides the initial movement toward a transcendence of personal consciousness and meaning that makes possible the higher order coordination of human activity, the vision of meaning in life abstracted, and the achievement of ethical, social, political, economic, and religious goods. Law, or rules if you prefer for now, are a key part of every child's socialization into a family, a school, or a team. The communal rules to which we subject our children and ourselves impart meaning and purpose to the collective of which we become a part. As the scope and scale of such rules increase to approach the level more commonly understood as law, the sense of achievement, good, and transcendence provided by the law becomes more abstract and distant. Nevertheless, at every level, the plurality of laws by which we lead our lives encode assumptions and ideas about what we aspire to as human beings and what we presume about ourselves and others. Those assumptions, ideas, and presuppositions I call theology, and they pertain to ordinary life, things near to us like family, birth, death, sex, money, marriage, and work – all common themes in the law.

In staking this claim, I am obviously asking the reader to set aside or extend commonplace notions of law that exist today. One cannot deny the increasing global acceptance of a once parochial notion of law as rules backed by sanctions enforced by the state. This very modern, very European notion of law is not natural, not a given; it was produced at a specific moment in history and promulgated systematically and often forcibly through the institutions of what we now call the nation-state, especially those nations that were also colonial powers.¹ Many now argue that

¹ See Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983), p. vii; Gerald Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986), p. 15.

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 “particularly in the developed West, contemporary law posits a fundamental conceptual divide between sacred and secular ... [but] the assertion of that divide has its own history, one that defines Western modernity itself.”² The restriction of law to state-based rules and institutions led in the twentieth century to a kind of backlash against understanding law exclusively as legal positivism. Two important results were the legal realism and, later, legal pluralism movements (among others). Legal realism emphasized the elements of law in practice that had little or nothing to do with the interpretation of legislative statutes and the application of rules in court. Legal pluralism in turn emphasized other normative domains that often served functionally similar roles to state-based laws but without or beyond the control or oversight of the state itself.

First and foremost, therefore, this is a book about the nature of law, and more specifically its dependence and influence on religion.³ When thinking about law, many of us think exclusively in terms of what the law and its institutions do *to* us, rather than focusing on what the law does *for* us. In other words, we tend to highlight what law restricts and constrains rather than what law enables and achieves. This emphasis derives from the thoroughgoing efforts to “secularize” the law by removing all elements of religion from the law and placing exclusive control over the law in the hands of the state. “Secularization,” a term that could mean simply the process of the emphasizing of this world and worldly affairs – a process that does not necessarily exclude religion – has also come to mean the process of eliminating religion from public and civic life. Two centuries of “secularization,” however, have hardly removed all religious elements from the law, even in the most secular, liberal, democratic nations. The language of secular theology includes words such as justice, order, security, family, tolerance, equality. In other words, a very similar range of ideas as any transcendental theology.

The formulation of law as the theology of ordinary life may at first seem unusual, even strident, but it is an extension of existing scholarship on the relation of law and everyday life. The key in this scholarship has been to find a way to connect law and everyday life without collapsing them

² Martha Merrill Umphrey, Austin Sarat, and Lawrence Douglas, “The Sacred in Law: An Introduction.” In *Law and the Sacred* (Stanford: Stanford University Press, 2006), p. 1.

³ It is important, however, to state up front that I do not intend to reduce law to religion in the form of theology in any historical or chronological sense that might be taken as a crass Durkheimian originalism. Rather, the relationship of law and religion I examine here is conceptual and mutual, though it has important institutional consequences as well.

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 indistinguishably. What I propose in this book is that the practice of theology helps us see how actions and events of ordinary life first instigate law-making through theological reflection and are then in turn influenced by those very laws. Theology is the attempt to understand or to give meaning to the transcendent significance of acts. Normally, we think of theology as directed, as its etymology clearly tells us, toward God or gods, i.e., to otherworldly affairs. However, most, if not all, theological traditions in this sense also direct attention toward the affairs of the mundane world.⁴ When they do so, I suggest that theological reflection takes shape as the law. The act of reflection converts a mere act, a movement of the body, into an obligation. This kind of reflection, focused as it is on the ordinary world and ordinary actions, is theological because it is a reflective attempt to impart meaning and purpose to quotidian acts.

There are many ordinary acts that are rarely, if ever, subject to theological reflection in the sense I intend – blinking, for instance – but many other acts of this kind do become the subject of theological concern – take urination, defecation, and even breathing (think here of the rules/laws for meditation). It is the intrusion of such theological consideration into an otherwise taken-for-granted action that brings it into the realm of law. When the act in question is more deliberate or by nature requires more attention, it is all the more likely to be considered theologically.

Take an example: walking one's children to school. It is obvious that this act by itself, no matter how often done, does not create law. However, as soon as one begins to think about or reflect upon why and how one gets children to school, a host of important questions arise. Suppose, for instance, that one decides that two factors, being a good parent and ensuring the child's safety, take precedence over all other factors in motivating this act. Immediately, two values, two ethical goods, have been identified through self-reflection and reflection on the mundane world. Now, unless such reflection is meant to remain idiosyncratic, motivating only one person, we are faced with a situation in which many people may agree that these are suitable motivations for walking one's children to school. Parents should be good and children should be safe. These crude, reductive conclusions when set in the context of reflection on the specific act of walking children to school beg in fact for the creation of legal restrictions and guarantees that people can achieve their goals to be good parents

⁴ Compare, for example, Ball's notion of "nonreligious theology" as a "performance" necessary for any understanding of law. See Milner S. Ball, *The Word and the Law* (Chicago: University of Chicago Press, 1995), p. 2.

and have safe children. Thus arise severe speed limits for vehicles near schools and the provision of crossing-guards or crossing-flags at major intersections.

In the city where I live, the city government recently included appropriations to pay crossing guards. The mayor announced this decision with some fanfare at a local school saying, “This is one of those things that is, and should be, a priority; we should be protecting the health and safety of kids.”⁵ He also associated the move with public health and promoted it as part of the city’s fitness initiative. A document prepared by three national organizations with guidelines for crossing guards further suggests, “The presence of adult crossing guards can lead to more parents feeling comfortable about their children walking or bicycling to school.”⁶ Most interesting to me was the fact that almost every picture of children crossing a street included in the brochure also pictured a parent. One might think that the presence of crossing guards would lead to fewer parents accompanying their children to school, but the opposite seems true. Clearly, more than safety is involved in the demands made for crossing guards, crossing flags, and vehicle speed limits. The demands and the laws that emerge from them result from assumptions and aspirations about what it takes today to be a good parent and to have safe children. Those assumptions and aspirations in turn are part of an effort at worldly transcendence, a way of making parts of the ordinary world meaningful and ethically good. In this way, the law encodes theological ideas about ordinary actions.

Surely, the two goals are shared by parents even in communities that do not demand legal limitations and enablings that support this specific act. But, it is a theological reflection on this specific ordinary action in a specific community at a specific time that leads to the creation of laws that are prompted by an attempt to give meaning to what might otherwise be an unreflective habit.

Take another example, this time from South Asia: bathing. It would certainly be a stretch for many people in Europe or the United States to see how bathing as an act of ordinary life could possibly be the subject of theological reflection and, thus, in my formulation, of law. However, almost every system of religious law contains rules for bathing, both the appropriate times or occasions for cleaning the body and the methods

⁵ *Badger Herald*, October 4, 2005, “City Allows for Crossing Guards,” available at http://badgerherald.com/news/2005/10/04/city_allows_for_cros.php.

⁶ “Adult School Crossing Guard Guidelines,” prepared by the National Center for Safe Routes to School, available at www.saferoutesinfo.org/guide/crossing_guard/pdf/crossing_guard_guidelines_web.pdf.

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 used while bathing.⁷ Among most Hindus in India, for example, it would be unconscionable to worship at a temple without first having bathed. Traditionally, that bath itself would also have taken place in the temple tank. Bathing and rites of ablution are prominent in the Hindu law texts.

For instance, consider just some of the explicit instructions for bathing given in the *Laws of Manu* (5.134, 136–7):

To purify oneself after voiding urine or excrement and to clean any of the twelve impurities, one should use a sufficient amount of earth and water . . . A man intent on purifying himself should apply one lump of earth on the penis, three on the anus, ten on one hand, and seven on both. This is the purification for householders. It is twice that much for students, three times for forest hermits, and four times for ascetics.

Here again, there is no need to explain to people how to clean themselves. That is completely beside the point. The context at hand in the text is the purification of people and things in order for both to be effective participants in, or tools for, religious rituals, and also for social interactions. The ordinary action of bathing becomes through a theological connection to religious purification more than mere hygiene. It is now both a rite and a law that enhances and enables other acts, as also a set of restrictions that must be observed in order to participate in those acts.

Moreover, even hygiene, defined as both biological and social cleanliness, is at the root of rules, even laws, regarding bathing even in the West. One need only refer to showers being required before swimming, before returning to work, before incarceration, and so forth. Biological cleanliness is by no means the only criterion at work in such circumstances. It is the issue of social cleanliness and courtesy, being mandated through rules (admittedly rarely enforced), that take the simple act of bathing into the realm of theology. Yes, it is a worldly theology, but one that is as old as mankind, as Mary Douglas's work on dirt and defilement has shown.⁸

I have thus settled on this mode of thinking being *theological* reflection instead of ethical, ideological, or philosophical reflection for several reasons. First, theology signals the strongly religious element involved when turning ordinary acts into rituals and thereby giving them a transcendent, if still worldly, significance or meaning. Second, theology frequently connotes an abstract, even abstruse, intellectual activity. For

⁷ Compare Abraham Cohen, *Everyman's Talmud: The Major Teachings of the Rabbinic Sages* (New York: Schocken, 1995 [1949]), pp. 241–59; Nu Ha Mim Keller (trans.), *Al-Maqasid: Nawawi's Manual of Islam*, rev. edn (Beltsville, MD: Amana, 2002), pp. 12–31.

⁸ Mary Douglas, *Purity and Danger* (London: Routledge, 1966), pp. 34–40.

Gladstone, “Theology is ordered knowledge; representing in the region of the intellect what religion represents in the heart and life of man.”⁹ At its root, theology is the process of making sense of religious institutions and experience to oneself and to others. This definition would seem to beg the question of how to place a boundary around religion itself, but in my view theology is the very process of making that boundary. Everyone does this, but not everyone’s ideas count for the same or have equal influence beyond themselves. Plural theologies emerge just as plural legal orders emerge, and in relation to one another. The abstract or abstruse quality of theology is associated with its more professionalized forms, the theologies of priests, rabbis, pandits, and mullahs, and these tend to be hegemonic for many people, though never fully so. Finally, theology also connotes an agenda informed by shared teleological ends toward which the system works. Those ends may be ethical, political, soteriological, or ideological, but the act of reflection that coordinates these ends I will call theology.

There are several advantages to conceiving of law as the theology of ordinary life. First, the gap between rule and behavior is acknowledged and recognized. Law and society studies have insisted on this point for some time. Law and the actions of ordinary life connect but do not collapse into one another. Second, the sometimes stark division between law and everyday life is bridged through the mediating concept of theology. That bridge insists neither on total interpenetration nor on real separation, but rather clarifies the manner in which the two tend to overlap or come together. Theology, even in classic formulations such as St Anselm’s “faith seeking understanding” (*fides quaerens intellectum*), captures the liminal position of humanity in living between unconscious sentiment and rationalized discourse. Third, this conceptualization indicates that law is a special kind of theology focused on ordinary human activities, institutions, and events. Other theologies surely exist, but when the theological perspective is brought to bear on ordinary life, the result is law. Fourth and finally, the associations of theology with religion bring out the sense of higher purpose involved whenever law is invoked, and do so in a way that challenges all-too-easy understandings of religion itself as mere belief. If law is the theology of ordinary life, then religion is not a phenomenon directed solely at otherworldly ends, at God or gods, or at escaping or circumventing the practices of ordinary life. In this way, transcendence does not have to imply denial of or disengagement from the world. Law is both

⁹ W.E. Gladstone, “Proem to Genesis,” *The Nineteenth Century* 19 (1886): 1–21, quote from p. 19.

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 a means and an end for giving ordinary life meaning and value through a worldly transcendence. This is why law is often connected with other human goods such as order and justice.

Turning to the other element of the opening definition, whether we speak of everyday, ordinary, day-to-day, or workaday life, *Alltagsleben*, or *la vie quotidienne*, we are obviously grasping for something elusive – a way to capture the flux of human experience in its most immediate and most dominant sense. One might dispute whether we can do this at all given that this kind of experience changes faster than it can be fixed or named by language. Still, investigations into that flux are as old as the Buddha and we constantly strive to categorize and fix our lived experience in words. The now fairly large secondary literature on everyday life has argued for various ways to conceive of both the theoretical and the actual place of everyday life in relation to other more palpably defined human institutions. Some, like de Certeau, want to see everyday life as the social location for the contestation of power by ordinary people, the point at which coercive and oppressive social and political pressures are negotiated and resisted in the lives of people.¹⁰ Others, like Das, want to find in everyday life a safe haven of routine and the social location for coping with the intrusions of social and political power.¹¹ So, when we turn to law, what are we looking for with respect to ordinary life?

In their seminal thematic essay on the topic, Sarat and Kearns argue that an examination of law in everyday life allows us to avoid what they call the “law-first” perspective on the role of law in society. Two basic views of law in everyday life have dominated legal scholarship. The first, the instrumental view, “posits a relatively sharp distinction between legal standards, on the one hand, and nonlegal human activities, on the other.”¹² Instrumentalists are “centrally interested in law’s effectiveness,”¹³ or the degree to which laws achieve their intended effects on society. Moreover, in this view, “‘Law’ or ‘the legal system’ . . . is a distinctly secondary body of phenomena. It is a specialized realm of state and professional activity that is called into being by the primary social world in order to serve that world’s

¹⁰ Michel de Certeau, *The Practice of Everyday Life*, trans. S. Rendall (Berkeley: University of California Press, 1984).

¹¹ Veena Das, *Life and Words: Violence and the Descent into the Ordinary* (Berkeley: University of California Press, 2006).

¹² Austin Sarat and Thomas Kearns, “Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life.” In A. Sarat and T. Kearns (eds.), *Law in Everyday Life* (Ann Arbor: University of Michigan Press, 1993), p. 21.

¹³ *Ibid.*, p. 24.

needs.¹⁴ The second, the constitutive view, “suggests that law shapes society from the inside out, by providing the principal categories that make social life seem natural, normal, cohesive, and coherent.”¹⁵ Constitutivists tend to see the effect of law in terms of “meaning and self-understandings rather than in the results of sanctions.”¹⁶ Following Geertz, the constitutive view argues that “law, rather than being a mere technical add-on to a morally (or immorally) finished society, is, along of course with a whole range of other cultural realities . . . an active part of it.”¹⁷ Finally, advocates of the constitutive view usually take this view because they are in fact critical of the hegemony of law in Gramsci’s sense, i.e., the way in which law pre-structures and predetermines nefarious social realities concerning race, gender, class, religion, sex, and so forth. The strong advocates of one view or the other aside, Sarat and Kearns make a compelling case that everyday life shapes the real effects of law, even as it is simultaneously constituted by law, if only partially. In other words, both the instrumental and the constitutive views are partially correct.

In the end, the instrumental and constitutive views of law and everyday life differ quite dramatically over the question of whether law and everyday life are separate and distinct or together and intermingled. Sarat and Kearns try to offer a way out of the either/or quality of the two views by asking us to step outside what the two views share, namely an emphasis on law as the first site of intellectual reflection. Viewed instead from the perspective of everyday life, it is easy to see how law is both an instrument that hammers away at human actions, sometimes very ineffectively, and a pervasive influence over the way we live our lives. So, asking questions from the perspective of everyday life toward the realms of law seems to avoid some of the problems in beginning with law. Still, I can’t help thinking that the difference boils down to: if you want to see law everywhere, you can; if you don’t, you won’t. Instrumentalists emphasize the gap or separation between law and everyday life. Constitutivists emphasize rather their interpenetration. Is there another alternative?

When Sarat and Kearns claim that both views put law first, I think they really mean state law, primarily in the form of legislation and judicial precedent. What seems missing so far from their discussion of law and everyday life is a thorough consideration of legal pluralism. The fact

¹⁴ Robert Gordon, “Critical Legal Histories,” *Stanford Law Review* 36 (1984): 60.

¹⁵ Sarat and Kearns, “Beyond the Great Divide,” p. 22. ¹⁶ *Ibid.*, p. 27.

¹⁷ Clifford Geertz, “Local Knowledge: Fact and Law in Comparative Perspective.” In *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), p. 218.

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of plural legal regimes undermines clear boundaries between law and everyday life in the same manner described by the constitutivists, but it also reveals the definite limits of legal regimes of the state to make change and control action. Engel recognizes this in his use of the term “domain” to speak of coordinations of law and social context that vary widely in scope and power: “the continuum of normative orders ranging from the ‘law’ of the supermarket check-out line to the constitutional interpretations of federal courts.”¹⁸ Still, even Engel struggles to avoid collapsing law and everyday life without any distinction, and he recommends finally that we “reconsider one of the most obvious facts about ‘official’ law in relation to everyday life: its externality ... the norms, procedures, and sanctions of law are generally extrinsic to particular social domains.”¹⁹ Engel is surely right to point to law’s potential to be external to the social domain it purports to govern. At the same time, Engel has to revert to the notion of “official” law in order to make this point, a term that tends to be understood as “real” law, i.e., what we really mean by law, academic contortions aside.

The advantage of legal pluralism as a model for understanding law and everyday life is that it opens up the possibility for nuanced, multi-level descriptions that show a close relationship between law and ordinary practice at some levels and considerable divergence at others. The disadvantage of legal pluralism, however, is that we lose clarity about the boundaries of both law and everyday life, when we call several different normative orders “legal” and incorporate even wider swaths of human action under the label “everyday.” Nevertheless, I want to accept that studies of law and everyday life must be more informed by the fact of legal pluralism because I think the trade-off is worth it and because I think categories like law and everyday life are always contestable and fluid. In fact, it is their very elasticity that helps make expansions and contractions of their scope productive intellectual endeavors for understanding the world around us. Moreover, and more importantly, thinking of law as the theology of ordinary life allows us to think of the same process operating at different scales and in different social contexts, while still maintaining a shared quality. The distinctiveness of law, therefore, is not to be found by arguing for some social

¹⁸ David Engel, “Law in the Domains of Everyday Life: The Construction of Community and Difference.” In Sarat and Kearns, *Law in Everyday Life*, pp. 125–6. Engel acknowledges his debt to Moore’s well-known articulation of law as a “semi-autonomous social field.”

¹⁹ *Ibid.*, p. 168.

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 or institutional level as the best cut-off point, but rather by articulating the common process and subject matter of law – theology and ordinary life, respectively.

RELIGIOUS LAW, HINDU LAW, AND DHARMAŚĀSTRA

Focusing on a religious legal system has the advantage of a contrary emphasis to that of thinking of law in terms of legislatures, courts, police, and the state.²⁰ Religious law emphasizes the role of law in the service of religious goals, or how the law helps accomplish religious ends.²¹ One could just as easily look at other traditions of religious law such as Jewish law, Islamic law, or Canon law for similar cues about the close relationship of religion and law. In fact, several existing studies do just that.²² Too often religious law is classified together with natural law, when in fact all religious legal systems recognize a diversity of the sources of law, including sources that are natural (reason, deity), positive (ruler's edict, legislation), and traditional (custom, precedent). Because of the way they persist in contemporary political and legal contexts as the province of clerics, priests, and rabbis, religious laws are regularly portrayed as dogmatic, primitive, irrational, and anti-modern. Modern nation-states can permit no competition in the domain of law and, for structural reasons, must seek to destroy the real pluralism that exists in every national jurisdiction. That structural commitment is based on a misrepresentation of religious legal systems as inherently against this world and only interested in the not-of-this-world transcendence associated, wrongly in my view, with Christianity.

²⁰ Robert M. Cover, "Foreword: *Nomos* and Narrative," *Harvard Law Review* 97 (1983–4): 4–68, suggests that these elements are "but a small part of the normative universe that ought to claim our attention" (4). In terms of law's fecund capacity for "jurisgenesis," Cover writes, "Law is a resource in signification that enables us to submit, rejoice, struggle, pervert, mock, disgrace, humiliate, or dignify" (8).

²¹ To my mind, the change of emphasis from what law restricts to what law enables defines religious law. Part of the argument here is to suggest that every legal system must contain at least some religious elements and presuppose some goods and some ethics that may be understood in religious terms. Other scholars are less comfortable with the label "religious law." See Andrew Huxley (ed.), *Religion, Law and Tradition: Comparative Studies in Religious Law* (London: Routledge, 2002).

²² For example, Berman, *Law and Revolution*; Bernard G. Weiss, *The Spirit of Islamic Law* (Athens: University of Georgia Press, 1998); Calum Carmichael, *The Spirit of Biblical Law* (Athens: University of Georgia Press, 1996); R.H. Helmholz, *The Spirit of Classical Canon Law* (Athens: University of Georgia Press, 1996); and Geoffrey MacCormack, *The Spirit of Traditional Chinese Law* (Athens: University of Georgia Press, 1996).

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A study of religious law, therefore, has the potential to show first of all that a different kind of transcendence is possible that is worldly and yet still fully religious.²³ A comparative study of religious law, however, can also uncover and disentangle the complex interdependence of law and religion, even under systems that purport to be “secular” and, therefore, nonreligious. An easy way to conceptualize the distinction I make here is to recognize a difference between the separation of church and state and the separation of religion and law.²⁴ The former is a laudable and achievable goal for a political community, but the latter is both impossible and conducive to deceptive and false rhetoric about the law that can be politically misused and manipulated.²⁵ Extreme views about the need for law to be “secular” were regularly invoked in twentieth-century totalitarian regimes as part of the pogroms against particular religious communities, while covering up the highly religious underpinnings of laws promoted by such regimes.²⁶

As a study of religious law, this book is not an attempt to demonstrate directly how religion still impacts law today and vice versa. Instead, I propose to examine the necessary and essential linkages between law and religion by studying a system of religious law largely unknown to non-specialists, the tradition conventionally known as Hindu law. The benefit of looking at Hindu law lies precisely in the newness of it both for people interested in law and those interested in religion. Looking at the universal human phenomena of law and religion through the categories of a less familiar tradition forces us to pay closer attention to the details of the particular tradition itself and encourages a greater reflexivity because one cannot presume too much in advance. So, I am trying to take advantage of Hindu law’s unfortunate exotic status to reveal underexamined presuppositions in current understandings of the nature of law and to

²³ The best study of this special sense of transcendence in the Hindu context is Francis X. Clooney, “Jaimini’s Contribution to the Theory of Sacrifice as the Experience of Transcendence,” *History of Religions* 25:3 (1986): 199–212. Clooney summarizes: “In short, it is anthropocentrism that is transcended in Jaimini’s interpretation of sacrifice. Human meaningfulness is recognized and organized in balance with other equally important perspectives. Man realizes that he is part of something larger than himself – not the work of the gods or the order of the cosmos or what happened in the beginning, but the here and now, the perceived and repeatable performance of the Vedic sacrifice. By this realization he experiences the transcendent and recognizes that this experience itself is only a part of the ultimate meaning of the world” (p. 211).

²⁴ See Austin Sarat, Lawrence Douglas, and Martha Umphrey, *Law and the Sacred* (Stanford: Stanford University Press, 2006), p. 14.

²⁵ *Ibid.*, p. 15.

²⁶ See Hannah Arendt, *The Portable Hannah Arendt*, ed. Peter Baehr (New York: Penguin, 2000), pp. xvii, 119–40, and 471.

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 suggest certain beneficial lessons that may be learned from the Hindu legal tradition.

Let me be clear. It is not that *Hindu* law is the theology of ordinary life for *Hindus*. It is that the specifically religious foundations of all legal systems can be revealed through an examination of the Hindu legal tradition. The more narrow claim, while true and important for an understanding of Hindu law itself, perpetuates academic emphases on difference and uniqueness, rather than on comparability and shared imaginings. One purpose of this work is to suggest that the time has come for a different emphasis, one in which the distinctive and contextualized descriptions of Hindu law take second place to a rigorously comparative description.

In pursuit of this comparative emphasis, I repeatedly challenge the conceptualizations of both elements of Hindu law – Hinduism and law – as well as the constitutive concepts of the Hindu legal tradition.²⁷ In each chapter, I attempt to frame new questions about distinct concepts as part of the overall argument to re-imagine Hinduism in the light of law and law in the light of Hinduism. Each chapter has a threefold movement that begins with an explanation and analysis of a key concept from the scholastic tradition of Hindu jurisprudence. The concept is first explained insofar as possible in its own terms, that is, situating it in the context of the assumptions and worldview of the authors of Hindu legal texts. Next, the concept is linked to other Hindu jurisprudential ideas and the broader traditions of Hinduism. Finally, I consider a larger comparative issue such as ethics, meaning, property, or conflict, that emerges in connection with the Sanskrit term. The three sections of each chapter correspond to these three concerns. The book thus tacks between consideration of religion and law as presented in the Hindu legal texts and interpretive analysis of the comparative valence and value of Hindu jurisprudence. Though not particularly recommended, the book could be read by reading just the first section of each chapter if one were interested in basic technical descriptions of key Hindu legal concepts, or just the second section of each if one wanted an overview of the Hindu law tradition, or just the third sections if one's primary interest lay in the comparative and theoretical significance of the Hindu law tradition.

The fulcrum of the argument about the mutual modulation of both law and Hinduism is a specific genre of texts in the Sanskrit language known

²⁷ I am, of course, aware of the problematic conceptual history of the terms “Hindu” and “Hinduism,” but for the purposes of the present work I use it as suitable and defensible description of this tradition of religious jurisprudence and law. See Donald R. Davis, Jr., “Hinduism as a Legal Tradition,” *Journal of the American Academy of Religion* 75:2 (2007), pp. 241–67, for a specific discussion of my approach to the issue.

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 as Dharmasāstra. In common parlance, though not without distortion, these texts are also called the Hindu legal texts or lawbooks. These texts contain what I will call Hindu jurisprudence, a way of thinking about law from a distinctively Hindu perspective.

For those who coined the label, Hindu law referred to the laws applicable to Hindus in British India as determined through translations of Dharmasāstra texts by British Orientalists and the precedents of Hindu law cases brought before British judges in India. As a result of a well-known misinterpretation of what Dharmasāstra texts were, the British used them as though they were legislated codes and applied them uniformly throughout their territories in India, according to their own classification of religious identity. This poorly conceived presentation of a “native” Indian legal tradition was subsequently backread as a convenient, and less intimidating, label for the system of religious jurisprudence given in Dharmasāstra and also appropriated in the development of the still operative system of personal laws in India and elsewhere today. Although always either an anachronism or a distortion, the value in preserving the label “Hindu law” comes from its insistence that there is a legal history in Hindu traditions and that Hinduism does indeed have something to add to legal studies.

Understood as a long historical tradition, Hindu law can legitimately refer to different but related institutions and practices. Hindu jurisprudence, by contrast, is restricted almost exclusively to the legal theory of Dharmasāstra texts. There is no real sense that a point of substantive Hindu law or of Hindu legal reasoning could emanate from anywhere else, unlike for instance the highly variegated theories of soteriology, ritual practice, cosmology, etc. that collectively and conventionally are seen as equally part of Hinduism. It is for this reason that I have come to define classical Hindu law in the following terms:

Classical Hindu law was a variegated grouping of local legal systems that had different rules and procedures of law but that were united by a common jurisprudence or legal theory represented by Dharmasāstra. In premodern India, the practical legal systems of any two given Hindu communities may have operated quite differently, but they were both likely to respect the “spirit” of Dharmasāstra and incorporate it into their legal rules, processes, and institutions. The degree of correspondence between Dharmasāstra and practical law made a system more or less Hindu.²⁸

²⁸ Donald R. Davis, Jr. “Law.” In S. Mittal and G. Thursby (eds.), *Studying Hinduism* (New York: Routledge, 2008), p. 225. Obviously, the propriety of the label Hindu for any particular legal system is a matter for empirical and historical investigation and judgment.

This definition attempts to account for clear historical variations in the practice of Hindu law and the distinction, even separation, of such practice from Dharmaśāstra rules, while still incorporating the unifying effects of Dharmaśāstra on patterns of legal thought and, to some extent, substantive rules of law. Ironically, Hindu law was never a simple matter of applying the Dharmaśāstra until the British tried to do so. So, what is Dharmaśāstra?

Recent research on the composition of the early Dharmaśāstra texts suggests that their origins come from three sources:

- 1 historically existing customary norms;
- 2 reformulations of earlier texts on *dharma* and sometimes other genres; and
- 3 innovative rules and frameworks of individual authors.²⁹

Parsing out which parts of a text originate from what sources is very difficult, however, and is only achievable through extensive knowledge of other Sanskrit texts and further historical evidence.

A typical Dharmaśāstra text reads like a list of rules. A topic is announced and situated in some larger frame; for example, “I have described above the entire Law relating to decisions regarding boundaries. Next, I will explain how cases of verbal assault are to be decided” (MDh 8.266). Then a shorter or longer list of rules pertinent to that topic is given; for example, “For assailing a Brahmin, a Kṣatriya ought to be fined 100, and a Vaiśya 150 or 200, but a Śūdra ought to suffer corporal punishment. A Brahmin should be fined 50 for abusing a Kṣatriya, 25 for abusing a Vaiśya, and 12 for abusing a Śūdra” (MDh 8.267–8). Grammatically, the rules are usually stated in the imperative or command form known as the optative, though even many declarative statements are interpreted as commands. Due to this form and style, Dharmaśāstra texts give the appearance of being codifications set forth by lawgivers. However, the “lawgivers” here are all mythological figures and there is no historical evidence for either an active propagation or implementation of Dharmaśāstra by a ruler or a state – as distinct from other forms of recognizing, respecting, and using the texts. Thinking of Dharmaśāstra as a legal code and of its authors as lawgivers is thus a serious misunderstanding of its history.³⁰

²⁹ See Richard W. Lariviere, “Dharmaśāstra, Custom, ‘Real Law,’ and ‘Apocryphal’ Smṛtis,” *Journal of Indian Philosophy* 32:5–6 (2004): 611–27, Albrecht Wezler, “Dharma in the Veda and the Dharmaśāstras,” *Journal of Indian Philosophy* 32:5–6 (2004): 629–54, and Patrick Olivelle, *Manu’s Code of Law: a Critical Edition and Translation of the Mānava-Dharmaśāstra* (New York: Oxford University Press, 2005), pp. 5–49.

³⁰ Werner Menski, *Hindu Law: Beyond Tradition and Modernity* (Delhi: Oxford University Press, 2003) has been the most insistent scholar on this point.

Closer would be to think of the Dharmasāstras as the textbooks for the Hindu scholastic tradition of religious jurisprudence. The simile works because textbooks serve first to instruct someone in a particular academic way of thinking and, therefore, are always at some remove from practical life. Textbooks deal with the constructed world of an academic subject – in the case of Dharmasāstra, the ideal world of *dharma* properly performed. The constructed world is, of course, connected to the practical world, the world of ordinary life, but always through reflection and abstraction. In this way, the logic of everyday life is connected, as Holmes would have it, to the logic of law, but through the mediating lens of theology.

These textbooks of Hindu jurisprudence were written historically in four different formats.³¹ The early texts (c.300 BC to 100 BC), known as Dharmasūtras, were prose texts consisting of aphoristic rules linked according to themes that were elaborated in later texts. The Dharmasūtras were also explicitly ascribed to, and in some cases originated within, one of the Vedic lineages, the traditions of recitation and ritual practice associated with branches of the sacred Vedas. The *Laws of Manu* (c.AD 200) introduced, for the first time, both a new format, namely versified rules, and a host of new topics, especially those pertaining to rulers, into the Dharmasāstra tradition. Though not traditional, modern scholars often describe verse texts as Dharmasāstras and *smṛtis*, “remembered” traditions or texts.³² Both these early formats, prose and verse, are considered root-texts or source-texts for later commentaries and digests within the tradition, the third and fourth formats, respectively. It should be noted, however, that such root-texts continued to be produced until at least the eighteenth century. The earliest known commentary on a Dharmasāstra root-text is that of Bhāruci on the *Laws of Manu* or possibly Asahāya on the *Laws of Nārada* in the seventh or eighth century AD. Commentaries are organized as complete glosses and interpretations of a single root-text, but they always incorporate verses from other root-texts as well as part of their explanations. In this way, they differ only in emphasis from the digests, which are organized by topic or theme, not according to a single

³¹ An excellent survey of the Dharmasāstra literature is found in the first half of Robert Lingat's *The Classical Law of India* (Berkeley: University of California Press, 1973). A shorter survey with a more up-to-date chronology of the texts is Patrick Olivelle, “Dharmasāstra: A Textual History.” In T. Lubin, J. Krishnan, and D.R. Davis, Jr. (eds.), *Hinduism and Law: an Introduction* (Cambridge: Cambridge University Press, forthcoming).

³² On *smṛti*, see recently David Brick, “Transforming Tradition into Texts: The Early Development of *Smṛti*,” *Journal of Indian Philosophy* 34 (2006): 287–302. One notes that Dharmasāstra thus refers generally to a whole textual tradition and specifically to the versified root-texts such as the *Laws of Manu*.

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 source. Digests, however, also often include lots of explanatory glosses and interpretations in the manner of commentaries.

The tendency has been to see the formats as somehow replacing one another, but the reality is different. The earliest Dharmasūtra format continued in certain ways, for example in the *Laws of Viṣṇu*, though it was not a preferred mode of composition, while versified root-texts continued to be composed long after the earliest written commentaries were composed. We suspect, too, that every root-text probably had commentaries that have not survived or were transmitted orally right from the composition of the source. Digests as a textual form do seem to be an innovation of the twelfth century AD, but no satisfactory explanation has yet been given for this innovation. Nevertheless, digests did not displace other formats for Dharmasāstra. With this cursory review of the style and the genres of Dharmasāstra in mind, we might turn now to the subject at the heart of these texts, *dharma*.

In one way, the Hindu law tradition and Dharmasāstra texts in particular are concerned with one complex thing: what is *dharma* and how do we know it and do it? It is beyond the scope of this book, or perhaps any, to fully explore the wide range of meanings and significance given to this term in the long history of India.³³ What I can do here, however, is give a basic idea of how *dharma* is understood in Dharmasāstra texts and distinguish that idea from other prominent uses of the term. The general definition given long ago by P.V. Kane still captures well this specific meaning.

According to Kane, *dharma* in Dharmasāstra means “the privileges, duties and obligations of a man, his standard of conduct as a member of the Āryan community, as a member of one of the castes, as a person in a particular stage of life.”³⁴ In this definition, we see at least three important elements of *dharma*. First, *dharma* establishes and is oriented toward privilege, duty, and obligation rather than rights and uniform principles. Second, Dharmasāstra views these duties almost wholly in terms of and from the perspective of men. As with every ancient jurisprudence, the ideal subject of legal and religious reflection is always male. Women are considered within the system at various points, but we should keep in mind the essentially agnostic, though sometimes downright misogynistic, attitude of the authors of these texts toward the condition and role of women. Third, *dharma* is linked to and varies according to one’s membership in

³³ For a collective attempt to describe some of *dharma*’s various meanings and significances in South Asian religious history, see Patrick Olivelle (ed.), *Dharma: Studies in Its Semantic, Cultural, and Religious History* (Delhi: Motilal Banarsidass, 2009).

³⁴ P.V. Kane, *History of Dharmasāstra* (Poona: BORI, 1962–75), Vol. I, p. 3.

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particular communities. Again, uniformity gives way to specific statuses and identities. It is worth noting, too, that none of these elements refers to or relies upon a supernatural source or a particular sense of morality. *Dharma* in *Dharmaśāstra* thus connects primarily to socially determined statuses, duties, and institutions, and only secondarily to the fixed, transcendent source of the sacred Vedas of the Hindu tradition discussed in the next two chapters.

One important aspect of *dharma* in *Dharmaśāstra* not addressed here by Kane is the idea that *dharma* is both rule and substance. Hacker made this point some time ago:

We must imagine *dharma* as primarily a substance or a transcendental, immaterial thing. This substance, this immaterial thing is first of all in concrete duties, as they are passed down as fixed norms and prescriptions – indeed, these norms *are dharma*, that is, *dharma before its performance*. Because these norms already *are dharma*, however, *dharma* before its performance actually does not correspond to our concepts “norm,” “rule,” “law,” or “duty.” All of these are far too abstract. *Dharma* is rather a concrete *model of behavior* with positive significance for salvation that somehow exists already before its performance and waits for realization, or rather it is a collection of such models.³⁵

The tenth-century *Dharmaśāstra* commentator Medhātithi made exactly the same point in his commentary on the *Laws of Manu*: “The authors of the traditional texts use the word *dharma* sometimes in the sense of actions which form the subjects of injunctions and prohibitions and sometimes in the sense of the thing that arises from the performance of those actions and persists until it has given its reward.”³⁶ It is this ambiguity that allows *dharma* to be seen as both law and merit.

It may at first be surprising that very few definitions of *dharma* are given in the textual tradition devoted to its explication. The reason few definitions are given, however, lies precisely in *dharma*’s contextuality. Uniform statements of *dharma* are impossible. Instead, *dharma*’s sources must be established and its basic structure enumerated according to the contextual factors that cause *dharma* to vary from person to person and situation to situation. An example from the *Laws of Yājñavalkya* shows the emphasis on duty, contextuality, and society. The opening verse reads “The sages worshipped Yājñavalkya, the lord of yogis and said, “Tell us in full the *dharmas* of the castes, the orders of life, and the others” (YS 1.1).

³⁵ Paul Hacker, “Dharma in Hinduism,” *Journal of Indian Philosophy* 24 (2006): 490.

³⁶ *dharmaśabdo 'yaṁ smṛtikaraiḥ kadācid vidhiniśedhaviṣayabhūṭāyāṁ kriyāyāṁ prayujyate, kadācid tadanuṣṭhānājanya āphalaprādānāvasthāyini kasmimścid arthe* (Medh on MDh 2.6).

The commentator Vijnāneśvara tells us first that “the others” here refers to people of mixed caste. Then, he enumerates what *dharma* means by dividing it into six groups. The first five categories of *dharma* are:

- 1 caste;
- 2 life-stage;
- 3 caste and life-stage;
- 4 special; and
- 5 occasional.

The last category is (6) common. I separate the first five because these are the ones usually found in other texts. The groups identify the principal factor determining various *dharma*s such that some *dharma*s are effectively established by caste or life-stage alone, some by both caste and life-stage, some by special status such as being a ruler, and some by special occasion such as a festival or a personal penance. The sixth category refers to common virtues expected of all people including non-violence, honesty, and purification. Interestingly, but characteristically, the final category is enumerated in a single verse (YS 1.122) in the text.³⁷ The extremely concise treatment of this group signals its marginal position in the Dharmaśāstra understanding and presentation of *dharma*.

More revealing is the sixth verse of the *Laws of Yājñavalkya* (YS 1.6) which reads, “Whatever thing one gives with sincere faith to a worthy recipient at the right place, the right time, and by the right means, that is the entire definition of *dharma*.” The poetic impact of the root-text, its distillation of every human duty into a simple act of giving, is immediately undermined by Vijnāneśvara’s explanation of the verse. First, he glosses the word “gives” by saying that it means “relinquishing by bringing about the complete ownership of something in another person such that it may never return to its original owner.” A beautiful image of sincere and simple piety is thus reframed as the legal transfer of property claims over an object. Vijnāneśvara continues, “This brings about *dharma*. But, is that the full extent of it? No, because of the word ‘entire.’ Even other things that are stated in the *śāstra* such as caste, special duties, libations, sacrifices, and so forth, these are the ‘entire’ cause of *dharma*.” Again, the poetic simplicity suggested by the root-verse, in which the entirety of human obligation may be reduced to a single sincere act, is thwarted through a common

³⁷ The full list at YS 1.122 reads “Non-violence, truth, non-stealing, purification, control of the senses, giving, restraint, compassion, and calmness – these are means to achieve *dharma* for everyone.” Compare MDh 6.92.

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 interpretive extension of the meaning of a single word to include, in this case, a host of other actions under the originally exclusive term “entire.” The problem for Vijñāneśvara was this: the root-text can surely not mean what it says literally, because the remainder of the text becomes meaningless if it does. As prosaic as it may be, Vijñāneśvara, like all commentators in the tradition, is charged with making the whole text make sense as a whole. To do that in this case, he had to read all the other *dharma*s to be explained later in the text into the single word “entire.” The point of this verse then is merely to provide one example of the productive causes of *dharma*.

This seemingly complete definition of *dharma*, therefore, becomes in the commentator’s hands merely an illustrative statement of a much more complex web of privileges, duties, and obligations. The explanation emphasizes the practical social implications of the verse, namely the rules of property transfer and the large array of other *dharma*s that are similarly regulated. Other definitions of *dharma* in Hindu traditions emphasize its connection to Vedic ritual, religious salvation, or a fundamental moral principle such as non-violence or compassion.³⁸ Nevertheless, within Dharmaśāstra itself, we find a reluctance to define *dharma* at all, except in very general terms.³⁹ Instead, the texts provide elaborate systems for determining *dharma* (the subject of the [next chapter](#)) and extensive, but not exhaustive, elaborations of specific *dharma*s.

Historically, three frameworks have been used to divide *dharma* topically into discussions of specific duties. The oldest belongs to Manu, who divides *dharma* according to caste and life-stage. Another early scheme appears in Yājñavalkya, who divides *dharma* into three subtopics: household rites and duties, legal procedure, and penance. Finally, when digests of *dharma* material first began to appear in the twelfth century AD, extensive compendia on subtopics within older *dharma* schemes (legal procedure, gift, ancestral rites, kingship, etc.) came into vogue, though no fixed list of such topics existed. These three divisions are primarily ways to organize the contents of a text, but they further reveal the detail-oriented enumeration of rules for religious and legal practice that characterizes

³⁸ See Kane’s review (*History of Dharmaśāstra*, Vol. 1, pp. 4–5) of the Pūrva-Mīmāṃsā (*codanālakṣaṇo ‘rtho dharmah*), Vaiśeṣika (*yato ‘bhyudayaniḥśreyasasiddhiḥ sa dharmah*), and other definitions of *dharma* (*ahiṃsā paramo dharmah, ānṛṣaṃsyam paro dharmah, ācārah paramo dharmah*).

³⁹ Consider, for instance, Medhātithi’s definition of *dharma* at MDh 2.6 “*dharmasābdaś ca . . . yat puruṣasya kartavyam pratyakṣādyavagamyavilakṣaṇena svabhāvena śreyaḥsādhanam* [*Dharma* is that which a man should do and which produces his welfare, with a nature that is distinguished from what can be known through perception and other worldly means of knowledge].

both theological and legal writing. And yet, we find few philosophical, especially ontological, discussions of the nature of the self or spirit that typify Hindu writing on Vedānta or Yoga. Nor do we find speculations about esoteric rites or realities of the sort found in Tantric texts. And we certainly see little that might be connected with the devotional, emotive, and participatory religious experience associated with Bhakti poetry and institutions. It is true that texts such as the *Laws of Viṣṇu* and the *Laws of Śaṅkha and Likhita* have clear sectarian affiliations, but even these texts conform in the main to a special Dharmaśāstra idiom and form of religious and legal expression. Despite the relative absence of these other important Hindu ways of being religious, it would be hard not to characterize a great proportion of the contents of Dharmaśāstra as religious.

An important point about commentaries and digests is in order. The Dharmaśāstra tradition is a form of scholasticism, meaning that it is a relatively closed intellectual system that focuses primarily on the correct understanding and transmission of a canon of texts through time.⁴⁰ Some scholars have claimed that Hindu law commentaries came into being in order to bring older root-texts up to date by adjusting old norms to new times and circumstances.⁴¹ Others claim the opposite, that commentaries are solely part of a completely self-contained intellectual tradition, the transmitters of which paid little to no attention to changes in social history.⁴² The truth, most now suspect, lies somewhere in between. Perhaps the best way to describe what commentators were trying to do is to say that they, like most academics, were first concerned to preserve and work within the established conventions for thinking and writing in their discipline. In other words, a proper interpretation of the texts was foremost in their minds. At the same time, it is both expected and unavoidable that changing social, political, religious, economic, and other circumstances would have influenced the commentators' interpretations. It appears that the impact of social history was sometimes conscious and sometimes not.

⁴⁰ In this respect, the tradition of Hindu law mirrors the significant scholastic origins of legal thought in Europe. See Berman, *Law and Revolution*, pp. 131ff.

⁴¹ Ashutosh Dayal Mathur, *Medieval Hindu Law: Historical Evolution and Enlightened Rebellion* (Delhi: Oxford University Press, 2007) is only the most recent work to defend the notion that Hindu law commentaries were written to "suit the exigencies of the time and the particular requirements of various regions and groups" (p. xxiii).

⁴² Though famous denials of any concern for historical reality in Hindu legal texts were made by authors such as J.H. Nelson and Govinda Das, the staunchest defender of a view of Dharmaśāstra authors as scholiasts, not lawyers, and of Dharmaśāstra texts as academic treatises, not records of a common law tradition has been Ludo Rocher. Though his views have moderated somewhat recently, see Rocher's early article, "The Historical Foundations of Ancient Indian Law:" "The entire commentarial tradition is totally separated from reality; nor was it ever intended

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 For the most part, however, the authors of Dharmaśāstra are not forthright about innovations or changes that they make to the tradition, whether these be text-critical, organizational, or interpretive in nature. In this way, history in Dharmaśāstra is rhetorically suppressed.

For this reason, though historical questions will arise occasionally in the course of this study, my primary interest will concern rather the jurisprudence, philosophy, or theory of Hindu law as presented in Dharmaśāstra. I make no claim to present in these pages a *history* of Hindu law. Right up front, it is important to emphasize the synchronous, even timeless or ahistorical, self-presentation of the Hindu legal texts. Like the scholars of Canon law, Dharmaśāstra scholiasts “indulged in a sublime disregard of history.”⁴³ Concerns about historical and social context are, it would seem, systematically and scrupulously avoided. This is not to say that differences between and developments in the texts cannot be attributed, sometimes with fair certainty, to known historical or social factors; but, this is not how the texts themselves present matters. Instead, we find a somewhat open-ended group of foundational or root texts, on the one hand, and a series of commentaries on and thematic digests of these root-texts, on the other. We know almost nothing biographical about the authors of the root-texts and only slightly more about the commentators. Dating both root-texts and commentaries is fraught and existing chronologies hardly ever come closer than a century or two in most cases.⁴⁴ The result is a scholastic tradition that appears to operate outside the bounds of time and space. Of course, modern scholars need not accept the terms of self-presentation in Dharmaśāstra, but for the purposes of this book, I want to set aside significant historical questions in favor of appropriating a synchronic traditional view of Hindu jurisprudence in order to focus on conceptual foundations, assumptions, and structures that inform the Hindu legal imagination abstractly conceived. In particular, I avoid the very important historical work of correlating developments in Dharmaśāstra with changes in social history and cultural context. In the end, I provide an historically flattened view of well-developed medieval

to intervene in the reality of practical law and jurisdiction.” See also a later lecture “Changing Patterns of Diversification in Hindu Law” for a detailed account. Both articles can be found in Ludo Rocher, *Studies in Hindu Law and Dharmaśāstra*, ed. D.R. Davis, Jr. (Delhi: Motilal Banarsidass, forthcoming).

⁴³ Stephan Kuttner, “Harmony from Dissonance: An Interpretation of Medieval Canon Law.” In *The History of Ideas and Doctrines of Canon Law in the Middle Ages* (London: Variorum Reprints, 1980), p. 11.

⁴⁴ Kane, *History of Dharmaśāstra*, Vol. 2, pt. 1, pp. xi–xii provides the standard chronology of Dharmaśāstra texts. Olivelle, “Dharmaśāstra: A Literary History” gives the latest chronology of the major texts with a persuasive account of the appropriate methodology for dating.

views of Dharmasāstra over either a history of the texts or of the law in practice. This approach to the texts is not without intellectual pitfalls, but it does have the virtue of mirroring traditional approaches to the same texts. More importantly, this approach permits us to see the remarkably stable conceptual frameworks of the tradition.

One of the most amazing things about these texts, in fact, is the longevity of the conceptual and interpretive frameworks used by their authors. Of course, it would be too much to say that a first-century author understood the texts in exactly the same way as a tenth-century commentator or a nineteenth-century pandit, but the fact remains that the commonalities of presuppositions, hermeneutic approaches, and conceptual foundations between these far outweigh the differences. The tradition very effectively passed on specific ways of writing and thinking that changed but little in the course of time. The historical certainty of massive social, religious, political, and legal changes outside this textual tradition is simply not easily discerned in the texts themselves. Since the purpose of this book is to understand the tradition, its self-understanding, and its self-presentation, questions of history, profound and necessary as they are, find only a marginal place in this book.

A final key point to understand about Dharmasāstra is the place of this particular scholastic tradition in the larger realm of scholarship and scholasticism in India. Knowledge was divided into many different branches, each called a *śāstra*.⁴⁵ There are *śāstras* for architecture, dance, ritual, poetics, grammar, drama, religious liberation, rulership, and love, among others. The special branch devoted to religious and legal duty, however, was Dharmasāstra. This does not mean that this tradition and its texts had a complete monopoly on ideas about religion and law, but it does mean, first, that specialists in Dharmasāstra made it their business to know the specificities of this tradition and to promulgate its hegemony as the central discipline concerning *dharma*, and, second, that any other speculations about *dharma* in other genres and other traditions, Hindu or not, had to contend with the paragon status of Dharmasāstra views on *dharma*.⁴⁶

When I speak of law in this work, I mean *dharma*. More specifically, I intend that the Sanskrit word for law is *dharma* and, more importantly, that the English word for *dharma* is law. Translation always

⁴⁵ On *śāstra*, see Sheldon Pollock, “The Idea of Śāstra in Traditional India,” and “Playing by the Rules: Śāstra and Śāstric Literature,” both in A.L. Dallapiccola (ed.), *Shastric Traditions in Indian Arts* (Wiesbaden: Steiner, 1989), pp. 17–26 and 301–12.

⁴⁶ I explain this argument more fully in Donald R. Davis, Jr., “Hinduism as a Legal Tradition,” p. 258.

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 creates trouble. In this case, however, it is the best kind of trouble, in which a conceptual mismatch, a partial overlap, forces us to reconsider and rethink what we already know. I could instead speak of a restricted sense of law – limiting it to familiar ideas about courts, legislatures, and police – and an expansive sense of law – opening it to several kinds of social control, moral norms, and regularized behavior. But, I choose not to make this distinction because it lets us off the hook too easily in terms of seeing what is really interesting about the Hindu tradition, namely an insistence that both notions of *dharma*/law operate simultaneously. On the side of “law,” therefore, I want to suggest that we neglect the law’s *dharma* side and, conversely, on the side of “*dharma*” that we neglect its law side. For those interested in law, I will argue that *dharma* helps to reveal understudied interventions of law in ordinary life. For those interested in Hinduism, I will try to show that a focus on law uncovers a pervasive and power role for law in this often mythologically and esoterically defined religion.

The main social location of this other religious tradition in Hinduism, the household, is by no means unknown in scholarship. Rather, it is taken for granted or linked somehow to other religious practices. I believe this religion of the household has been subsumed or underemphasized, in part, because scholars have not considered it to have its own theology. My argument throughout this book is that Dharmaśāstra is that theology. It is a theological system focused on discovering and transmitting the religious significance of ordinary human activities, especially those linked with the family, household, and other localized institutions. Such a household theology, or theology of ordinary life, takes the form of law. From the Hindu law tradition, therefore, we may learn that the greater part of law everywhere incorporates a similar theology of ordinary life, and that this accounts for the inextricable links between law and religion.

A few final introductory remarks. I make no apology for the simultaneously Hegelian and Pauline title of the book, because I believe it invokes the right kind of associations for my argument. The authors of Dharmaśāstra themselves viewed the Veda as a quasi-Hegelian Spirit that guided and restrained the forward movement of humanity through history. At the same time, the Hindu tradition promotes a notion that Dharmaśāstra contained the spirit, the higher value, of the law as against the flesh, the merely worldly manipulation of law as political instrument or mechanical and lifeless ritual. We will see that this higher effect was called “the unseen” or the “unprecedented,” a substantive benefit created through the ritually conceived practice of *dharma* as law.

Lastly, I have been influenced by several theoretical approaches to law and religion and I should identify those at the beginning. From legal studies, readers will find a reliance on ideas of legal pluralism, legal realism, law and society, and law and literature – each of which brings something distinctive to the study of Hindu jurisprudence. The often quoted maxim in legal studies that “we are all realists now” may characterize the thoughtful core of legal academics and some professionals. However, I am skeptical that most professionals and most students have internalized a basic insight of “law and society” studies, namely that most law happens outside of courts and legislatures. In religious studies, readers should expect more emphasis on intellectualist views of religion over psychological, sociological, or phenomenological approaches. The nature of the evidence partially determines this choice, but I also want to argue that theology and hermeneutics are as central to religious life as ritual, experience, and identity. Indeed, I want to suggest that all these characteristics of religion interpenetrate one another. By combining the insights of methodologies in both legal and religious studies, I hope to bring the rich material of the Hindu law tradition to bear on questions that matter today, issues that continue to attract and confound academics and professionals in their efforts to improve the world around us through better understanding.

CHAPTER 7

Law and practice (ācāra)

In a study such as this, the chapter on practice and history inevitably does the work of an apology. Some readers will have been bothered by the cavalier treatment of historical context evinced in this work thus far. In fact, perhaps the most important trend in recent academia has been the near universal insistence to “always historicize.”¹ Nevertheless, the boundaries of what constitutes history are sometimes drawn too narrowly, especially when it comes to India.² I am convinced that studies attempting to reveal presuppositions of thought, practices of interpretation, and scholarly generalizations about real-world affairs are necessary and important for historical work. Indeed, they form part of history itself.

In the first chapter of this survey, we examined the authoritative sources of law as expressed in the Hindu law texts. In this final chapter, I return to the question of law’s authority, this time in the context of legal practice and customary law. In other words, I want to investigate both the conjunctions and disjunctions of how legal authority is represented and implemented between the Dharmaśāstra tradition and other historical sources. The concept of *ācāra* is both the conceptual and practical link between scholastic norms, ideas, and presuppositions and the rules and institutions of law in practice. It is important in this context because the relative dearth, indeed the striking rarity, of historical references to the Veda and Dharmaśāstra in legal contexts outside Sanskrit texts puts

¹ Frederic Jameson’s famous opening slogan in the Preface to *The Political Unconscious: Narrative as a Socially Symbolic Act* (Ithaca: Cornell University Press, 1981) has been widely cited and debated.

² On the problem of history in India, see, recently, Velcheru Narayana Rao, David Shulman, and Sanjay Subrahmanyam, *Textures of Time: Writing History in South India 1600–1800* (New York: Other Press, 2003). Compare Patrick Olivelle, *The Āśrama System: the History and Hermeneutics of a Religious Institution* (New York: Oxford University Press, 1993), p. 33: “It is simplistic to assume that only ‘events’ are historical. Attempts at theoretical and theological self-understanding are as much a part of the history of culture as wars and dynasties.”

the signal importance of *ācāra* into relief. We begin by examining the nature of *ācāra* in the *dharma* texts.

ĀCĀRA GENERAL AND ĀCĀRAS SPECIFIC

There are two related senses of *ācāra* in Dharmasāstra. The first, introduced in Chapter 1, refers to customary law as a source of law. To be more precise about the problematic category of custom and customary law, *ācāra* always possesses a normative and obligatory quality that is not necessarily implied by custom alone.³ For this reason, I usually gloss *ācāra* as “local law” or “community standards” in an attempt to indicate its normative character, but also its restricted applicability. It is difficult to follow the usual characterizations of *ācāra*’s authority as resting on the “observed conduct of ‘good people.’”⁴ How do we imagine this scene? Can we believe that anything we observe “good people” doing is *dharma*? Certainly not. Even Medhātithi anticipated this straw man: “When there are no statements in the revealed or traditional texts, but learned people perform [it] considering it to be *dharma*, then even that [act] should be understood as Vedic only, just like the previous[ly mentioned sources].”⁵

Nevertheless, to speak of “conduct” suggests that one need only witness or observe the behavior of “good people” in order to determine *dharma*. It is this focus on conduct and behavior that, I believe, leads us astray in understanding *ācāra*. If we focus instead on the “good people” element, i.e., the idea that *ācāra* must always be restricted to a particular context or at least the general context of respected people, then we can imagine a different picture of *ācāra*’s authority. Here, *ācāra* would refer to declared norms that are actually practiced and put into practice by people with power over a delimited group. The ideal within Dharmasāstra is, of course, the learned male Brahmin, the Veda-knower, but the theologically necessary ideal of people with Vedic knowledge slips easily and regularly within

³ See Donald R. Davis, Jr., *The Boundaries of Hindu Law: Tradition, Custom, and Politics in Medieval Kerala*. Corpus Iuris Sanscriticum et Fontes Iuris Asiae Meridianaee et Centralis. Vol. 5. Ed. Oscar Botto (Torino: CESMEO, 2004), pp. 128–44, for a more substantial critique of the labels “custom” and “customary law” for *ācāra*.

⁴ Adam Bowles, *Dharma, Disorder, and the Political in Ancient India: The Āpaddharmaparvan of the Mahābhārata* (Leiden: Brill, 2007), p. 197 (emphasis added).

⁵ Medh on MDh 2.6: *yatra śrutiśmṛtivākyaṇi na santi śiṣṭāś ca dharmabuddhyānūtiṣṭhanti tad api vaidikam eva pūrvavat pratipattavyam*. Compare Kumārila on PMS 1.3.7: “It is only those actions that are held by good people to be *dharma*, and are performed as such, that are accepted as *dharma*; because the persons that perform these are the same as those that perform the sacrifices enjoined in the Veda” (Ganganatha Jha, trans., *Tantravārttika*, p. 184).

Dharmaśāstra itself into contextually defined “good people,” most often identified with the leaders of a particular community.

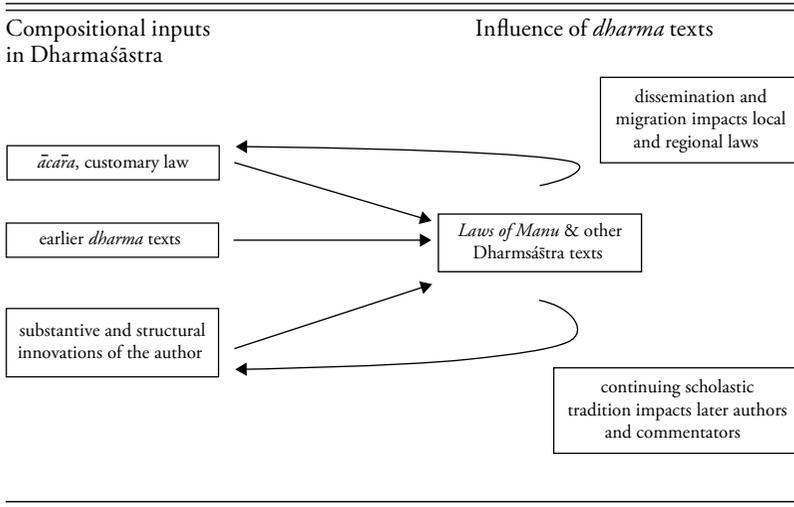
The contextually unmarked good (*sad-*) in “standards of the good (people)” (*sadācāra*) is actually marked by default as the archetypal and presumed ideal of a Vedic Brahmin. When the first element is replaced, as it regularly is, with other contextual markers, the theological connection to the Veda is also weakened or lost. Texts speak freely of the *ācāra* of particular places, families, castes, and various corporate groups. When pushed beyond the boundaries of its archetype, therefore, *ācāra* appears to be nothing but the norms accepted and imposed by the leaders of various social institutions. This slippage is very important for understanding how the famous recognition of the customary laws of various social groups in Hindu jurisprudence came to be incorporated into the texts.

Here’s how I think we should imagine the textual history involved.⁶ A solid consensus of scholars now suggests that Dharmaśāstra is a record of *ācāra* written in a specialized scholastic idiom.⁷ If *ācāra* were conduct to be observed, then Dharmaśāstra would be a kind of ethnographic report, an observer’s journal. *Dharma* texts were likely not produced observationally, but rather discursively, in the sense that authors composed in dialogue with their peers, their students, their memories, their knowledge of prior texts, and their own agendas (see Table 7). Once the texts were constituted, however, they became the sources for education about law and even for its administration in some cases. New texts and commentaries incorporated both the wisdom of the old texts and, to some extent, the *ācāra* of new places and times. The primary intention of all scholars in the tradition was to set forth the *ācāras* of the Brahmin caste in textual form. From the *Laws of Manu* onward, the scope of the intention expanded to include the *ācāras* of the Kṣatriya caste as well. The bulk of Dharmaśāstra is concerned with one of these two textualized expositions of *ācāra*. These two ideal subjects of law dominate the discourse of Dharmaśāstra and together they serve as paradigms for the explanation of any *dharma* that might pertain to other kinds of people.

⁶ For a more descriptive account of the cycle of composition, transmission, and reception of Dharmaśāstra, see Donald R. Davis, Jr., “Recovering the Indigenous Legal Traditions of India: Classical Hindu Law in Practice in Late Medieval Kerala,” *Journal of Indian Philosophy* 27:3 (1999): 166–7.

⁷ Richard W. Lariviere, “Dharmaśāstra, Custom, ‘Real Law,’ and ‘Apocryphal’ Smṛtis,” *Journal of Indian Philosophy* 32:5–6 (2004): 611–27; Patrick Olivelle, “The Semantic History of Dharma: The Middle and Late Vedic Periods,” *Journal of Indian Philosophy* 32 (2004): 491–511; Albrecht Wezler, “Dharma in the Vedas and in the Dharmaśāstras,” *Journal of Indian Philosophy* 32 (2004): 629–54.

Table 7. Relationship of text and practice in Hindu law



In the general notion of *ācāra*, therefore, the texts are concerned with delineating all the various substantive rules for the two ideal person-types in classical Sanskrit texts, the Brahmin and the Kṣatriya. When the texts take notice of *ācāra* beyond these two, however, the references are invariably brief and allusive, even as the customary laws mentioned are also fully recognized as *dharma*.

In the end, therefore, the difference between *ācāra* and *dharma* is very slight.⁸ In fact, by definition all *ācāra* is *dharma*. In the tripartite scheme outlined by Hacker,⁹ *ācāra* is first *dharma* during its performance but also *dharma* as the norm before its performance. However, *ācāra* is never to my knowledge likened to *dharma* as merit after its performance. The slender difference between the two, however, is one good reason not to assimilate *ācāra* too quickly to the category of custom or customary law,¹⁰ because those categories tend to drive a wedge between *dharma* and *ācāra* that

⁸ Donald R. Davis, Jr., “Dharma in Practice: *Ācāra* and Authority in Medieval Dharmasāstra.” *Journal of Indian Philosophy* 32:5 (2004) especially pp. 818, 824.

⁹ See Paul Hacker, “Dharma in Hinduism,” *Journal of Indian Philosophy* 34 (2006): 490, quoted in the Introduction to this book.

¹⁰ For example, Robert Lingat, *The Classical Law of India*, trans. J.D.M. Derrett (Berkeley: University of California Press, 1973), pp. 176–206, overemphasizes the differences between *ācāra* and *dharma* in his chapter on “Dharma and Custom.”

does not exist in the spirit of Hindu law. *Ācāra* is not only a source of *dharma*; it is also its highest form or mode, because it is *dharma* done.

In another tripartite scheme, *dharma* is divided into *ācāra*, *vyavahāra*, and *prāyaścitta*, a classification that I earlier compared to substantive, procedural, and penal law, respectively. While both the procedures of *vyavahāra* and the punishments and penances of *prāyaścitta* (and *daṇḍa*) are forms of *dharma*, they are *dharmas* for when things are wrong. *Ācāra*, by contrast, is the form *dharma* takes when things are right. In the normal, ideal world, people are habituated to perform the normative actions spelled out in the *ācāra* division of *dharma*. This is the division that describes sacramentary and household rites, marriage, eating, bathing, and all the other personal *dharmas*, especially those of Brahmins. These are the rites of law that form the central core of *dharma* – actions that, when appropriated and carried out in conformity to tradition, produce ritual-like results, both in this world and the next. Ordinary actions of human life are thus placed in a theological context whereby a lawful performance of those actions in the particular manner described by the texts and tradition will bring great merit to the person and order to the system.

A favorite example among students comes from the *Laws of Yājñavalkya*: “Holding his penis, he should stand up and, with earth and water that has been drawn up, clean himself thoroughly until the smell and filth are removed” (YS 1.17). The commentary of Vijñāneśvara explains that “the cleansing described in the phrase ‘until the smell and filth are removed’ is common to people of all life-stages, but the restrictive rule concerning the number of times earth should be used is for an unseen purpose.”¹¹ The question always comes up, do we really need a text to tell us how to clean ourselves or to teach us not to piss into the wind as we learn from the *Laws of Manu* (MDh 4.48)? Not only is the basic act described, but Vijñāneśvara’s commentary points to other texts that prescribe a precise number of applications of earth for proper purification.¹² The specificity of the applications of earth already points to what Vijñāneśvara states plainly: the purpose of cleansing is common, but the purpose of detailed purification is unseen, unknown to us through any ordinary means of knowledge.

¹¹ Vijñāneśvara on YS 1.17: *atra gandhalepakṣayakaram iti sarvāśramiṇāṃ sādharmaṇam idaṃ śaucam | mṛtsamkhyāniyamas tu adṛṣṭārthaḥ.*

¹² See, for example, VaDh 6.18–19: “Tradition lays down one application of earth on the penis, three on the left hand, and two on both hands; and five applications on the anus, ten on the left hand, and seven on both hands. This is the purification for householders. It is twice that much for students, three times for forest hermits, and four times for ascetics.”

Almost every quotidian act described in the Dharmaśāstra root-texts and commentaries could come with this same disclaimer. The transcendent, unseen effects of cleaning oneself in a particular manner are accepted as unchallengeable truths. The application of a theological framework onto a circumstance of ordinary life thus results in an only partially explainable set of legal rules, the benefits of which are imprecise but certain nonetheless. To explain these rules on the grounds of hygiene alone not only crassly reduces the import of the text to an allegedly scientific basis but also misses the important theological point of any such rule. One way of stating that theological point is to say that no human action is beyond the pale of *dharma* and that everything we do as people matters in ways that we cannot always immediately comprehend. To accomplish the theological (and ethical) goal of such ordinary actions demands the acceptance of an authority in the form of hard-to-justify legal rules.

The second, specific notion of *ācāra* refers precisely to the caste, life-stage, and community-bound rules that together constitute the substantive rules of law pertinent to an individual and to the groups to which he or she belongs. Unlike *ācāra* generally, however, the specific *ācāras* are described and discussed as part of the ruler's *dharma* and not as part of the general exposition of the authoritative sources of *dharma*. The *Laws of Manu* provides a summary statement: "He who knows the Law should examine the Laws of castes, regions, guilds, and families, and only then settle the Law specific to each ... He should ratify the acknowledged practices of virtuous men and righteous twice-born individuals, if such practices do not conflict with those of a particular region, family, or caste" (MDh 8.4I, 46). Though the root-text uses the word *dharma* for "Law" in this passage, it is telling that Medhātithi switches freely between *dharma* and *ācāra* when discussing them – a good example of the slight, not great, difference between them. Moreover, such rules are covered under the Vedic umbrella, and some texts take time to justify these specific *ācāras* in terms of the larger theology.¹³

The rules referred to by Manu are acknowledged to differ from one another and to be distinct from the textual rules (so long as they do not contradict them). However, what I am calling the specific *ācāras* are in fact never specified in detail within the texts, and this is precisely the point. Hindu jurisprudence leaves ample room for the creation of law outside its own strictures. Theological and legal reasons are given for accommodating

¹³ See Medh on MDh 8.4I, 46.

the customary laws of various groups, but the enumeration of those laws is not made within the texts themselves. Saying this does not alter the fact that many rules of Dharmaśāstra likely originated from precisely the specific *ācāras* of Brahmin communities at the time when the texts were composed or compiled. One way to think about this is to say that the texts represent systematized customary laws of the past, while at the same time maintaining the legitimacy and legality of other unspecified customary laws in the present.

To assess the spirit of Hindu law on the role of customary law, we must examine further the tension that occasionally arises within the texts on the relative strength of Dharmaśāstra and customary law in legal contexts.¹⁴ As we saw in Chapter 2, theologically in terms of *dharma*, there is no doubt whatsoever that Dharmaśāstra is superior. Time and again, commentators emphasize that no worldly rule or practice can trump the authority and the claim on human action found in the textual tradition. At the same time, we also find many texts and authors that insist upon the greater authority of customary law in practice. Whether it is Viśvarūpa insisting that texts must be interpreted so as to conform with customary law and not vice versa (YS 3.250), Asahāya saying “when there is contradiction between Dharmaśāstra and customary law (*lokavyavahāra*), one should ignore the Dharmaśāstra and do what is established as customary law” (NS Mā 1.38), or Medhātithi claiming that customary law is really just another form of tradition, no different from the texts (MDh 2.10), the superiority or at least equality of *ācāra* in practical contexts has been regularly defended.

In some cases, the boldness of the claim that *ācāra* is the superior source of law is surprising. For example, the commentator Mitramiśra reads into the Sanskrit particle *ca* “and” in the *pramāṇa* verse (MDh 2.6) from the *Laws of Manu* a huge scope for customary law: “And, thus, even the *ācāra* of those who do not know the Veda, i.e., the poor and vile people, is authoritative. In same way, the *ācāra* of good Śūdras and others with regard to their sons is also authoritative.”¹⁵ The surprising element here is whose *ācāra* is being recognized. “Veda-knowers” is a common gloss for “good people” in almost every commentary on this verse. To parallel “veda-knowers” and “non-veda-knowers” (*avedavidām*), as Mitramiśra

¹⁴ Still the best discussion of the tension between Hindu legal texts and customary law within Dharmaśāstra is P.V. Kane, *History of Dharmaśāstra* (Poona: BORI, 1962–75), Vol. 3, pp. 856–84.

¹⁵ *Paribhāṣāprakāśa*, p. 9, quoted in Kane, *History of Dharmaśāstra*, Vol. 3, p. 881, fn. 1722: *evaṃ cāvedavidām api kṣīṇadoṣapurūṣaṅām ācārah pramāṇam | tathā ca sacchūdrādyācāras tatputrādīn prati bhavati pramāṇam.*

explicitly does, undercuts the usual arguments for the Vedic connection to customary law. To specify then that the *ācāra* of Śūdras is also legitimate, when Śūdra in most texts is synonymous with despicable and unworthy, further reverses the expectations set up in most texts. How do we reconcile such views with the usual hierarchy of legal sources?

The solution is one that is found in probably every legal system, even if not recognized as such. When the law is clear and when one's legal duties, obligations, and rights are not confused, questioned, or endangered, then the normal epistemological hierarchy of law's sources applies. Explicit ritual practices, contractual agreements, and mandatory penances must all be carried out in order to obtain the benefits that the law enables. The problem arises when there are doubts or disputes about what the nature of one's legal obligations or rights is in specific instances. In this case, the normal hierarchy of legal sources has already failed and another method for discerning the law is required. In such cases, local law or *ācāra* is one of the main factors for determining the relevant solution or for making a judgment in the context of a formal legal procedure.¹⁶ In the case of the Śūdras mentioned by Mitramiśra, the problem is that the texts say very little about the *dharma* of low caste groups or any other local corporate groups. The resulting ignorance leads to doubt in practice about what to do in the case of people, groups, or institutions that are hardly discussed in the Dharmaśāstra. That doubt requires an extra-textual means to determine the law. In other words, there is little in the Vedas or *smṛti* texts to help Śūdras do *dharma*, but they do have *ācāra*, a suitable substitute. In most situations, *ācāra* is held to be the sufficient source for determining and/or adjudging the relevant law. Stated plainly, under normal circumstances, the normal hierarchy prevails, but in cases of doubt or dispute, non-textualized sources of law must be consulted.

THE PRACTICABILITY OF HINDU JURISPRUDENCE

Mitramiśra's legitimation of the customary law of even the lowest social groups and Śūdras suggests that the world of legal practice in classical and medieval India was much more complex than was acknowledged in

¹⁶ The ruler's edict is another source of lawmaking outside the texts. This is how we should understand the often misinterpreted rules in the *Arthaśāstra* and *Laws of Nārada* about the four feet of legal procedure. In the context of a trial or other formal legal procedure, customary law and the edict or decision of the ruler can override other means of judicial decision. See Robert Lingat, "Les Quatre Pieds du Procès," *Journal Asiatique* 250 (1962): 489–503.

the Dharmaśāstra. Indeed, we should not expect a scholastic tradition to produce nuanced histories of local legal practice and the whole structure of this study has avoided this problem accordingly. Nevertheless, readers may be justifiably curious about both the Dharmaśāstra's own views of the practicability of its religious jurisprudence and the historical evidence for Hindu law in practice.

The internal evidence for practical law within the Dharmaśāstra begins from the somewhat rare instances in which the textual tradition points beyond itself. What we are looking for are places at which the texts either recognize the independent validity of certain laws outside the purview of the scholastic tradition or employ examples that deviate from the stock, historically unmarked examples used in most commentarial discussions. In the previous chapter, several examples of how Dharmaśāstra accorded rulers limited lawmaking capacity were cited. In addition to the ruler, and probably more important, however, we find the externally pointing discussion in the title of law known as the Non-observance of Conventions. A few further remarks on this title beyond those already given will provide a good summary of the Dharmaśāstra view of how law is administered in practice.

Though a title of law, the content of the Non-observance of Conventions connects notionally with *ācāra*.¹⁷ The conventional rules made by the myriad corporate groups in classical and medieval India acted as one of the prime sources of practical law at the time. It should also be noted that in Dharmaśāstra discussions of *dharmādhikaraṇa*, or trial courts, corporate groups were charged with conducting their own legal procedures as well.¹⁸ The commentator Vācaspati Miśra is quite clear on this issue:

The words of experts should, however, be respected in all cases. Thus Nārada says: "In the case of merchants, artisans, farmers, and stage-players, a decision is not possible; here persons who themselves know the nature (of these trades) should be charged with it." This is an illustrative statement; it means that each and every case must be decided in association with persons who are experts in that field.¹⁹

By its very nature, therefore, this title of law displays a concern on the part of Dharmaśāstra authors for practical influence and an incorporation

¹⁷ The following discussion is adapted from Donald R. Davis, Jr., "The Non-observance of Conventions: A Title of Hindu Law in the *Smṛticandrikā*," *Zeitschrift der Deutschen Morgenländischen Gesellschaft* 137:1 (2007): 105–7.

¹⁸ *Smṛticandrikā*, pp. 38ff.

¹⁹ *Vyavahāracintāmani* 33 (Rocher's translation).

of empirical realities. At the same time, Dharmaśāstra provides us with only a jurisprudential account of that legal realm by establishing a viable technical argument for recognizing such conventional laws as part of the scholastic tradition of Dharmaśāstra.

The principal technique for achieving this recognition is to place such conventional rules (*samaya*) in the category of *paribhāṣā*, technical, supplementary, or meta-rules for determining the detailed interpretation of general rules of *śāstra*.²⁰ Under the technical rule categorization, conventions do not threaten the authority of the Dharmaśāstra itself, but rather operate where the *śāstra* is silent or ambiguous to supplement or clarify what the *dharma* is in any given situation. Here the limitations of the letter of the law in Dharmaśāstra are implicitly acknowledged, while the spirit of Hindu law is preserved by incorporating these rules as part of its jurisprudence. Understanding the Non-observance of Conventions in this way indicates that its practical import may be much greater than its middling consideration in Dharmaśāstra would suggest, for it presents an expansive realm of law beyond the texts.

As in all Dharmaśāstra discussions, the rules for Brahmins occupy a place of first importance in this title of law and act as an archetype for understanding other groups as ectypes.²¹ In the end, however, Brahmins appear primarily as just another group that may make collective conventions for their communal governance. Indeed, the list of groups considered in the Dharmaśāstra includes “heretical” (e.g., Buddhist and Jain) monastic groups²² and other groups beyond the pale of Ārya status. It is significant, therefore, that the conventions made by such groups are also called *dharmas*, since *dharma* normally connotes a deep exclusiveness and ethnocentrism.²³ The label *samayadharmas* for the conventional laws of corporate groups does not call into question the supremacy of *varṇāśramadharmas* as described in Dharmaśāstra because conventions are derivative and

²⁰ 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* 48:1 (2005): 95–100.

²¹ Patrick Olivelle (ed. and trans.), *Manu’s Code of Law* (New York: Oxford University Press, 2005), p. 12.

²² Olivelle, *Āśrama System*, p. 209 notes that it is likely that even the laws pertaining to Hindu *mathas* would have been included under this rubric. He generally discusses there the potentially powerful influence that such monastic institutions, whether Buddhist, Jain, or Hindu, may have had in the law of medieval India. The *Smṛticandrikā* excludes all Vedic groups from this category of “heretic” (*pāṣaṇḍa*), but does mention service in a *maṭha* as an example of a convention among such groups.

²³ Wilhelm Halbfass, *India and Europe: An Essay in Philosophical Understanding* (Albany: SUNY Press, 1988), pp. 172ff.

inferior *dharma*s that are never permitted to abrogate an explicit textual rule. However, the practical fact is, and this goes unstated but presumed in the texts, that the law of Dharmaśāstra and the law of corporate groups operated in largely independent realms. The question of conflict, though considered as we have seen, must have rarely had any practical import. The influence of Dharmaśāstra is rather at the level of ideas, approaches, and reasoning to be used in practical contexts.²⁴

Perhaps unexpectedly, the figure of the ruler also appears prominently in discussions of the Non-observance of Conventions. Of course, the inculcation and maintenance of the system of castes and life-stages among his subjects is one of the ideal Hindu king's highest responsibilities. In this title of law, however, the king must also enforce and sanction the conventional rules established by the corporate groups in his realm. At the same time, the traditionally exclusive ascription of the right to punish that is given to kings in Hindu political theory is moderated to some extent in the texts. Under certain circumstances, it becomes not only necessary, but also desirable, for a corporate group itself to impose various punishments on members who transgress the group's laws. Provision is also made for the king to establish *dharma* by means of his decree, whether that means rectification or confirmation of established legal norms (common) or the legislation of new laws for a community (rare). As with the discussion of the conventions of corporate groups, the discussion of the king also points to certain legal realities and negotiations beyond the direct scope of the Dharmaśāstra. Again, this title of law does not undermine or challenge the standard presentations of the ruler's *dharma* in the texts. Rather, what we find is an attempt to jurisprudentially account for and authorize the practical legality of rulers' decrees and group conventions within the conceptual framework of Dharmaśāstra.

Turning to actual instances of Hindu law in practice, it would be impossible to give a comprehensive list.²⁵ Instead, I can only summarize the kind of evidence that is available in order to give readers at least some sense of the material for legal history in India in general, namely:

- 1 texts copied repeatedly over time;
- 2 inscriptions on stone and copper;

²⁴ Davis, "Recovering the Indigeneous Legal Traditions," p. 199.

²⁵ The most recent survey can be found in Axel Michaels, "The Practice of Classical Hindu Law." In Timothy Lubin, Jayanth Krishnan, and Donald R. Davis, Jr. (eds.), *Hinduism and Law: An Introduction* (New York: Cambridge University Press, forthcoming).

- 3 documentary records from the archives of temple and royal courts; and
- 4 reports of foreign visitors and others.

The textual tradition in general must be used with caution for the reasons we have seen repeatedly in this study. As with so many aspects of India's history, the collection and cataloging of this evidence has barely begun.

The inscriptional corpus of India is truly huge.²⁶ Inscriptions are found carved into the stone walls of Hindu temples and other religious institutions, most often recording a donation to the temple for the maintenance of the deity and its priests. Larger temples existed at the center of economic redistribution networks that played a key role in many local economies. Both the donative information itself and the ancillary details given in inscriptions provide evidence for legal transactions. Similar details also occur on royal copper-plate inscriptions that might record donations of villages to Brahmins or gifts to temples. Again, other details of political, religious, and legal history are often incorporated into the panegyric to the donor, the description of the land's boundaries or the donees. Examples of legal details found in inscriptions include the caste dispute among Kammālas in AD 1118 and 1166 in which Brahmin councils were asked to determine the proper caste status of the so-called chariot-maker caste,²⁷ and the relatively old inscription of AD 592 which contains seventy-two *ācāras* that were to be maintained in a community of merchants by order of the ruler Viṣṇuṣeṇa.²⁸ Such examples aside, few studies of inscriptions that focus on law have been undertaken, despite the great potential that epigraphy has to illuminate this and many other aspects of Indian history.

A second source of legal practice in history is found in repositories or archives of documents, usually on palm-leaf, from more recent periods. Temples, for example, often kept detailed accounting records of income and expense, including records of mortgage, lease, and sale of lands owned by the temple. Very often, the accompanying description of the temple's income and expenditure incidentally provides important information about the administration of law, jurisdiction, arrest, trial procedures, and

²⁶ Richard Salomon, *Indian Epigraphy* (New York: Oxford University Press, 1998) is the best survey of Indian inscriptions and their interpretation.

²⁷ J.D.M. Derrett, "Two Inscriptions Concerning the Status of Kammālas and the Application of Dharmasastra." In *Essays in Classical and Medieval Hindu Law*, Vol. 1 (Leiden: Brill, 1976), pp. 86–110.

²⁸ D.C. Sircar, "Glimpses of *Ācāra* and *Vyavahāra* in Early Indian Literary and Epigraphic Records." In Richard W. Lariviere (ed.), *Studies in Dharmasāstra* (Calcutta: Firma KLM, 1984), pp. 3–14.

punishments. A good example of such description comes from AD 1607 in Kerala.²⁹ The record was made to account for the temple's receipt of the clothes and weapon of a man. The rest of the record, however, recounts that the man in question had murdered a Brahmin, that he was arrested and jailed in the temple, that superior political leaders were involved, and that the man was executed with their permission. In this way, a record made for one purpose can be the source of information about many other aspects of law in Kerala at the time. Repositories and archives containing such records have rarely been studied, much less edited and published.

Documents of a similar kind are also found in the form of formularies and other collections of exemplary legal documents. The most famous of these is known as the *Lekhapaddhati* and it contains a fascinating array of models for making legal documents, akin to modern forms, and other sample records of legal transaction designed to serve the scribes who wrote them out. There are, however, several such formularies and collections that have generally been noticed rather than studied. Again, the potential for legal history in such early archival material has yet to be developed.

One final source of information for legal history in practice has been fairly well studied, namely the reports of missionaries, travelers, officials, and others who visited or traveled through India. From Marco Polo onwards, we have a series of European visitors and travelers in India, many of whom recorded aspects of law that they witnessed or otherwise gleaned during their travels. Such observations and reports intensified in the run-up to colonialism during the eighteenth century and continued through the nineteenth century. That history is important but has too often substituted for a thorough history of law in classical and medieval India. Beside and before the Europeans, of course, came Buddhist travelers to India from China, some of whom described elements of legal practice, and Muslim travelers and officials, notably Alberuni, whose interest in legal matters became of increasing importance to Islamic rulers in India. Though this genre of travelers' reports has produced some insights into the practice of law in medieval India, the evidence is often eclectic or random in its focus and full of expected prejudices that together yield problematic and sometimes unreliable presentations of legal history.

In asking the question of Hindu law's practicability, therefore, we inevitably arrive at an intellectual impasse. Hindu law properly so called should refer to legal systems that are influenced by and have influence on the textual tradition of Hindu jurisprudence in Dharmaśāstra. Other criteria

²⁹ The full record is translated in Davis, *Boundaries of Hindu Law*, pp. 83–5.

for determining what is Hindu about a legal system – connection to a Hindu temple, to caste, or Hindu sects, for instance – all seem insufficient as descriptive bases for differentiating Hindu law from law generally. Rather these appear to be incidents only of a greater likelihood that a specifically Hindu law would operate in such contexts than in others. As we have seen from several perspectives, however, Dharmaśāstra was not written with the intention to produce a functional legal system. The practical implementation of law, as this chapter suggests, was left to communities of overlapping corporate groups and to political rulers. There is a gap then between what the texts imagine and present in terms of their own applicability or practicability and what may have actually happened in a given place and time. The practical influence of Dharmaśāstra and thereby the creation of a practical *Hindu* law occurred indirectly via the influence of the Brahmin caretakers of the *dharma* tradition, the rulers and others who may also have studied it. In many cases, it is quite possible to demonstrate such influence. Much more tangible and important, however, is the fact that Dharmaśāstra represents by far the most elaborate and systematic reflection upon law that we have from classical and medieval India, an unbroken tradition of more than 2,000 years. When it came to *thinking* about law, therefore, Dharmaśāstra was almost the only game in town. In terms of implementing law, by contrast, Dharmaśāstra was but one resource for substantive and procedural rules and ideas for the practical operation of law. The implications of this impasse for the study of law and practice still remain for consideration in the next section.

AN APPROACH TO THE HISTORY OF LAW
IN INDIA, AND OF HINDU LAW

It is a mistake to write a history of law in India on the basis of Dharmaśāstra. I mean this in two senses. First, Dharmaśāstra *by itself* cannot provide a direct witness to legal practices because it is composed within and for a scholastic tradition that privileges its own idioms and commentarial practices over a concern for relevance. It provides always a *mediated* witness to legal history, a “meta-discourse” in Olivelle’s apt phrase.³⁰ Second, even if other historical sources are consulted, *starting with* Dharmaśāstra inevitably yields a view of law in which practice is seen as either congruent or divergent from the texts. This is the code-practice problem that has plagued Hindu law studies since their inception. Dharmaśāstra was not a

³⁰ Olivelle, *Manu’s Code of Law*, p. 64.

code written to be consulted like a recipe-book for the proper ingredients and preparation of a legal system, or a religio-legal system. They are works of scholarship written by pandits not unlike contemporary professors, whose own work, including this one, tends to follow its own rules and veer away quite freely from real life, even if one of its purposes is to understand real life better.

The more appropriate focus for historical research on law in India is, therefore, what both the Dharmaśāstra and the epigraphical record call *ācāra* or some synonym. An approach to India's legal history that begins with *ācāra* has three distinct advantages:

- 1 it focuses first on the local, contextual, and particular histories of law that characterized different places and times; *ācāra* demands concreteness and specificity;
- 2 it appropriates the language of law found in dated historical evidence for legal institutions and practices; *ācāra* or its synonyms is almost always the word for "law" found in historical evidence from India; and
- 3 it maximizes our ability to use all available sources for legal history, including Dharmaśāstra, without privileging one kind of source unnecessarily.³¹

It should be emphasized here that beginning at the level of and with the language of *ācāra* takes us quickly outside the realm of "Hindu law," because it would again privilege a Dharmaśāstra-centered view of legal history to prejudice legal systems or practices as somehow Hindu prior to investigating them. Hindu law is not the default in the absence of other information. Rather, legal systems of classical and medieval India probably combined many influences, only one of which *may* have been the jurisprudence of Hindu law found in the texts studied here. The extent of overlap or influence between laws studied first at the historical level of *ācāra* and Hindu jurisprudence is a matter for empirical investigation and scholarly argument. To describe a legal system as a system of Hindu law, as I have done for medieval Kerala, demands justification and a clear demonstration of the influence of Dharmaśāstra on that system. Despite an academic turn away from such easy assumptions, collapsing the categories Hindu and Indian has become politically expedient in recent years. That tendency also manifests in some academic works, but I do not accept it in any form, because it not only misunderstands the realities of historical legal practice and institutions, but also makes diffuse and corrupt the coherent

³¹ Summarized from Davis, *Boundaries of Hindu Law*, p. 150.

and beautiful vision of law contained within the Hindu tradition itself. The practical impact of Dharmaśāstra on law and religion can still be an interesting question, but not if approached by looking for Dharmaśāstra's traces in historical evidence. Rather, we must start with evidence for historically situated legal practice and from that begin to build up a picture of law in that place and time. Once a relatively clear picture of a historical legal system or of some small aspect of law becomes clearer, then one may profitably turn to texts like Dharmaśāstra to begin to ask whether Hindu jurisprudence, or any other textually represented legal thought, has influenced the law.

From these reflections emerges what the future of legal history of India might look like. What we need above all are many more micro-histories of law from different parts of India and in different periods. In some cases, such micro-histories can emerge only when scholars read existing evidence with a view toward developing a history of law. As a simple example, though it is widely recognized that the vast majority of India's gigantic epigraphical corpus consists of inscriptions that are also legal documents, especially records of legal donations, epigraphy has generally speaking not been read with legal history in mind. In other cases, micro-histories can emerge by examining as yet understudied or even unused historical materials. In my own case, a Kerala historian with whom I studied, M.G.S. Narayanan, introduced me to a genre of historical writing common in many parts of South India that contained a great deal of information pertaining to many aspects of law, even though the purpose of the records was financial record-keeping. I can only expect that records of a similar sort exist elsewhere in India and that other genres of historical evidence might also be used for legal history.³²

As more micro-histories or regional histories of law are produced, we could begin to consider a scholarly consolidation and comparison of those for the purpose of discerning whether patterns emerge in the historical development of law in India generally or whether legal history follows more exclusively regional trends. The academic model in this instance is the revolution in Hindu studies created by the proliferation of ethnographic studies of Hinduism beginning in the 1950s. The many wonderful ethnographies that now exist on very local, regional, and transregional aspects of Hinduism can be used to produce nuanced formulations of both Hinduism's current structure and nature and as the basis for determining

³² Axel Michaels, "The Practice of Classical Hindu Law," surveys the known possibilities.

its historical development. It is not that ethnographic work has neglected law in India. In fact, a few good ethnographic studies focused on law do exist.³³

Rather, it is that the anthropological perspective on legal history has not found its way into studies of earlier developments in the Hindu tradition. As scholars of Hinduism, we have learned to read sectarian traditions, practices of renunciation, ritual, and devotion, and so forth from a perspective that always holds a very practical knowledge of these in mind.³⁴ We are thus open to a bottom-up view of these aspects of the Hindu tradition in a way that we have not opened ourselves to when it comes to law, in part because Hindu law was thoroughly dismantled and redesigned in very different form under colonialism. Stated in this way, my suggestion is simply that studies of legal history in India should mirror studies of history in India generally. The move to regional histories and to nuanced political histories has not yet produced thorough investigations of the place of law in the larger story.

Having a firm historical foundation grounded in regional and then transregional histories of law would finally allow us to re-read the normative texts such as Dharmaśāstra against a history that does not derive its trajectory from the texts themselves.³⁵ The textual trajectory has been the bane of both Hindu law studies and of Indian legal history for a long time. Our expectations change dramatically when the textual trajectory is demoted from a place of privilege. We should expect that texts did in fact influence both thought and practice, but also that they were influenced themselves by changes in society, religion, economics, politics, and so forth. It is almost commonplace now to invoke an expectation that social institutions be mutually constitutive. The level of detail in the texts and the fact that the authors of Dharmaśāstra wanted to be recognized as the final arbiters of *dharma* and law have encouraged hegemonic readings of the texts. Reversing the methodological approach, however, puts the texts in their proper place. In this view, texts still have power, power to create

³³ See recently, Robert M. Hayden, *Disputes and Arguments among Nomads: A Caste Council in India* (Delhi: Oxford University Press, 1999), and the extensive bibliography therein.

³⁴ Louis Dumont and David Pocock, "For a Sociology of India," *Contributions to Indian Sociology* 1:1 (1957): 7–22; J.A.B. van Buitenen, "On the Archaism of the *Bhāgavata-Purāna*." In Milton Singer (ed.), *Kṛṣṇa: Myths, Rites, and Attitudes* (Chicago: University of Chicago Press, 1966), pp. 23–40.

³⁵ For an experimental attempt to write a history of Hindu law without reference to Dharmaśāstra, see Donald R. Davis, Jr. "An Historical Overview of Hindu Law." In T. Lubin, J. Krishnan, and D.R. Davis (eds.), *Hinduism and Law: An Introduction* (New York: Cambridge University Press, forthcoming).

rhetorical worlds, to establish discourses, to educate thought, and even to provide substantive rules for practice. At the same time, texts never exist in a vacuum. The historical evolution of social institutions different from law most assuredly impacted the development of law, even if that development is muted and downplayed in texts like *Dharmaśāstra*.

In this connection, I must reiterate my view of the nature of *Dharmaśāstra*, because it comes from a particular lineage of academia and is somewhat at odds with some other prevailing views.³⁶ An established position in the study of Hindu law has been that the purpose of the later commentaries on *Dharmaśāstra* was to bring the older texts up to date and to add new material relevant to contemporary times.³⁷ In other words, according to this view commentators tried to adapt and revise the classic root-texts in accordance with changes in social, religious, and political circumstances. It is undeniable that historical change affected and must affect the contents of even the most closed-in scholastic traditions. It is another thing altogether to claim that scholiasts and later writers *intended* to introduce changes in order to update the tradition before them. In some cases, it is clear that they did – local laws were defended in *Dharmaśāstra* terms or new topics were introduced and elaborated in ever greater detail.³⁸ In most cases, it seems equally apparent that they did not intend to adapt texts to local situations or update them according to changed historical circumstances. More often the localization of textual norms or their contextual implementation happened outside the textual tradition itself. The commentators' primary interest must be understood to be the correct interpretation of the tradition that preceded them.

³⁶ Specifically, I have taken my basic understanding of the *dharma* textual tradition from the work of Ludo Rocher and his students Patrick Olivelle and Richard Lariviere. For further delineation of Rocher's views and their elaboration by his students, see my introduction to Ludo Rocher, *Studies in Hindu Law and Dharmaśāstra*, ed. Donald R. Davis, Jr. (Torino: CESMEO, forthcoming). A similar view of the history and development of Hindu law is expressed in U.C. Sarkar, *Epochs in Hindu Legal History* (Hoshiarpur: Vishveshvaranand Vedic Research Institute, 1958).

³⁷ A.S. Altekar, *Sources of Hindu Dharma in its Socio-religious Aspects* (Sholapur: Institute of Public Administration, 1952); and, more recently, Ashutosh Dayal Mathur, *Medieval Hindu Law: Historical Evolution and Enlightened Rebellion* (Delhi: Oxford University Press, 2007).

³⁸ The best example to my knowledge is the adaptive reformulation of *Dharmaśāstra* rules on adoption according to the practice of matriliney in Kerala. See Donald R. Davis, Jr. "Matrilineal Adoption, Inheritance Law, and Rites for the Dead among Hindus in Medieval Kerala." In Steven Lindquist (ed.), *Essays in Honor of Patrick Olivelle* (Firenze: Firenze University Press, forthcoming). New topics, including *sati*, *virthas*, etc., were introduced and expanded in medieval *Dharmaśāstra* in ways that must correspond to some extent to the new prominence given to such issues in social practice.

If commentators in most cases did not intend to innovate on tradition, we might ask what it is they did intend in and by their work? A complete answer would have to examine the full gamut of scholastic academic traditions in India, traditions that addressed much more than law and religion. Nevertheless, we can say a few things about the models and metaphors that are most appropriate when considering these kinds of scholastic traditions. There are always different instruments or methods to use when trying to understand something. A microscope is objectively a more powerful tool for magnification, but it is much less useful for reading than eyeglasses or a magnifying glass. Similarly, the choice of theoretical and methodological perspective for viewing legal history in India, particularly Hindu law, greatly affects the resulting representation of that history.

What we are looking for is a theoretical framework that shares similar concerns with the Hindu law tradition. In the 1950s, a powerful and productive Marxist historiography developed in studies of India in the work of Kosambi and many others. In the 1980s, the Marxist approach in turn paved the way for the development of Subaltern studies in the work of Guha and others. Both of these, along with broader academic trends such as postcolonialism, have directed attention to the silent and silenced voices of history in an attempt to overcome both great-man and Orientalist histories of earlier generations. The important contributions of these “from below” historical approaches should not be neglected. Indeed, the general approach for the new history of law just described derives its primary inspiration from a similar desire to circumvent the restrictive lens of normative texts without discarding them altogether. At the same time, when one is interested as I am here in the nature and historical valence of those same normative texts, the suitability of a praxis- and subaltern-oriented method may be called into question because these do not share the values and social perspectives of the authors of the texts. As a result, we gain only transgressive readings that purposefully look behind and in between the contents of the text for clues about other matters of interest to the historian. Transgressive readings can yield exciting results, but they do not present us with the whole picture.

Sympathetic readings of the texts can also yield important insights and I want to suggest that an underutilized tradition of political, social, and cultural historiography exists that may be more appropriate to the study of Dharmaśāstra and Hindu law. There is no good label for this tradition,³⁹

³⁹ This list of names will undoubtedly call to some readers’ minds the unfortunate name “conservative sociology” for this line of thought, though the label refers more to current politics than to any inherent intellectual commitment.

but its modern intellectual history in Europe may be traced to Burke and, in India, the original Orientalists like Jones and Colebrooke through the work of Hegel, Tocqueville, and Durkheim to the more recent studies of Nisbet, Berger, and Luhmann. Perhaps the fundamental distinction of this line of thought is a commitment to a view that humans are innately and positively embedded in social institutions and traditions that existed before they did. Both society and tradition are reified or substantivized to a great extent in this view. Other features of this view stem from the tangible view of society and tradition.

Nisbet identified five characteristics that sufficiently summarize this view.⁴⁰ First, there is an emphasis on community and the positive valuation of belonging to communities as a part of both meaning and aspiration in human life. Family and the associations of civil society are prominent among the communities identified. Second, authority takes precedence over power and assertions of power are viewed with suspicion and severe restriction. Third, status is held to be the most powerful criterion for differentiating individuals within society. Rather than political, legal, religious, or economic distinctions, socially constructed recognitions of honor serve as the basis of status stratifications that determine the self-perception and self-presentation of both individuals and groups. Fourth, ideas of the sacred or the transcendent are held to be the ultimate source of wise tradition and positive prejudice that guide human action. Fifth and finally, alienation is the sense that holding fast to a once-perfect order and tradition inevitably involves loss and degeneration from the ideal. The vision of human progress is here inverted to emphasize rather an unavoidable diminution of humanity over time.

Though these five features are merely illustrative in terms of the detailed arguments of scholars in this tradition, they already suggest a correspondence with fundamental commitments of scholars in the Hindu law tradition. Both share a distrust of the state as an institution prone to corruption and abuses of power, preferring instead to emphasize the ordering capacity of communities and their traditional authority. Both view tradition and social status in substantial, even material, terms, considering other differences between people to be of less consequence. And, both imagine history in terms of a lamentable, but unstoppable, movement away from a primordial, transcendent ideal.

Hindu jurisprudence is fairly obsessed with the integrity and dharmic character of the ruler as the prime instigator of the state. Theologically, the

⁴⁰ Robert A. Nisbet, *The Sociological Tradition* (New York: Basic Books, 1966).

state is subordinate as we have seen within the system of castes and life-stages. At the same time, the good state is seen as the guarantor of *dharma* in the world and the only means by which any semblance of *dharma* can be maintained in the current age. Moreover, we have seen that the highest value is placed on tradition for the transmission and integrity of *dharma*, with the system of castes and life-stages being its ideal form. Placement of people within that system is a matter of personal substance, of a status-based and inherited set of traits within people. Finally, the familiar theme of time as loss recurs again and again in Dharmasāstra and elsewhere in Brahminical traditions. The degenerate current age is precisely a progressive alienation of humanity away from the ideals set forth in the timeless Vedas.

As a whole, therefore, we might read the Hindu law tradition as a theological account of the ordinary life of a proper Hindu, especially a male Brahmin. As the culmination of a long scholarly tradition, that account intends to promote and justify the authority of tradition, to explain and reinforce traditional social status, and to situate human life in communities of livable scope and common interest. At no point in this view do the exigencies of contemporary life, the need to adapt tradition to changed circumstances, or even significant facts of history play an important part in Hindu jurisprudence. The texts recognize such realities, but, according to the principle of alienation, they desperately look more to the past for solutions than to the present or future.

With this very brief review in mind, I am simply arguing that a rich set of theoretical approaches to intellectual and social traditions such as Hindu jurisprudence should include approaches that treat the traditions sympathetically, using presuppositions that mirror or resemble those of the Hindu tradition itself. A largely untapped set of such resources is available, I suggest, in the lineage of thought called by most “conservatism.”⁴¹ Though I find the label confusing and prejudicial, I have no better alternative to offer and no expectation that it can be avoided in any case. Moreover, I do not think it will be surprising to any reader of this book that the tradition of Hindu jurisprudence is a “conservative” tradition. The approach to society and history in that tradition offers us a way to sympathetically understand the Hindu tradition in a way that makes its own self-presentation seem less remote or foreign.

In summary, the future of legal history on India should begin from dated historical evidence of legal practice, from the level conceptually identified

⁴¹ I trust readers to kindly distinguish personal politics from intellectual inquiry.

in the Indian materials as *ācāra*. The collocation and the comparative interpretation of that evidence should be understood as the piecing together of different witnesses to the same history of law, each witness bringing its own biases, elisions, and agendas. Only after sorting out and adjudging the value of each witness with respect to a given historical context or issue, can the best possible description of law emerge. In some cases, Dharmasāstra may be an excellent historical witness. In others, it may be terrible. The same goes for epigraphy, temple records, other textual genres, and foreign accounts. Together, however, the variegated sources have the potential to produce both a plausible account of legal history in India and the basis for even wider comparative legal history beyond the permeable cultural zone of India or South Asia. Furthermore, when the normative texts are re-read in the light of a history that does not tautologically depend upon them, that re-reading should be both transgressive and sympathetic, incorporating not only insights from subaltern views, but also views that link the hermeneutics of the Hindu legal texts with current intellectual horizons that similarly emphasize tradition, community, and authority.

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Introduction

■ General characteristics of Indian philosophy—The natural situation of India—The dominance of the intellectual interest—The individuality of Indian philosophy—The influence of the West—The spiritual character of Indian thought—Its close relation to life and religion—The stress on the subjective—Psychological basis of metaphysics—Indian achievements in positive science—Speculative synthesis and scientific analysis—the brooding East—Monistic idealism—Its varieties, non-dualism, pure monism, modified monism and implicit monism—God is all—The intuitional nature of philosophy—Darśana—Sāṅkara's qualifications of a candidate for the study of philosophy—The constructive conservatism of Indian thought—The unity and continuity of Indian thought—Consideration of some charges levelled against Indian philosophy, such as pessimism, dogmatism, indifference to ethics and unprogressive character—The value of the study of Indian philosophy—The justification of the title 'Indian Philosophy'—Historical method—The difficulty of a chronological treatment—The different periods of Indian thought—Vedic, epic, systematic and scholastic—'Indian' histories of Indian philosophy. ■

I

THE NATURAL SITUATION OF INDIA

For thinking minds to blossom, for arts and sciences to flourish, the first condition necessary is a settled society providing security and leisure. A rich culture is impossible with a community of nomads, where people struggle for life and die of privation. Fate called India to a spot where nature was free with her gifts and every prospect was pleasing. The Himalayas, with their immense range and elevation on one side and the sea on the others, helped to keep India free from invasion for a long time. Bounteous nature yielded abundant food, and man was relieved of the toil and struggle for existence. The Indian never felt that the world was a field of battle where men struggled for power, wealth and domination. When we do not need to waste our energies on problems of life on earth, exploiting nature and controlling the forces of the world, we begin to think

of the higher life, how to live more perfectly in the spirit. Perhaps an enervating climate inclined the Indian to rest and retirement. The huge forests with their wide leafy avenues afforded great opportunities for the devout soul to wander peacefully through them, dream strange dreams and burst forth into joyous songs. World-weary men go out on pilgrimages to these scenes of nature, acquire inward peace, listening to the rush of winds and torrents, the music of birds and leaves, and return whole of heart and fresh in spirit. It was in the āśramas and tapovanās or forest hermitages that the thinking men of India meditated on the deeper problems of existence. The security of life, the wealth of natural resources, the freedom from worry, the detachment from the cares of existence, and the absence of a tyrannous practical interest, stimulated the higher life of India, with the result that we find from the beginnings of history an impatience of spirit, a love of wisdom and a passion for the saner pursuits of the mind.

Helped by natural conditions, and provided with the intellectual scope to think out the implications of things, the Indian escaped the doom which Plato pronounced to be the worst of all, viz. the hatred of reason. 'Let us above all things take heed,' says he in the *Phaedo*, 'that one misfortune does not befall us. Let us not become misologists as some people become misanthropes; for no greater evil can befall men than to become haters of reason.' The pleasure of understanding is one of the purest available to man, and the passion of the Indian for it burns in the bright flame of the mind.

In many other countries of the world, reflection on the nature of existence is a luxury of life. The serious moments are given to action, while the pursuit of philosophy comes up as a parenthesis. In ancient India philosophy was not an auxiliary to any other science or art, but always held a prominent position of independence. In the West, even in the heyday of its youth, as in the times of Plato and Aristotle, it leaned for support on some other study, as politics or ethics. It was theology for the Middle Ages, natural science for Bacon and Newton, history, politics and sociology for the nineteenth-century thinkers. In India philosophy stood on its own legs, and all other studies looked to it for inspiration and support. It is the master science guiding other sciences, without which they tend to become empty and foolish. The *Mundaka Upaniṣad* speaks of *Brahma-vidyā* or the science of the eternal as the basis of all sciences, *sarva-vidyā-pratiṣṭhā*. 'Philosophy,' says Kautilya, 'is the lamp of all the

sciences, the means of performing all the works, and the support of all the duties.'¹

Since philosophy is a human effort to comprehend the problem of the universe, it is subject to the influences of race and culture. Each nation has its own characteristic mentality, its particular intellectual bent. In all the fleeting centuries of history, in all the vicissitudes through which India has passed, a certain marked identity is visible. It has held fast to certain psychological traits which constitute its special heritage, and they will be the characteristic marks of the Indian people so long as they are privileged to have a separate existence. Individuality means independence of growth. It is not necessarily unlikeness. There cannot be complete unlikeness, since man the world over is the same, especially so far as the aspects of spirit are concerned. The variations are traceable to distinctions in age, history and temperament. They add to the wealth of the world culture, since there is no royal road to philosophic development any more than to any other result worth having. Before we notice the characteristic features of Indian thought, a few words may be said about the influence of the West on Indian thought.

The question is frequently raised whether and to what extent Indian thought borrowed its ideas from foreign sources, such as Greece. Some of the views put forward by Indian thinkers resemble certain doctrines developed in ancient Greece, so much that anybody interested in discrediting this or that thought system can easily do so.² The question of the affiliation of ideas is a useless pursuit. To an unbiased mind, the coincidences will be an evidence of historical parallelism. Similar experiences engender in men's minds similar views. There is no material

1. See I.A., 1918, p. 102. See also B.G., x. 32.

2. Sir William Jones wrote: 'Of the philosophical schools, it will be sufficient here to remark that the first Nyāya seems analogous to the Peripatetic; the second, sometimes called Vaiśeṣika, to the Ionic; the two Mīmāṃsās, of which the second is often distinguished by the name of Vedānta, to the Platonic; the first Sāṃkhya to the Italic; and the second of Patañjali to the Stoic philosophy; so that Gautama corresponds with Aristotle, Kaṇāda with Thales, Jaimini with Socrates, Vyāsa with Plato, Kapila with Pythagoras, and Patañjali with Zeno' (*Works*, i, 360–1. See also Colebrooke, *Miscellaneous Essays*, i. 436 ff.) While the opinion that Greek thought has been influenced by the Indian is frequently held, it is not so often urged that Indian thought owes much to Greek speculation. (See Garbe, *Philosophy of Ancient India*, chap. II.)

evidence to prove any direct borrowings, at any rate by India, from the West. Our account of Indian thought will show that it is an independent venture of the human mind. Philosophical problems are discussed without any influence from or relation to the West. In spite of occasional intercourse with the West, India had the freedom to develop its own ideal life, philosophy and religion. Whatever be the truth about the original home of the Aryans who came down to the Peninsula, they soon lost touch with their kindred in the West or the North, and developed on lines of their own. It is true that India was again and again invaded by armies pouring into it through the North-Western passes, but none of them, with the exception of Alexander's, did anything to promote spiritual intercourse between the two worlds. Only latterly, when the gateway of the seas was opened, a more intimate intercourse has been fostered, the results of which we cannot forecast, since they are yet in the making. For all practical purposes, then, we may look upon Indian thought as a closed system or an autonomous growth.

II

GENERAL CHARACTERISTICS OF INDIAN THOUGHT

Philosophy in India is essentially spiritual. It is the intense spirituality of India, and not any great political structure or social organisation that it has developed, that has enabled it to resist the ravages of time and the accidents of history. External invasions and internal dissensions came very near crushing its civilisation many times in its history. The Greek and the Scythian, the Persian and the Mogul, the French and the English have by turn attempted to suppress it, and yet it has its head held high. India has not been finally subdued, and its old flame of spirit is still burning. Throughout its life it has been living with one purpose. It has fought for truth and against error. It may have blundered, but it did what it felt able and called upon to do. The history of Indian thought illustrates the endless quest of the mind, ever old, ever new.

The ~~spiritual motive~~ dominates life in India. Indian philosophy has its interest in the haunts of men, and not in supra-lunar solitudes. It takes its origin in life, and enters back into life after passing through the schools. The great works of Indian philosophy do not have that ex cahtedra character which is so prominent a feature of the latter criticisms and commentaries. The Gītā and the Upanisads are not remote from popular

belief. They are the great literature of the country, and at the same time vehicles of the great systems of thought. The Purāṇas contain the truth dressed up in myths and stories, to suit the weak understanding of the majority. The hard task of interesting the multitude in metaphysics is achieved in India.

The founders of philosophy strive for a socio-spiritual reformation of the country. When the Indian civilisation is called a Brāhmanical one, it only means that its main character and dominating motives are shaped by its philosophical thinkers and religious minds, though these are not all of Brāhman birth. The idea of Plato that philosophers must be the rulers and directors of society is practised in India. The ultimate truths are truths of spirit, and in the light of them actual life has to be refined.

Religion in India is not dogmatic. It is a rational synthesis which goes on gathering into itself new conceptions as philosophy progresses. It is experimental and provisional in its nature, attempting to keep pace with the progress of thought. The common criticism that Indian thought, by its emphasis on intellect, puts philosophy in the place of religion, brings out the rational character of religion in India. No religious movement has ever come into existence without developing as its support a philosophic content. Mr Havell observes: 'In India, religion is hardly a dogma, but a working hypothesis of human conduct, adapted to different stages of spiritual development and different conditions of life.'³ Whenever it tended to crystallise itself in a fixed creed, there were set up spiritual revivals and philosophic reactions which threw beliefs into the crucible of criticism, vindicated the true and combated the false. Again and again, we shall observe, how when traditionally accepted beliefs become inadequate, nay false, on account of changed times, and the age grows out of patience with them, the insight of a new teacher, a Buddha or a Mahāvīra, a Vyāsa or a Śaṅkara supervenes, stirring the depths of spiritual life. These are doubtless great moments in the history of Indian thought, times of inward testing and vision, when at the summons of the spirit's breath, blowing where it listeth and coming whence no one knows, the soul of man makes a fresh start and goes forth on a new venture. It is the intimate relation between the truth of philosophy and the daily life of people that makes religion always alive and real.

3. *Aryan Rule in India*, p. 170. See the article on *The Heart of Hinduism: Hibbert* *Journal*, October, 1922.

The problems of religion stimulate the philosophic spirit. The Indian mind has been traditionally exercised over the questions of the nature of Godhead, the end of life and the relation of the individual to the universal soul. Though philosophy in India has not as a rule completely freed itself from the fascinations of religious speculation, yet the philosophical discussions have not been hampered by religious forms. The two were not confused. On account of the close connection between theory and practice, doctrine and life, a philosophy which could not stand the test of life, not in the pragmatistic but the larger sense of the term, had no chance of survival. To those who realise the true kinship between life and theory, philosophy becomes a way of life, an approach to spiritual realisation. There has been no teaching, not even the Sāṃkhya, which remained a mere word of mouth or dogma of schools. Every doctrine is turned into a passionate conviction, stirring the heart of man and quickening his breath.

It is untrue to say that philosophy in India never became self-conscious or critical. Even in its early stages rational reflection tended to correct religious belief. Witness the advance of religion implied in the progress from the hymns of the Veda to the Upaniṣads. When we come to Buddhism, the philosophic spirit has already become that confident attitude of mind which in intellectual matters bends to no outside authority and recognises no limit to its enterprise, unless it be as the result of logic, which probes all things, tests all things, and follows fearlessly wherever the argument leads. When we reach the several darśanas or systems of thought, we have mighty and persistent efforts at systematic thinking. How completely free from traditional religion and bias the systems are will be obvious from the fact that the Sāṃkhya is silent about the existence of God, though certain about its theoretical indemonstrability. Vaiśeṣika and Yoga, while they admit a supreme being, do not consider him to be the creator of the universe, and Jaimini refers to God only to deny his providence and moral government of the world. The early Buddhist systems are known to be indifferent to God, and we have also the materialist Cārvākas, who deny God, ridicule the priests, revile the Vedas and seek salvation in pleasure.

The supremacy of religion and of social tradition in life does not hamper the free pursuit of philosophy. It is a strange paradox, and yet noting more than the obvious truth that while the social life of an individual is bound by the rigours of caste, he is free to roam in the matter of opinion. Reason freely questions and criticises the creeds in which men are born. That is why the heretic, the sceptic, the unbeliever, the rationalist and the free thinker.

the materialist and the hedonist all flourish in the soil of India. The Mahābhārata says: 'There is no *muni* who has not an opinion of his own.'

All this is evidence of the strong intellectuality of the Indian mind which seeks to know the inner truth and the law of all sides of human activity. This intellectual impulse is not confined to philosophy and theology, but extends over logic and grammar, rhetoric and language, medicine and astronomy, in fact all arts and sciences, from architecture to zoology. Everything useful to life or interesting to mind becomes an object of inquiry and criticism. It will give an idea of the all comprehensive character of intellectual life, to know that even such minutiae as the breeding of horses and the training of elephants had their own *śāstras* and literature.

The philosophic attempt to determine the nature of reality may start either with the thinking self or the objects of thought. In India the interest of philosophy is in the self of man. Where the vision is turned outward, the rush of fleeting events engages the mind. In India 'Ātmānam viddhi,' know the self, sums up the law and the prophets. Within man is the spirit that is the centre of everything. Psychology and ethics are the basal sciences. The life of mind is depicted in all its mobile variety and subtle play of light and shade. Indian psychology realised the value of concentration and looked upon it as the means for the perception of the truth. It believed that there were no ranges of life or mind which could not be reached by a methodical training of will and knowledge. It recognised the close connexion of mind and body. The psychic experiences, such as telepathy and clairvoyance, were considered to be neither abnormal nor miraculous. They are not the products of diseased minds or inspiration from the gods, but powers which the human mind can exhibit under carefully ascertained conditions. The mind of man has the three aspects of the subconscious, the conscious and the superconscious, and the 'abnormal' psychic phenomena, called by the different names of ecstasy, genius, inspiration, madness, are the workings of the superconscious mind. The Yoga system of philosophy deals specially with these experiences, though the other systems refers to them and utilise them for their purposes.

The metaphysical schemes are based on the data of the psychological science. The criticism that Western metaphysics is one-sided, since its attention is confined to the waking state alone, is not without its force.

There are other states of consciousness as much entitled to consideration as the waking. Indian thought takes into account the modes of waking,

dreaming and dreamless sleep. If we look upon the waking consciousness as the whole, then we get realistic, dualistic and pluralistic conceptions of metaphysics. Dream consciousness when exclusively studied leads us to subjectivist doctrines. The state of dreamless sleep inclines us to abstract and mystical theories. The whole truth must take all the modes of consciousness into account.

The dominance of interest in the subjective does not mean that in objective sciences India had nothing to say. If we refer to the actual achievements of India in the realm of positive science, we shall see that the opposite is the case. Ancient Indians laid the foundations of mathematical and mechanical knowledge. They measured the land, divided the year, mapped out the heavens, traced the course of the sun and the planets through the zodiacal belt, analysed the constitution of matter, and studied the nature of birds and beasts, plants and seeds.⁴ 'Whatever conclusions we may arrive at as to the original source of the first astronomical ideas current in the world, it is probable that to the Hindus is due the invention of algebra and its application to astronomy and geometry. From them also the Arabs received not only their first conceptions of algebraic analysis, but also those invaluable numerical symbols and decimal notation now current everywhere in Europe, which have rendered untold service to the progress of arithmetical science.'⁵ 'The motions of the moon and the sun were carefully observed by the Hindus, and with such success that their determination of the moon's synodical revolution is a much more correct one than the Greeks ever achieved. They had a division of the ecliptic into twenty-seven and twenty-eight parts, suggested evidently by the moon's period in days and seemingly their own. They were particularly conversant with the most splendid of the primary planets; the period of Jupiter being introduced by them, in conjunction with those of the sun and the moon into the regulation of

4. We may quote a passage which is certainly not less than 2,000 years before the birth of Copernicus, from the Aitareya Brāhmaṇa: 'The sun never sets nor rises. When people think to themselves the sun is setting, he only changes about after reaching the end of the day, and makes night below and day to what is on the other side. Then when people think he rises in the morning, he only shifts himself about after reaching the end of the night, and makes day below and night to what is on the other side. In fact he never does set at all.' Haug's Edition, iii. 44; Chāṇ.

Up., iii. 11. 1-3. Even if this be folklore, it is interesting.

their calendar in the form of the cycle of sixty years, common to them and the Chaldeans.⁶ It is now admitted that the Hindus at a very early time conceived and developed the two sciences of logic and grammar.⁷ Wilson writes: 'In medicine, as in astronomy and metaphysics, the Hindus once kept pace with the most enlightened nations of the world; and they attained as thorough a proficiency in medicine and surgery as any people whose acquisitions are recorded, and as indeed was practicable, before anatomy was made known to us by the discoveries of modern inquirers.'⁸ It is true that they did not invent any great mechanical appliances. For this a kind Heaven, which gave them the great water-courses and abundant supplies of food, is responsible. Let us also remember that these mechanical inventions belong, after all, to the sixteenth century and after, by which time India had lost her independence and become parasitic. The day she lost her freedom and began to flirt with other nations, a curse fell on her and she became petrified. Till then she could hold her own even in arts, crafts and industries, not to speak of mathematics, astronomy, chemistry, medicine, surgery, and those branches of physical knowledge practised in ancient times. She knew how to chisel stone, draw pictures, burnish gold and weave rich fabrics. She developed all arts, fine and industrial, which furnish the conditions of civilised existence. Her ships crossed the oceans and her wealth brimmed over to Judaea, Egypt and Rome. Her conceptions of man and society, morals and religion were remarkable for the time. We cannot reasonably say that the Indian people revelled in poetry and mythology, and spurned science and philosophy, though it is true that they were more intent on seeking the unity of things than emphasising their sharpness and separation.

The speculative mind is more synthetic, while the scientific one is more analytic, if such a distinction be permitted. The former tends to create cosmic philosophies which embrace in one comprehensive vision the origin of all things, the history of ages and the dissolution and decay of the world. The latter is inclined to linger over the dull particulars of the world and miss the sense of oneness and wholeness. Indian thought attempts vast, impersonal views of existence, and makes it easy for the critic to bring the charge of being more idealistic and contemplative,

6. Colebrooke's translation of *Bhaskara's Work of Algebra*, p. xxii.

7. See Max Müller's *Sanskrit Literature*.

8. *Works*, vol. iii. p. 269.

producing dreamy visionaries and strangers in the world, while Western thought is more particularist and pragmatistic. The latter depends on what we call the senses, the former presses the soul sense into the service of speculation. Once again it is the natural conditions of India that account for the contemplative turn of the Indian who had the leisure to enjoy the beautiful things of the world and express his wealth of soul in song and story, music and dance, rites and religions, undisturbed by the passions of the outer world. 'The brooding East,' frequently employed as a term of ridicule, is not altogether without its truth.

It is the synthetic vision of India that has made philosophy comprehend several sciences which have become differentiated in modern times. In the West during the last hundred years or so several branches of knowledge till then included under philosophy, economics, politics, morals, psychology, education have been one by one sheared away from it. Philosophy in the time of Plato meant all those sciences which are bound up with human nature and form other core of man's speculative interests. In the same way in ancient Indian scriptures we possess the full content of the philosophic sphere. Latterly in the West philosophy became synonymous with metaphysics, or the abstruse discussions of knowledge, being and value, and the complaint is heard that metaphysics has become absolutely theoretical, being cut off from the imaginative and the practical sides of human nature.

If we put the subjective interest of the Indian mind along with its tendency to arrive at a synthetic vision, we shall see how monistic idealism becomes the truth of things. To it the whole growth of Vedic thought points; on it are based the Buddhistic and the Brāhmanical religions; it is the highest truth revealed to India. Even systems which announce themselves as dualistic or pluralistic seem to be permeated by a strong monistic character. If we can abstract from the variety of opinion and observe the general spirit of Indian thought, we shall find that it has a disposition to interpret life and nature in the way of monistic idealism, though this tendency is so plastic, living and manifold that it takes many forms and expresses itself in even mutually hostile teachings. We may briefly indicate the main forms which monistic idealism has assumed in Indian thought, leaving aside detailed developments and critical estimates. **This will enable us to grasp the nature and function of philosophy as understood in India. For our purposes monistic idealism is of four types:**

(1) Non-dualism or Advaitism; (2) Pure monism; (3) Modified monism; and (4) Implicit monism.

Philosophy proceeds on the facts of experience. Logical reflection is necessary to ascertain whether the facts observed by one individual are accepted by all, or are only subjective in their character. Theories are accepted if they account for facts satisfactorily. We have already said that the facts of mind or consciousness were studied by the Indian thinkers with as much care and attention as the facts of the outer world are studied by our modern scientists. The philosophical conclusions of Advaitic monism are based on the data of psychological observation.

The activities of the self are assigned to the three states of waking, dreaming and dreamless sleep. In dream states an actual concrete world is presented to us. We do not call that world real, since on waking we find that the dream world does not fit in with the waking world; yet relatively to the dream state the dream world is real. It is discrepancy from our conventional standards of waking life, and not any absolute knowledge of truth as subsisting by itself, that tells us that dream states are less real than the waking ones. Even waking reality is a relative one. It has no permanent existence, being only a correlate of the waking state. It disappears in dream and sleep. The waking consciousness and the world disclosed to it are related to each other, depend on each other as the dream consciousness and the dream-world are. They are not absolutely real, for in the words of Śaṅkara, while the 'dream-world is daily sublated, the waking world is sublated under exceptional circumstances.' In dreamless sleep we have a cessation of the empirical consciousness. Some Indian thinkers are of opinion that we have in this condition an objectless consciousness. At any rate this is clear, that dreamless sleep is not a complete non-being or negation for such a hypothesis conflicts with the later recollection of the happy repose of sleep. We cannot help conceding that the self continues to exist, though it is bereft of all experience. There is no object felt and there can be none so long as the sleep is sound. The pure self seems to be unaffected by the flotsam and jetsam of ideas which rise and vanish with particular moods. 'What varies not, nor changes in the midst of things that vary and change is different from them.'⁹ The self which persists unchanged and is one throughout all the changes is different from them

all. The conditions change, not the self. 'In all the endless months, years and small and great cycles, past and to come, this self-luminous consciousness alone neither rises nor ever sets.'¹⁰ An unconditioned reality where time and space along with all their objects vanish is felt to be real. It is the self which is the unaffected spectator of the whole drama of ideas related to the changing moods of waking, dreaming and sleeping. We are convinced that there is something in us beyond joy and misery, virtue and vice, good and bad. The self 'never dies, is never born—unborn, eternal, everlasting, this ancient one can never be destroyed with the destruction of the body. If the slayer thinks he can slay, or if the slain thinks he is slain, they both do not know the truth, for the self neither slays nor is slain.'¹¹

In addition to the ever-identical self, we have also the empirical variety of objects. The former is permanent, immutable, the latter impermanent and ever changing. The former is absolute, being independent of all objects, the latter changes with the moods.

How are we to account for the world? The empirical variety is there bound in space, time and cause. If the self is the one, the universal, the immutable, we find in the world a mass of particulars with opposed characters. We can only call it the not-self, the object of a subject. In no case is it real. The principal categories of the world of experience, time, space and cause are self-contradictory. They are relative terms depending on their constituents. They have no real existence. Yet they are not non-existent. The world is there, and we work in it and through it. We do not and cannot know the why of this world. It is this fact of its inexplicable existence that is signified by the word *māyā*. To ask what is the relation between the absolute self and the empirical flux, to ask why and how it happens, that there are two, is to assume that everything has a why and a how. To say that the infinite becomes the finite or manifests itself as finite is on this view utter nonsense. The limited cannot express or manifest the unlimited. The moment the unlimited manifests itself in the limited, it itself becomes limited. To say that the absolute degenerates or lapses into the empirical is to contradict its absoluteness. No lapse can come to a perfect being. No darkness can dwell in perfect light. We cannot admit that the supreme, which is changeless, becomes limited by changing. To change is to desire or to feel a want, and it shows lack of perfection. The

10. Pañcadaśī, i. 7.

11. Katha Up., ii. 18–19, B.G., ii. 19–20.

absolute can never become an object of knowledge, for what is known is finite and relative. Our limited mind cannot go beyond the bounds of time, space and cause, nor can we explain these, since every attempt to explain them assumes them. Through thought, which is itself a part of the relative world, we cannot know the absolute self. Our relative experience is a waking dream. Science and logic are parts of it and products of it too. This failure of metaphysics is neither to be wept over nor to be laughed over, neither to be praised nor blamed, but understood. With a touching humility born of intellectual strength, a Plato or a Nāgārjuna, a Kant or a Śaṅkara, declares that our thought deals with the relative, and has nothing to do with the absolute.

Though the absolute being is not known in the logical way, it is yet realised by all who strain to know the truth, as the reality in which we live, move and have our being. Only through it can anything else be known. It is the eternal witness of all knowledge. The non-dualist contends that his theory is based on the logic of facts. The self is the inmost and deepest reality, felt by all, since it is the self of all things known and unknown too, and there is no knower to know it except itself. It is the true and the eternal, and there is nought beside it. As for the empirical ramifications which also exist, the non-dualist says, well, they are there, and there is an end of it. We do not know and cannot know why. It is all a contradiction, and yet is actual. Such is the philosophical position of Advaita or non-dualism taken up by Gauḍapāda and Śaṅkara.

There are Advaitins who are dissatisfied with this view, and feel that it is no good covering up our confusion by the use of the word māyā. They attempt to give a more positive account of the relation between the perfect being absolutely devoid of any negativity, the immutable real, felt in the depths of experience and the world of change and becoming. To preserve the perfection of the one reality we are obliged to say that the world of becoming is not due to an addition of any element from outside, since there is nothing outside. It can only be by a diminution. Something negative like Plato's non-being or Aristotle's matter is assumed to account for change. Through the exercise of this negative principle, the immutable seems to be spread out in the moving many. Rays stream out of the sun which nevertheless did not contain them. Māyā is the name of the negative principle which lets loose the universal becoming, thereby creating endless agitation and perpetual disquiet. The flux of the universe is brought about by the apparent degradation of the immutable. The real represents all

that is positive in becoming. The things of the world ever struggle to recover their reality, to fill up what is lacking in them, to shake off their individuality and separateness, but are prevented from doing so by their inner void, the negative *māyā* constituted by the interval between what they are and what they ought to be. If we get rid of *māyā*, suppress the tendency to duality, abolish the interval, fill up the deficit, and allow the disturbance to relax, space, time and change reach back into pure being. As long as the original insufficiency of *māyā* prevails, things are condemned to be existent in space—time cause world. *Māyā* is not a human construction. It is prior to our intellect and independent of it. It is verily the generator of things and intellects, the immense potentiality of the whole world. It is sometimes called the *prakṛti*. The alternations of generation and decay, the ever-repeated cosmic evolutions, all represent this fundamental deficit in which the world consists. The world of becoming is the interruption of being. *Māyā* is the reflection of reality. The world-process is not so much a translation of immutable being as its inversion. Yet the world of *māyā* cannot exist apart from pure being. There can be no movement, if there were not immutability, since movement is only a degradation of the immutable. The truth of the universal mobility is the immobile being.

As becoming is a lapse from being, so is *avidyā* or ignorance a fall from *vidyā* or knowledge. To know the truth, to apprehend reality, we have to get rid of *avidyā* and its intellectual moulds, which all crack the moment we try to force reality into them. This is no excuse for indolence of thought. Philosophy as logic on this view persuades us to give up the employment of the intellectual concepts which are relative to our practical needs and the world of becoming. Philosophy tells us that, so long as we are bound by intellect and are lost in the world of many, we shall seek in vain to get back to the simplicity of the one. If we ask the reason why there is *avidyā*, or *māyā*, bringing about a fall from *vidyā* or from being, the question cannot be answered. Philosophy as logic has here the negative function of exposing the inadequacy of all intellectual categories, pointing out how the objects of the world are relative to the mind that thinks them and possess no independent existence. It cannot tell us anything definite about either the immutable said to exist apart from what is happening in the world, or about *māyā*, credited with the production of the world. It cannot help us directly to the attainment of reality. It, on the other hand, tells us that to measure reality we have to distort it. It may perhaps serve the interests

of truth when once it is independently ascertained. We can think it out, defend it logically and help its propagation. The supporters of pure monism recognise a higher power than abstract intellect which enables us to feel the push of reality. We have to sink ourselves in the universal consciousness and make ourselves co-extensive with all that is. We do not then so much *think* reality as *live* it, do not so much *know* it as *become* it. Such an extreme monism, with its distinctions of logic and intuition, reality and the world of existence, we meet with in some Upaniṣads, Nāgārjuna and Śaṅkara in his ultra-philosophical moods, Śrī Harṣa and the Advaita Vedāntins, and echoes of it are heard in Parmenides and Plato, Spinoza and Plotinus, Bradley and Bergson, not to speak of the mystics, in the West.¹²

Whatever the being, pure and simple, may be to intuition, to intellect it is nothing more or less than an absolute abstraction. It is supposed to continue when every fact and form of existence is abolished. It is the residue left behind when abstractions is made from the whole world. It is a difficult exercise set to the thought of man to think away the sea and the earth, the sun and the stars, space and time, man and God. When an effort is made to abolish the whole universe, sublimate all existence, nothing seems to remain for thought. Thought, finite and relational, finds to its utter despair that there is just nothing at all when everything existent is abolished. To the conceptual mind the central proposition of intuition, 'Being only is,' means that there is just nothing at all. Thought, as Hegel said, can only work with determinate realities, concrete things. To it all affirmation implies negation, and vice versa. Every concrete is a becoming, combining being and non-being, positive and negative. So those who are not satisfied with the intuited being, and wish to have a synthesis capable of being attained by thought which has a natural instinct for the concrete, are attracted to a system of objective idealism. The concrete idealists try to put together the two concepts of pure being and apparent becoming in the single synthesis of God. Even extreme monists recognise that becoming depends on being, though not vice versa. We get now a sort of refracted absolute, a God who has in Him the possibility of the world, combines in

12. In the Sāṅkhya philosophy we have practically the same account of the world of experience, which does not in the least stain the purity of the witness self. Only a pluralistic prejudice which has no logical basis asserts itself, and we have a plurality of souls. When the pluralism collapses, as it does at the first touch of logic, the Sāṅkhya theory becomes identical with the pure monism here sketched.

His nature the essence of all being, as well as of becoming, unity as well as plurality, unlimitedness and limitation. The pure being now becomes the subject, transforming itself into object and taking back the object into itself. Position, opposition, and composition, to use Hegelian expressions, go on in an eternal circular process. Hegel rightly perceives that the conditions of a concrete world are a subject and an object. These two opposites are combined in every concrete. The great God Himself has in Him the two antagonistic characters where the one is not only through the other, but is actually the other. When such a dynamic God eternally bound in the rotating wheel is asserted, all the degrees of existence, from the divine perfection up to vile dust, are automatically realised. The affirmation of God is the simultaneous affirmation of all degrees of reality between it and nothing. We have now the universe of thought constructed by thought, answering to thought and sustained by thought, in which subject and object are absorbed as moments. The relations of space, time and cause are not subjective forms, but universal principles of thought. If on the view of pure monism we cannot understand the exact relation between identity and difference, we are here on better ground. The world is identity gone into difference. Neither is isolated from the other. God is the inner ground, the basis of identity; the world is the outer manifestation, the externalisation of self-consciousness.

Such a God, according to the theory of pure monism, is just the lapse from the absolute, with the least conceivable interval separating him from pure being or the absolute. It is the product of avidyā which is separated from vidyā by the least conceivable extent. In other words, this concrete God is *the highest product of our highest intelligence*. The pity is, that it is a *product* after all, and our intelligence, however near it approximates to vidyā, is not yet vidyā. This God has in him the maximum of being and the minimum of defect—still a defect. The first touch of māyā, the slightest diminution of absolute being, is enough to throw it into space and time, though this space and this time will be as near as possible to the absolute unextendedness and eternity. The absolute one is converted into the Creator God existent in some space, moving all things from within without stirring from His place. God is the absolute objectivised as something somewhere, a spirit that pushes itself into everything. He is being-non-being, Brahman-māyā, subject-object, eternal force, the motionless mover of Aristotle, the absolute spirit of Hegel, the (absolute-relative) viśiṣṭādvaita of Rāmānuja, *the efficient as well as the final cause of the universe*. The world is

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beginningless and endless, since the energising of God could not have begun and could never come to an end. It is its essential nature to be ever at unrest.

There is no doubt that this is the highest conception which thought can reach. If we follow to the end the natural movement of our intellect which tries to unify the things of the world and synthesise opposites, a principle of explanation which is neither pure being nor pure non-being, but something which combines both, is what we get. This concept is constructed by a compression of all things into the whole. Philosophy on this view is constructive in character, and is therefore positive in its nature and synthetic in its function. Even here logical understanding playing with abstractions shuts us from the concrete in which alone the abstractions live, move and have their being. Thought as reason gets over the difficulties of logical understanding. Starting from the world of experience, we go up to the ultimate principle of God, and from the conception of the whole so gained we descend into details and review the parts. All logical dogmatisms which have confidence in the power of thought end with this conception of the world. The difficulty arises if we doubt the absoluteness of thought. May not our knowledge be relative to the requirements of the mind which unifies and divides? Perhaps for a mind differently shaped, knowledge may be different from what it is. Our present knowledge makes us think that all knowledge will be of this type, but when there are critics who dispute such an assertion, it is difficult to defend the position. Admitting that the conceptual plan of reality revealed to thought is true, still, it is sometimes urged, thought is not identical with reality. By compressing all concepts into one, we do not go beyond concepts. A relation is only a part of the mind that relates. Even an infinitely superior mind is yet a mind and of the same mould as man's. The theory of modified monism is adopted by some Upaniṣads, and the Bhagavadgītā, some followers of Buddhism and Rāmānuja, if not Bādarāyaṇa. In the West Aristotle and Hegel stand out as witnesses to it.

According to the first view perfect being is real; unreal becoming is actual, though, we do not know why. According to the second, the world becoming is a precipitation (apparent) of pure being into space and time by the force of diminution or māyā. According to the third, the highest product we have is a synthesis of pure being and not-being in God. We are immediately under a logical necessity to affirm all intermediate degrees of reality. If pure being is dismissed as a concept useless so far as the world

of experience is concerned and we also disregard as illogical the idea of a Creator God, then what exists is nothing more than a mere flux of becoming, ever aspiring to be something else than what it is. The main principle of Buddhism results. In the world of existence, on the hypothesis of modified monism, the specific characters of the degrees of intermediate reality are to be measured by the distance separating them from the integral reality. The common characters of all of them are existence in space and time. Closer attention reveals to us more and more special attributes. Admit the distinction between thinking reals and unthinking objects, and we have the dualistic philosophy of Madhva. Even this is fundamentally a monism so long as the reals are dependent (paratantra) on God, who alone is independent (svatantra). Emphasise the independence of the thinking beings, and we have pluralism according to Sāṅkhya, if only we do not worry about the existence of God which cannot be demonstrated. Add to it the plurality of the objects of the world, we have pluralistic realism, where even God becomes one real, however great or powerful, among others. In the discussions about the intermediate degrees of reality the unit of individuality seems to depend upon the fancy of the philosopher. And whether a system turns out atheistic or theistic is determined by the attention paid to the absolute under the aegis of which the drama of the universe is enacted. It sometimes shines out brilliantly with its light focussed in a God and at other times fades out. These are the different ways in which the mind of man reacts to the problems of the world according to its own peculiar constitution.

There is a cordial harmony between God and man in Indian thought, while the opposition between the two is more marked in the West. The mythologies of the peoples also indicate it. The myth of Prometheus, the representative man, who tries to help mankind by defending them against Zeus who desires to destroy the human race and supplant them with a new and better species, the story of the labours of Hercules who tries to redeem the world, the conception of Christ as the Son of Man, indicate that man is the centre of attention in the West. It is true that Christ is also called the Son of God, the eldest begotten who is to be sacrificed before a just God's anger can be appeased. Our point here is that the *main* tendency of Western culture is an opposition between man and God, where man resists the might of God, steals fire from him in the interests of humanity. **In India man is a product of God. The whole world is due to the sacrifice of God. The Puruṣa Sūkta speaks of such an eternal sacrifice which sustains**

man and the world.¹³ In it the whole world is pictured as one single being of incomparable vastness and immensity, animated by one spirit, including within its substance all forms of life.

The dominant character of the Indian mind which has coloured all its culture and moulded all its thoughts is the spiritual tendency. Spiritual experience is the foundation of India's rich cultural history. It is mysticism, not in the sense of involving the exercise of any mysterious power, but only as insisting on a discipline of human nature, leading to a realisation of the spiritual. While the sacred scriptures of the Hebrews and the Christians are more religious and ethical, those of the Hindus are more spiritual and contemplative. The one fact of life in India is the Eternal Being of God.

It is the ultimate presupposition of all philosophy that nothing real can be self-contradictory. In the history of thought it takes some time to realise the importance of this presupposition, and make a conscious application of it. In the R̥g-Veda there is an unconscious acceptance of the validity of ordinary knowledge. When we reach the stage of the Upaniṣads, dialectical problems emerge and the difficulties of knowledge are felt. In them we find an attempt made to mark the limits of knowledge and provide room for intuition, but all in a semi-philosophical way. When faith in the power of reason was shaken, scepticism supervened, and materialists and nihilists came upon the scene. Admitting the Upaniṣad position that the unseen reality cannot be comprehended by the logical intellect, Buddhism enforced the unsubstantiality of the world. To it, contradiction is of the nature of things, and the world of experience is nothing more than a tension of opposites. We cannot know if there is anything more than the actual, and this cannot be real since it is self-contradictory. Such a conclusion was the end of the Buddhistic development. We have in the theory of Nāgārjuna a philosophically sustained statement of the central position of the Upaniṣads. There is a real, though we cannot know it; and what we know is not real, for every interpretation of the world as an intelligible system breaks down. All this prepared the way for a self-conscious criticism of reason. Thought itself is self-contradictory or inadequate. Differences arise when the question is put, why exactly it is incapable of grasping reality. Is it because it deals with parts and not the whole, or is it because of its structural incapacity or innate self-contradictoriness? As we have

13. R.V., x. 90; see also R.V., x. 81, 3; Svetāśvatara Up., iii. 3 B.G. xi.

seen, there are those who hold to the rationality of the real with the reservation that reality is not mere reason. So thought is incapable of giving us the whole of reality. The 'that' exceeds the 'what' in Bradley's words. Thought gives us knowledge of reality, but it is only knowledge, and not reality. There are others who feel that the real is self-consistent, and whatever is thought is self-contradictory. Thought works with the opposition of subject and object, and the absolute real is something in which these antitheses are annulled. The most concrete thought, in so far as it tries to combine a many in one, is still abstract, because it is self-contradictory, and if we want to grasp the real, we have to give up thought. On the first hypothesis, what thought reveals is not opposed to reality, but is revelatory of a part of it. Partial views are contradictory only because they are partial. They are true so far as they go, but they are not the whole truth. The second hypothesis tells us that reality can be apprehended by a form of feeling or intuition.¹⁴ The first view also insists on a supplementing of thought by feeling, if reality is to be attained in its fullness. We seem to require another element in addition to thought, and this is suggested by the term 'darśana', which is used to describe a system of philosophy, doctrine of śāstra.

The term 'darśana' comes from the word *drś*, to see. This seeing may be either perceptual observation or conceptual knowledge or intuitional experience. It may be inspection of facts, logical inquiry or insight of soul. Generally, 'darśanas' mean critical expositions, logical surveys, or systems. We do not find the word used in this reference in the early stages of philosophical thought, when philosophy was more intuitional. It shows that 'darśana' is not an intuition, however much it may be allied to it. Perhaps the word is advisedly used, to indicate a thought system acquired by intuitive experience and sustained by logical argument. In the systems of extreme monism philosophy prepares the way for intuitional experience by giving us an idea of the impotence of thought. In the systems of moderate monism, where the real is a concrete whole, philosophy succeeds at best in giving an ideal reconstruction of reality. But the real transcends, surrounds and overflows our miserable categories. In extreme monism it is intuitional experience that reveals to us the fullness of reality; in concrete

14. Cf. Bradley, who says that we can reach reality through a kind of feeling, and McTaggart, who looks upon love as the most satisfactory way of characterising the absolute.

monism, it is insight, where knowledge is penetrated by feeling and emotion. Conceptual constructions do not possess the certainty of experienced facts. Again, an opinion or logical view becomes truth only if it stands the test of life.

'Darśana' is a word which is conveniently vague, as it stands for a dialectical defence of extreme monism as well as the intuitional truth on which it is based. Philosophically 'darśana' is putting the intuition to proof and propagating it logically. Even in other systems it applies to the logical exposition of the truth that could be had in conceptual terms with or without the aid of any vivifying intuition. 'Darśana' so applies to all views of reality taken by the mind of man, and if reality is one, the different views attempting to reveal the same must agree with each other. They cannot have anything accidental or contingent, but must reflect the different viewpoints obtained of the one real. By a close consideration of the several views our mind gets by snapshooting reality from different points, we rise to the second stage of a full rendering of reality in logical terms. When we realise the inadequacy of a conceptual account to reality, we try to seize the real by intuition, where the intellectual ideas are swallowed up. It is then that we are said to get the pure 'being' of extreme monism from which we get back to the logical real of thought, which again we begin to spell letter by letter in the different systems themselves. 'Darśana' as applicable to this last means any scientific account of reality. It is the one word that stands for all the complex inspiration of philosophy by its beautiful vagueness.

A 'darśana' is a spiritual perception, a whole view revealed to the soul sense. This soul sight, which is possible only when and where philosophy is lived, is the distinguishing mark of a true philosopher. So the highest triumphs of philosophy are possible only to those who have achieved in themselves a purity of soul. This purity is based upon a profound acceptance of experience, realised only when some point of hidden strength within man, from which he can not only inspect but comprehend life, is found. From this inner source the philosopher reveals to us the truth of life, a truth which mere intellect is unable to discover. The vision is produced almost as naturally as a fruit from a flower out of the mysterious centre where all experience is reconciled.

The seeker after truth must satisfy certain essential conditions before he sets out on his quest. Śaṅkara, in his commentary on the first Sūtra of the Vedānta Sūtras, makes out that four conditions are essential for any student of philosophy. The first condition is a knowledge of the distinction

between the eternal and the non-eternal. This does not mean full knowledge, which can come only at the end, but only a metaphysical bent which does not accept all it sees to be absolutely real, a questioning tendency in the inquirer. He must have the inquiring spirit to probe all things, a burning imagination which could extract a truth from a mass of apparently disconnected data, and a habit of meditation which will not allow his mind to dissipate itself. The second condition is the subjugation of the desire for the fruits of action either in the present life or a future one. It demands the renunciation of all petty desire, personal motive and practical interest. Speculation or inquiry to the reflective mind is its own end. The right employment of intellect is understanding the things, good as well as bad. The philosopher is a naturalist who should follow the movement of things without exaggerating the good or belittling the evil on behalf of some prejudice of his. He must stand outside of life and look on it. So it is said that he must have no love of the present or the future. Only then can he stake his all on clear thinking and honest judgment and develop an impersonal cosmic outlook with devotedness to fact. To get this temper he must suffer a change of heart, which is insisted on in the third condition, where the student is enjoined to acquire tranquillity, self-restraint, renunciation, patience, peace of mind and faith. Only a trained mind which utterly controls the body can inquire and meditate endlessly so long as life remains, never for a moment losing sight of the object, never for a moment letting it be obscured by any terrestrial temptation. The seeker after truth must have the necessary courage to lose all for his highest end. So is he required to undergo hard discipline, spurn pleasure, suffer sorrow and contempt. A spiritual discipline which includes pitiless self-examination will enable the seeker to reach his end of freedom. The desire for mokṣa or release is the fourth condition. The metaphysically minded man who has given up all his desires and trained his mind has only one devouring desire to achieve the end or reach the eternal. The people of India have such an immense respect for these philosophers who glory in the might of knowledge and the power of intellect, that they worship them. The prophetic souls who with a noble passion for truth strive hard to understand the mystery of the world and give utterance to it, spending laborious days and sleepless nights, are philosophers in a vital sense of the term. They comprehend experience on behalf of mankind, and so the latter are eternally grateful to them.

Reverence for the past is another national trait. There is a certain doggedness of temperament, a stubborn loyalty to lose nothing in the long march of the ages. When confronted with new cultures or sudden extensions of knowledge, the Indian does not yield to the temptations of the hour, but holds fast to his traditional faith, importing as much as possible of the new into the old. This conservative liberalism is the secret of the success of Indian culture and civilisation. Of the great civilisations of the world, hoary with age, only the Indian still survives. The magnificence of the Egyptian civilisation can be learnt only from the reports of the archaeologists and the readings of the hieroglyphics; the Babylonian Empire, with its marvels of scientific, irrigation and engineering skill, is today nothing more than a heap of ruins; the great Roman culture, with its political institutions and ideals of law and equality, is, to a large extent, a thing of the past. The Indian civilisation, which even at the lowest estimate is 4,000 years old, still survives in its essential features. Her civilisation, dating back to the period of the Vedas, is young and old at the same time. She has been renewing her youth whenever the course of history demanded it. When a change occurs, it is not consciously felt to be a change. It is achieved, and all the time it professes to be only a new name for an old way of thinking. In the R̥g-Veda we shall see how the religious consciousness of the Aryan invaders takes note of the conceptions of the people of the soil. In the Atharva-Veda we find that the vaguer cosmic deities are added to the gods of the sky and sun, fire and wind worshipped by the Aryan peoples from the Ganges to the Hellespont. The Upaniṣads are regarded as a revival or rather a realisation of something found already in the Vedic hymns. The Bhagavadgītā professes to sum up the teachings of the Upaniṣads. We have in the Ep̥is the meeting-point of the religious conceptions of the highest import with the early nature worship. To respect the spirit of reverence in man for the ancient makes for the success of the new.¹⁵ The old spirit is maintained, though not the old forms. This

15. Cf. 'This claim of a new thing to be old is, in varying degrees, a common characteristic of great movements. The Reformation professed to be a return to the Bible, the Evangelical movement in England a return to the Gospels, the High Church movement a return to the Early Church. A large element even in the French Revolution, the greatest of all breaches with the past, had for its ideal a return to Roman republican virtue or to the simplicity of the natural man' (Gilbert Murray, *Four Stages of Greek Religion*, p. 58).

tendency to preserve the type has led to the fashionable remark that India is immobile. The mind of man never stands still, though it admits of no absolute breach with the past.

This respect for the past has produced a regular continuity in Indian thought, where the ages are bound each to each by natural piety. The Hindu culture is a product of ages of change wrought by hundreds of generations, of which some are long, stale and sad, and others short, quick and joyous, where each has added something of quality to the great rich tradition which is yet alive, though it bears within it the marks of the dead past. The career of Indian philosophy has been compared to the course of a stream which, tumbling joyfully from its source among the northern mountain tops, rushes, through the shadowy valleys and plains, catching the lesser streams in its imperious current, till it sweeps increased to majesty and serene power through the lands and peoples whose fortunes it affects, bearing a thousand ships on its bosom. Who knows whether and when this mighty stream which yet flows on with tumult and rejoicing will pass into the ocean, the father of all streams?

There are not wanting Indian thinkers who look upon the whole of Indian philosophy as one system of continuous revelation. They believe that each civilisation is working out some divine thought which is natural to it.¹⁶ There is an immanent teleology which shapes the life of each human race towards some complete development. The several views set forth in India are considered to be the branches of the self-same tree. The short cuts and blind alleys are somehow reconciled with the main road of advance to the truth. A familiar way in which the six orthodox systems are reconciled is to say that just as a mother in pointing out the moon to the baby speaks of it as the shining circle at the top of the tree, which is quite intelligible to the child, without mentioning the immense distance separating the earth from the moon which would have bewildered it, even so are different views given to suit the varying weakness of human understanding. The Prabodhacandrodaya, a philosophic drama, states that the six systems of Hindu philosophy are not mutually exclusive, but establish from various points of view the glory of the same uncreate God. They together form the living focus of the scattered rays that the many-faceted humanity reflects from the splendid sun. Mādhava's

16. The Greeks call this special quality of each people their 'nature', and the

Indians call it their 'dharma'.

Sarvadarśanasamgraha (AD 1380) sketches sixteen systems of thought so as to exhibit a gradually ascending series, culminating in the Advaita Vedānta (or non-dualism). In the spirit of Hegel, he looks upon the history of Indian philosophy as a progressive effort towards a fully articulated conception of the world. The truth is unfolded bit by bit in the successive systems, and complete truth is reflected only when the series of philosophies is completed. In the Advaita Vedānta are the many lights brought to a single focus. Vijñānabhikṣu, the sixteenth-century theologian and thinker, holds that all systems are authoritative,¹⁷ and reconciles them by distinguishing practical from metaphysical truth, and looks upon Sāṃkhya as the final expression of truth. Madhusūdana Sarasvatī in his Prasthānabheda writes: 'The ultimate scope of all the munis, authors of these different systems, is to support the theory of māyā, and their only design is to establish the existence of one supreme God, the sole essence, for these munis could not be mistaken, since they were omniscient. But as they saw that men, addicted to the pursuit of external objects, could not all at once penetrate into the highest truths, they held out to them a variety of theories in order that they might not fall into atheism. Misunderstanding the object which the munis thus had in view, and representing that they even designed to propound doctrines contrary to the Vedas, men have come to regard the specific doctrines of these several schools with preference, and thus became adherents of a variety of systems.'¹⁸ This reconciliation of the several systems,¹⁹ is attempted by almost all the critics and commentators. The difference is only about what they regard as the truth. Defenders of Nyāya like Udayana look upon Nyāya, and theists like Rāmānuja consider theism to be the truth. It is in accordance with the spirit of Indian culture to think that the several currents of thought flowing in its soil will discharge their waters into the one river whose flood shall make for the City of God.

From the beginning the Indian felt that truth was many-sided, and different views contained different aspects of truth which no one could fully express. He was therefore tolerant and receptive of other views. He was fearless in accepting even dangerous doctrines so long as they were backed up by logic. He would not allow to die, if he could help it, one jot

17. Sarvāgamaprāmānya.

18. See Muir, O.S.T., iv. 1 and 2.

19. Sarvadarśanasamgraha.

or tittle of the tradition, but would try to accommodate it all. Several cases of such tolerant treatment we shall meet with in the course of our study. Of course there are dangers incident to such a breadth of view. Often it has led the Indian thinkers into misty vagueness, lazy acceptance and cheap eclecticism.

III

SOME CHARGES AGAINST INDIAN PHILOSOPHY

The main charges against Indian philosophy are those of pessimism, dogmatism, indifference to ethics and unprogressiveness.

Almost every critic of Indian philosophy and culture harps on its pessimism.²⁰ We cannot, however, understand how the human mind can speculate freely and remodel life when it is filled with weariness and overcome by a feeling of hopelessness. A priori, the scope and freedom of Indian thought are inconsistent with an ultimate pessimism. Indian philosophy is pessimistic if by pessimism is meant a sense of dissatisfaction with what is or exists. In this sense all philosophy is pessimistic. The suffering of the world provokes the problems of philosophy and religion. Systems of religion which emphasise redemption seek for an escape from life as we live it on earth. But reality in its essence is not evil. In Indian philosophy the same word 'sat' indicates both reality and perfection. Truth and goodness, or more accurately reality and perfection, go together. The real is also the supremely valuable, and this is the basis of all optimism. Professor Bosanquet writes: 'I believe in optimism, but I add that no optimism is worth its salt that does not go all the way with pessimism and arrive at a point beyond it. This, I am convinced, is the true spirit of life; and if any one thinks it dangerous, and an excuse for unjustifiable acquiescence in evil, I reply that all truth which has any touch of thoroughness has its danger for practice.'²¹ Indian thinkers are pessimistic in so far as they look upon the world order as an evil and a lie; they are optimistic since they feel that there is a way out of it into the realm of truth, which is also goodness.

20. Chailley, in his *Administrative Problems* (p. 67), asserts that Indian philosophy springs 'from lassitude and a desire for eternal rest.'

21. *Social and International Ideals*, p. 43. Cf. Schopenhauer: 'Optimism, when it is not merely the thoughtless talk of such as harbour nothing but words under their low foreheads, appears not merely as an absurd but also as a really wicked way of thinking, as a bitter mockery of the unspeakable suffering of humanity.'

Indian philosophy, it is said, is nothing if not dogmatic, and true philosophy cannot subsist with the acceptance of dogma. The course of our study of Indian thought will be an answer to this charge. Many of the systems of philosophy discuss the problem of knowledge, its origin, and validity as a preliminary to a study of other problems. It is true that the Veda or the śruti is generally considered to be an authoritative source of knowledge. But a philosophy becomes dogmatic only if the assertions of the Veda are looked upon as superior to the evidence of the senses and the conclusions of reason. The Vedic statements are āptavacana, or sayings of the wise, which we are called upon to accept, if we feel convinced that those wise had better means than we have of forming a judgment on the matter in question. Generally, these Vedic truths refer to the experiences of the seers, which any rational rendering of reality must take into account. These intuitional experiences are within the possibility of all men if only they will to have them.²² The appeal to the Vedas does not involve any reference to an extra-philosophical standard. What is dogma to the ordinary man is experience to the pure in heart. It is true that when we reach the stage of the later commentaries we have a state of philosophical orthodoxy, when speculation becomes an academic defence of accepted dogmas. The earlier systems also call themselves exegetical and profess to be commentaries on the old texts, but they never tended to become scholastic, since the Upaniṣads to which they looked for inspiration were many-sided.²³ After the eighth century philosophical controversy became traditional and scholastic in character, and we miss the freedom of the earlier era. The founders of the schools are canonised, and so questioning their opinions is little short of sacrilege and impiety. The fundamental propositions are settled once for all, and the function of the teacher is only to transmit the beliefs of the school with such changes as his brain can command and the times require. We have fresh arguments for foregone conclusions, new expedients to meet new difficulties and a re-establishment of the old with a little change of front or twist of dialectic. There is less of meditation on the deep problems of life and more of discussion of the artificial ones. The treasure that is the tradition clogs us with its own burdensome wealth, and philosophy ceases to move and sometimes finds it hard to breathe at all. The charge of unprofitableness urged in general against the whole of Indian philosophy may have some point when applied

to the wordy disquisitions of the commentators who are not the inspired apostles of life and beauty which the older generation of philosophers were, but professional dialecticians conscious of their mission to mankind. Yet even under the inevitable crust of age the soul remains young, and now and then breaks through and sprouts into something green and tender. There arise men like Śaṅkara or Mādhava, who call themselves commentators, and yet perceive the spiritual principle which directs the movements of the world.

It is often urged against Indian philosophy that it is nonethical in character. 'There is practically no ethical philosophy within the frontiers of Hindu thinking.'²⁴ The charge, however, cannot be sustained. Attempts to fill the whole of life with the power of spirit are common. Next to the category of reality, that of dharma is the most important concept in Indian thought. So far as the actual ethical content is concerned, Buddhism, Jainism and Hinduism are not inferior to others. Ethical perfection is the first step towards divine knowledge.

Philosophy in India, it is said, remains stationary and represents an endless process of threshing old straw. 'The unchanging East' connotes that in India time has ceased to fly and remained motionless for ever. If it means that there is a fundamental identity in the problems, then this sort of unprogressiveness is a feature common to all philosophical developments. The same old problems of God, freedom and immortality and the same old unsatisfactory solutions are repeated throughout the centuries. While the form of the problems is the same, the matter has changed. There is all the difference in the world between the God of the Vedic hymns drinking soma, and the Absolute of Śaṅkara. The situations to which philosophy is a response renew themselves in each generation, and the effort to deal with them needs a corresponding renewal. If the objection means that there is not much fundamental difference between the solutions given in the ancient scriptures of India and Plato's works or Christian writings, it only shows that the same loving universal Spirit has been uttering its message and making its voice heard from time to time. The sacred themes come down to us through the ages variously balanced and coloured by race and tradition. If it means that there is a certain reverence for the past which impels the Indian thinkers to pour new wine

nto old bottles, we have already said that this is a characteristic of the Indian mind. The way to grow is to take in all the good that has gone before and add to it something more. It is to inherit the faith of the fathers and modify it by the spirit of the time. If Indian thought is said to be futile because it did not take into account the progress of the sciences, it is the futility which all old things possess in the eyes of the new. The scientific developments have not brought about as great a change in the substance of philosophy as this criticism assumes. The theories so revolutionary in their scientific aspects as the biological evolution and the physical relativity have not upset established philosophies, but only confirmed them from fresh fields.

The charge of unprogressiveness or stationariness holds when we reach the stage after the first great commentators. The hand of the past grew heavy, initiative was curbed, and the work of the scholastics, comparable to that of the medieval Schoolmen, with the same reverence for authority and tradition and the same intrusion of theological prejudice, began. The Indian philosopher could have done better with greater freedom. To continue the living development of philosophy, to keep the current of creative energy flowing, contact with the living movements of the world capable of promoting real freedom of thought is necessary. Perhaps the philosophy of India which lost its strength and vigour when her political fortunes met with defeat may derive fresh inspiration and a new impulse from the era just dawning upon her. If the Indian thinkers combine a love of what is old with a thirst for what is true, Indian philosophy may yet have a future as glorious as its past.

IV

VALUE OF THE STUDY OF INDIAN PHILOSOPHY

It is not merely as a piece of antiquarian investigation that Indian thought deserves study. Speculations of particular thinkers or the ideas of a past age are not without value. Nothing that has ever interested men and women can ever wholly lose its vitality. In the thought of the Vedic Aryans we witness the wrestlings of powerful minds with the highest problems set to thinking man. In the words of Hegel: "The history of philosophy in its true meaning deals not with the past, but with the eternal and veritable present; and in its results resembles, not a museum of aberrations of the

human intellect, but a pantheon of Godlike figures representing various stages of the immanent logic of all human thought.²⁵ The history of Indian thought is not what it seems at first sight, a mere succession of ghostly ideas which follow one another in rapid succession.

It is easy to make sport of philosophy, since to those who are content to live among the things of sense and think in a slovenly way, philosophic problems wear a look of unreality, and possess a flavour of absurdity. The hostile critic looks upon the disputes of philosophy as wasteful logic-chopping and intellectual legerdemain concerned with such conundrums as 'Did the hen come first or the egg?'²⁶ The problems discussed in Indian philosophy have perplexed men from the beginning of time, though they have never been solved to the satisfaction of all. There seems to be an essential human need or longing to know the nature of soul and God. Every thinking man, when he reflects on the fact that he is swept without pause along the great curve of birth to death, the rising flood of life, the ceaseless stream of becoming, which presses ever onward and upward, cannot but ask, What is the purpose of it all, as a whole, apart from the little distracting incidents of the way? Philosophy is no racial idiosyncrasy of India, but a human interest.

If we lay aside professional philosophy, which may well be a futile business, we have in India one of the best logical developments of thought. The labours of the Indian thinkers are so valuable to the advancement of human knowledge that we judge their work to be worthy of study, even if we find manifest errors in it. If the sophisms which ruined the philosophies of the past are any reason for neglecting them, then not only the study of Indian philosophy but of all philosophy should be given up. After all, the residuum of permanent truth which may be acknowledged as the effective contribution to human thought even with regard to the most illustrious thinkers of the West, like Plato and Aristotle, is not very great. It is easy to smile at the exquisite rhapsodies of Plato or the dull dogmatism of Descartes or the arid empiricism of Hume or the bewildering paradoxes of Hegel, and yet withal there is no doubt that we profit by the study of their works. Even so, though only a few of the vital truths of Indian thinkers have moulded the history of the human mind, yet there are general

25. *Logic*, p. 137. Wallace's translation.

26. After all, this question is not so trite or innocent as it appears to be. See Samuel Butler's *Luck or Cunning*.

syntheses, systematic conceptions put forward by a Bādarāyaṇa or a Śaṅkara which will remain landmarks of human thought and monuments of human genius.²⁷

To the Indian student a study of Indian philosophy alone can give a right perspective about the past of India. At the present day the average Hindu looks upon his past systems, Buddhism, Advaitism, Dvaitism, as all equally worthy and acceptable to reason. The authors of the systems are worshipped as divine. A study of Indian philosophy will conduce to the clearing up of the situation, the adopting of a more balanced outlook and the freeing of the mind from the oppressing sense of the perfection of everything that is ancient. This freedom from bondage to authority is an ideal worth striving at. For when the enslaved intellect is freed, original thinking and creative effort might again be possible. It may be a melancholy satisfaction to the present day Indian to know some details of his country's early history. Old men console themselves with the stories of their youth, and the way to forget the bad present is to read about the good past.

V

PERIODS OF INDIAN THOUGHT

It is necessary to give some justification for the title 'Indian Philosophy,' when we are discussing the philosophy of the Hindus as distinct from that of the other communities which have also their place in India. The

27. Many scholars of the West recognise the value of Indian philosophy. 'On the other hand, when we read with attention the poetical and philosophical movements of the East, above all those of India, which are beginning to spread in Europe, we discover there so many truths, and truths so profound, and which make such a contrast with the meanness of the results at which the European genius has sometimes stopped, that we are constrained to bend the knee before that of the East, and to see in this cradle of the human race the native land of the highest philosophy' (Victor Cousin). 'If I were to ask myself from what literature, we here in Europe, we who have been nurtured almost exclusively on the thoughts of Greeks and Romans, and of one Semitic race, the Jewish, may draw that corrective which is most wanted, in order to make our inner life more perfect, more comprehensive, more universal, in fact more truly human, a life, not for this life only, but a transfigured and eternal life—again, I should point to India' (Max Müller). 'Among nations possessing indigenous philosophy and metaphysics, together with an innate relish for these pursuits, such as at present characterises Germany, and in olden times was the proud distinction of Greece, Hindustan holds the first rank in point of time' (Ibid.).

most obvious reason is that of common usage. India even today is mainly Hindu. And we are concerned here with the history of Indian thought up till AD 1000 or a little after, when the fortunes of the Hindus became more and more linked with those of the non-Hindus.

To the continuous development of Indian thought different peoples at different ages have brought their gifts, yet the force of the Indian spirit had its own shaping influence on them. It is not possible for us to be sure of the exact chronological development, though we shall try to view Indian thought from the historical point of view. The doctrines of particular schools are relative to their environment and have to be viewed together. Otherwise, they will cease to have any living interest for us and become dead traditions. Each system of philosophy is an answer to a positive question which its age has put to itself, and when viewed from its own angle of vision will be seen to contain some truth. The philosophies are not sets of propositions conclusive or mistaken, but the expression and evolution of a mind with which and in which we must live if we wish to know how the systems shaped themselves. We must recognise the solidarity of philosophy with history, of intellectual life with the social conditions.²⁸ The historical method requires us not to take sides in the controversy of schools, but follow the development with strict indifference.

While we are keenly alive to the immense importance of historical perspective, we regret that on account of the almost entire neglect of the chronological sequences of the writings it is not possible for us to determine exactly the relative dates of the systems. So unhistorical, or perhaps so ultra-philosophical, was the nature of the ancient Indian, that we know more about the philosophies than about the philosophers. From the time of the birth of Buddha Indian chronology is on a better foundation. The rise of Buddhism was contemporaneous with the extension of the Persian power to the Indus under the dynasty of Achaemenidae in Persia. It is said to be the source of the earliest knowledge of India in the West obtained by Hecateus and Herodotus.

28. In the image of Walter Pater. 'As the strangely twisted pine-tree, which would be a freak of nature on an English lawn, is seen, if we replace it in thought, amid the contending forces of the Alpine torrent that actually shaped its growth, to have been the creature of necessity, of the logic of certain facts, even so the most fantastic beliefs will assume their natural propriety when they are duly correlated with the conditions round them of which they are in truth a part' (*Plato and Platonism*, p. 10).

The following are the broad divisions of Indian philosophy: (1) The Vedic Period (1500 BC–600 BC) covers the age of the settlement of the Aryans and the gradual expansion and spread of the Aryan culture and civilisation. It was the time which witnessed the rise of the forest universities, where were evolved the beginnings of the sublime idealism of India. We discern in it successive strata of thought, signified by the Mantras or the hymns, the Brāhmaṇas, and the Upaniṣads. The views put forward in this age are not philosophical in the technical sense of the term. It is the age of groping, where superstition and thought are yet in conflict. Yet to give order and continuity to the subject, it is necessary for us to begin with an account of the outlook of the hymns of the R̥g-Veda and discuss the views of the Upaniṣads.

(2) The Epic Period (600 BC to AD 200) extends over the development between the early Upaniṣads and the darśanas or the systems of philosophy. The epics of the Rāmāyaṇa and the Mahābhārata serve as the vehicles through which was conveyed the new message of the heroic and the godly in human relations. In this period we have also the great democratisation of the Upaniṣad ideas in Buddhism and the Bhagavadgītā. The religious systems of Buddhism, Jainism, Śaivism, Vaiṣṇavism belong to this age. The development of abstract thought which culminated in the schools of Indian philosophy, the darśanas, belongs to this period. Most of the systems had their early beginnings about the period of the rise of Buddhism, and they developed side by side through many centuries; yet the systematic works of the schools belong to a later age.

(3) The Sūtra Period (from AD 200) comes next. The mass of material grew so unwieldy that it was found necessary to devise a shorthand scheme of philosophy. This reduction and summarisation occurred in the form of Sūtras. These Sūtras are unintelligible without commentaries, so much so that the latter have become more important than the Sūtras themselves. Here we have the critical attitude in philosophy developed. In the preceding periods we have philosophical discussions, no doubt, where the mind did not passively receive whatever it was told, but played round the subject, raising objections and answering them. By happy intuition the thinkers pitch upon some general principles which seem to them to explain all aspects of the universe. The philosophical syntheses, however profound and acute they may be, suffered throughout from the defect of being pre-critical, in the Kantian sense of the term. Without a previous criticism of the human capacity to solve philosophical problems, the mind looked at

the world and reached its conclusions. The earlier efforts to understand and interpret the world were not strictly philosophical attempts, since they were not troubled by any scruples about the competence of the human mind or the efficiency of the instruments and the criteria employed. As Caird puts it, mind was 'too busy with the object to attend to itself.'²⁹ So when we come to the Sūtras we have thought and reflection become self-conscious, and not merely constructive imagination and religious freedom. Among the systems themselves, we cannot say definitely which are earlier and which later. There are cross-references throughout. The Yoga accepts the Sāṅkhya, the Vaiśeṣika recognises both the Nyāya and the Sāṅkhya. Nyāya refers to the Vedānta and the Sāṅkhya. Mīmāṃsā directly or indirectly recognises the pre-existence of all others. So does the Vedānta. Professor Garbe holds that the Sāṅkhya is the oldest school. Next came Yoga, next Mīmāṃsā and Vedānta, and last of all Vaiśeṣika and Nyāya. The Sūtra period cannot be sharply distinguished from the scholastic period of the commentators. The two between them extend up till the present day.

(4) The Scholastic Period also dates from the second century AD. It is not possible for us to draw a hard and fast line between this and the previous one. Yet it is to this that the great names of Kumārila, Śaṅkara, Śrīdhara, Rāmānuja, Madhva, Vācaspati, Udayana, Bhāskara, Jayanta, Vijñānabhikṣu and Raghunātha belong. The literature soon becomes grossly polemical. We find a brood of schoolmen, noisy controversialists indulging in over-subtle theories and fine-spun arguments, who fought fiercely over the nature of logical universals. Many Indian scholars dread opening their tomes which more often confuse than enlighten us. None would deny their acuteness and enthusiasm. Instead of thought we find words, instead of philosophy logic-chopping. Obscurity of thought, subtlety of logic, intolerance of disposition, mark the worst type of the commentators. The better type, of course, are quite as valuable as the ancient thinkers themselves. Commentators like Śaṅkara and Rāmānuja re-state the old doctrine, and their restatement is just as valuable as a spiritual discovery.

There are some histories of Indian philosophy written by Indian thinkers. Almost all later commentators from their own points of view discuss other doctrines. In that way every commentator happens to give an idea of the other views. Sometimes conscious attempts are made to

deal with the several systems in a continuous manner. Some of the chief of these 'historical' accounts may here be mentioned. *Ṣaḍdarśanasamuccaya*, or the epitome of the six systems, is the name of a work by Haribhadra.³⁰ Samantabhadra, a Digambara Jain of the sixth century, is said to have written a work called *Āptamīmāṃsā*, containing a review of the various philosophical schools.³¹ A Mādhyamika Buddhist, by name Bhāvaviveka, is reputed to be the author of a work called *Tarkajvāla*, a criticism of the Mīmāṃsā, Sāṃkhya, Vaiśeṣika and Vedānta schools. A Digambara Jain, by name Vidyānanda, in his *Aṣṭasāhasrī*, and another Digambara, by name Merutuṅga, in his work on *Ṣaḍdarśanavicāra* (AD 1300) are said to have criticised the Hindu systems. The most popular account of Indian philosophy is the *Sarvadarśanasamgraha*, by the well-known Vedāntin Mādhavācārya, who lived in the fourteenth century in South India. The *Sarvasiddhāntasārasamgraha* assigned to Śaṃkara,³² and the *Prasthānanabheda* by Madhusūdana Sarasvatī,³³ contain useful accounts of the different philosophies.

30. Mr Barth says: 'Haribhadra, who according to tradition died in AD 529, but by more exact testimony lived in the ninth century, and who had several homonyms, was a Brāhmin converted to Jainism. He is famous still as the author of Fourteen Hundred Prabandhas (chapters of works), and seems to have been one of the first to introduce the Sanskrit language into the scholastic literature of the Śvetāmbara Jains. By the six systems the Brāhmins understand the two Mīmāṃsās, the Sāṃkhya and the Yoga, the Nyāya and the Vaiśeṣika. Haribhadra, on the other hand, expounds under this title very curtly in eighty-seven slokas, but quite impartially, the essential principles of the Buddhists, the Jainas, the followers of the Nyāya, the Sāṃkhya, the Vaiśeṣika and the Mīmāṃsā. He thus selects his own school and those with whom the Jainas had the closest affinities, and puts them in between the schools of their greatest enemies, the Buddhists and the ritualists of the school of Jaimini. These last he couples with the Lokāyatikas, the atheistic materialists, not simply from sectarian fanaticism and on his own judgment, but following an opinion that was then prevalent even among the Brāhmins' (*Indian Antiquary*, p. 66, 1895).

31. Vidyabhushan, *Mediaeval Systems of Indian Logic*, p. 23.

32. The ascription seems to be incorrect. See Keith: *Indian Logic*, p. 242, n. 3.

33. See Max Müller, *Six Systems*, pp. 75-84.

TOWARDS A SOCIOLOGY OF INDIAN LAW

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UPENDRA BAXI



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Dedicated to the Memory of Professor Julius Stone

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Preface

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UPENDRA BAXI
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The original of the present monograph was commissioned by the Indian Council of Social Science Research, as a contribution to their *Survey of Research in Sociology and Social Anthropology, 1969-1979* (Satvahan, 1986). The text of this *Survey*, reproduced here in an augmented form, goes much further back than 1969 ; I record here my appreciation of the ICSSR for their indulgence on this score.

Since the text was submitted to the ICSSR in early 1980, it explored themes, issues and literature emerging till then. Since the *Survey* is being published only now (1986), I requested the ICSSR to permit a separate monographic publication with a postscript and supplementary bibliography, since to revise the manuscript would not merely have added to the delay in the publication of their series but also disrupted their time-span for the *Survey* series. I remain appreciative of the ICSSR's ready agreement to this suggestion.

The period 1980-1985 has produced a fascinating corpus of literature relevant to sociological exploration of the law. This literature ranges from work on classical Indian jurisprudence to the contemporary profile of the Indian legal profession. It is not possible to provide a detailed thematic review of all these works, but interested readers will, we hope, find the supplementary bibliography useful. In the Postscript we focus on three significant domains : compensatory discrimination policies, the emergent subaltern studies and social action litigation (still miscalled 'public interest litigation').

The publication of the *Survey*, with additional materials, is perhaps, justified by the hope that this format will make it easily accessible to students and scholars concerned with sociology of law. In particular, we hope that this format will help instruction in courses like 'Law and Society', 'Law and Social Change', 'Legal History' and 'Legal System'.

I am deeply grateful to Shri Satish Chander and his colleagues at the Delhi University Law Library for their warm-hearted co-operation. Shri H.C. Jain and Shri Pramod Singh of the Indian Law Institute Library

(vi)

assisted me at irritatingly short notices to complete details of the bibliography.

Shri K.J. Kapoor, now with the Indian Society of International Law, assisted me in preparation of bibliography and sources on customary law; and Shri D. Sud, then a student in Master of Law's programme at Delhi University, saved me from many errors of commission and omission.

Shri S.S. Narula and Satvahan Publications took the initiative for this publication. The argus-eyed editing by Shri Narula has contributed immeasurably to making presentable an otherwise musty manuscript. It is a rare experience for an Indian author to have a publisher who is so demanding of the author as Shri Narula.

New Delhi

Upendra Baxi

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SOCIOLOGY OF LAW

- . Law and Social Change : Some Aspects of Contemporary Experience.
- i. People's Law or Non-State Legal Systems.
- i. Tribal Law and Justice.
- i. Nyaya Panchayats.
- i. Law and Social Control.
- i. Adjudication under State Legal Systems.

All the available literature has been examined, or even mentioned in the text, though an attempt has been made to make the bibliography complete as possible. A variety of methods has been used to examine different themes and literature, including the rather unconventional one of (the present format) rather detailed examination of some works which deserve fuller exposition. The result is not aesthetically pleasant; but I hope that the untidiness is somewhat compensated by the issues raised overall by the survey.

I

CLASSICAL HINDU LAW

Veena Das noted, in the previous survey, the complexities of the dialectic between the law in the books and the law in action with regard to *dharma-sastras*. She complained rightly, and without at all belittling the magnitude of achievement, that Kane's "monumental six volume work" does not, after all, "give one any insight into the structure of legal rules." She preferred to such exegetical and doctrinal method the more explicit ethnographical work. But on the whole she lamented the lack of a "single sociological compilation of *corpus juris* for any social group in India" (Das, 1974 : 368-75).

A major publication since then has been Robert Lingat's (1973) *Classical Law of India* (translated by J.D.M. Derrett, to whom all students of Indian law and society stand now further indebted). Lingat's analysis relates to many perplexities which assailed Veena Das and is generally pertinent to any account of social thought on Indian (and not just the Hindu) law. Lingat's contribution merits an extended analysis in this section. Lingat formulates with enviable elegance of style, certain basic questions : How is one to distinguish (prior to the advent of the Western conceptions of law and authority) between *dharma* and law, between *dharma*, law, custom, and royal power? What kinds of relationships exist among these? What are the relationships between the law-in-books and the law-in-action? What are the distinctive features of the Hindu jurisprudence? These, and related questions, have no doubt preoccupied eminent scholars in the field : but Lingat offers, a systematic array of answers to them, and subsequent work in the area will have to take them as starting points for thought.

Dharma, explains Lingat, is not merely a "set of eternal laws", inherent in the nature of things but is also a "morality addressed to men in society," a morality which specifies the "totality of duties which bears

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upon the individual according to his status (*varna*) and the stage of his life (*asrama*)" (Lingat 1973 : 3-4). The morality of *dharma* (superior to that of *artha*—wealth, interest—and *kama*—pleasure) is both social and religious : *dharma* "is essentially a rule of interdependence, founded on the hierarchy corresponding to the nature of things and necessary for the maintenance of social order." To deviate from its requirements "is to violate one's salvation" (*ibid.*, 211). *Dharma* is transcendent and immutable; its authority derives from the natural order of things, although *dharma* has no "constraining power by itself" (*ibid.*, 258). Thus, says Lingat, the "rule of *dharma* will remain fixed at the very foundation of the concept of law" (*ibid.*, 5-6).

Hence the problem : Can we analytically disengage the rules of *dharma* from juridical rules? The latter, quite prominent in *dharmaśāstras* "continue to be incorporated with rules of a purely religious and ritual inspiration." The rule of prescription (through adverse possession) formulated by Yajñavalkya, is "virtually of the same nature as that which enjoins upon a *dvija* a duty of not marrying a woman of *varna* higher than his own." Both these precepts "express or rather determine the requirements necessary to maintain the cosmic and the moral order" (*ibid.*, 135). Fulfilment of both the precepts represent an unquestionable religious duty, and accordingly confer "merit". But are the legal rules expressed in *dharma-śāstras* direct sources of law or merely indirect ones? In Lingat's sharp formulation : Do they have the "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 are amongst the sources of law in Europe?" In Lingat's analysis, the latter will not constitute the "true source" of law.

Robert Lingat's answer to this question is necessarily complex. *Dharma-śāstras* were obviously not codes "in European sense of that word" because, prior to the British period, "there never was in India . . . a power to pass legislation, in our sense of that word, at least in matters of private law." Still, the *śāstric* precepts were not entirely without influence : apart from the authority they had by virtue of their origin, they also offered (particularly "in the judges' eyes") "some framework of juridical reasoning" (*ibid.*, 141). The precepts, however, were exposed to the Scylla of custom and the Charybdis of royal power and governmental policies. The voyage from *Dharma* to law, Lingat emphasizes, became possible because of the labours of commentators on *śāstric* precepts : it was only with the Mimamsa technique of interpretation that "a true juridical science began in India" (*ibid.*, 143).

One must turn to the art of interpretation (*ibid.*, 143-175) to fully appreciate the virtuosity of commentators in interpreting the texts and contexts of the *śāstric* injunctions and precepts, whether through the techniques of manipulating the distinction between a *vidhi* (precept

CLASSICAL HINDU LAW

embodying an injunction) and an *arthavada* (additional varbiage offering descriptions, elaborations or reasons for injunctions) or of manipulating the rules for resolving differences between two *śāstric* texts of equal authority (see the discussion of Vijnanesvara's exegesis on adverse possession and prescription at pp. 161-167 *ibid.*). It should suffice to note here that the juristic concern with interpretation, overtly analytical and exegetical though it may appear, continually made *śāstric* precepts responsive to social realities, within which they had to function as rules for conduct. Sometimes, such interpretation legitimized local customs : the most dramatic example being furnished by Madhava's interpretation of Manu (*ibid.*, IX : 172-173) which prohibits the marriage of a boy with his maternal uncle's or paternal aunt's daughter—common among South Indians. In a *tour de force* of exegesis, Madhava reinterprets the verse to sanction what it expressly prohibits! (*ibid.*, 169-71). It is the same type of creative ability which enables both Vijnanesvara and Jimutavahana to derive from the Smṛiti text, "violently opposed theses" resulting into now well-known 'schools' (respectively) of Mitaksara and Dayabaga (*ibid.*, 172-75).

Lingat warns us, rightly, not to assume that the commentators' role or function was to "canonize" custom. Customary rules are "often imprecise and incomplete." Interpretation "offers them a framework which demands adjustments and correctives in enunciation, at the same time it allows gaps to be filled." It is this framework through which interpretation could exercise influence upon custom "even when custom has not directed its choice" (*ibid.*, 172). We see continuing examples of this kind of interaction in Lingat's absorbing analysis of contrasts and conflicts between *dharma* and custom.

The precepts of *dharma*, and of law, stand in sharp contrast to those of custom. *Śāstric* law (religious and juridical) is didactic, religious in conception and consequences. Rule of custom, in principle, "is different to the religious consequences of an act" : custom may be consonant with *śāstric* law, or may be in acute conflict with them. *Śāstric* law, as eternal natural law is independent of human volition : "the rules govern the activity of men : they are not influenced by man" whereas custom is a "purely human development." While *dharma*, and law related to it, has a "transcendent character," custom is a "social phenomenon." *Dharma* is immutable and universal : custom is territorially limited and variable (*ibid.*, 176-77). Lingat shows, however, that these ideal-typical contrasts drawn in literature can mislead us : indeed, he demonstrates that despite these contrasts, the *śāstric* texts disclose "a place for custom in the genesis of *dharma*" (*ibid.*, 177).

How does this come about? Firstly, the *śāstras* explicitly recognize *sad-acara*, the custom of the good or *sista-acara*, the custom of the initiated, instructed and virtuous as a source of *dharma*. In a sense, the good

custom as a source of *dharma*, "amounts to saying that the conduct of everyone should be ruled by that of Brahmins," as only they would best understand how to act in a disinterested way, with a belief that the behaviour is required by "obedience for the divine law" (*ibid.*, 179-80). Even though some commentators endeavoured to enlarge this conception to include behaviour of those *not* learned in the Vedas, the custom which would count as a rule of *dharma* "must not only be immemorial but also free from all apparent worldly motive, interest, or utilitarian consideration" (*ibid.*, 180).

Secondly, despite all this, the *sastric* texts demonstrate clearly the influence of custom in formulation of precepts whether directly acknowledged (e.g., procedure for hearing of cases) or indirectly manifested through inconsistencies in *sastric* prescription (e.g., condemnation of marriage of a *dvija* with *sudra* woman yet providing rules for a share of paternal estate for a son of Brahmin, *ksatriya* or *vaisvaya* born of female *sudra* 1) It may be that the incorporation of custom into *sastric* injunctions may be selective, and may transform the rules of custom: but neither the fact of incorporation nor the resultant nexus between *dharma* and custom can be gainsaid.

Thirdly, the theory of *yugas*, especially as developed by Parasara, would seem to make *dharma* (and law) more responsive to social realities, often expressed through customs and usages of the group. Hindu cosmogony divides each epoch into four periods (*yugas*): *krta* (the first golden age) is followed by *trata*, *dvapara* and finally the *kali* (the present, decadent age). Each period has its own characteristics and its own *dharma*. What varies, according to Lingat, are not the "moral imperatives" of *dharma* but rather man's capacities "to obey the moral law" (*ibid.*, 189).

Be that as it may, Lingat concedes that the theory of *yugas* has "fed us little by little to the idea "that although the *sastric* rules of conduct "retain eternally their redemptive quality, they are not always good to follow" (*ibid.*, 189). The commentators arrived at this result by asserting that the rule of *dharma* is not to be followed if it is *loka-vidvasta* (odious to the world) or *loka-vikrasta* (reproved by the world). A large number of acts, although enjoined by the *sastars*, thus become *kali-varjyas* i.e., acts prohibited in the *kali yuga*. The local custom thus triumphs over the *sastric* norms: though the intellectual activity of the commentators attempts to legitimate this triumph within the framework of *sastric* law. Lingat, however, feels that the *kali-varjyas* theory has merely a negative character of abrogating old customs. The task is to discover how new customs, contributing to the birth of "new institutions" emerge.

How did new customary rules and institutions arise despite the orthodox positions that a practice contrary to *sastric* precepts is evil and

sinful? Lingat shows that most commentators used creatively the doctrine of good custom to legitimate whole bodies of customary rules existent in different regions. Moreover, the royal duties extended to the preservation of customs, conventions and usages, not merely of the people in a conquered territory but also with respect to groups of his own subjects. The king is advised that *dharma* can "only prosper in order": if, therefore, abrogation of custom, contrary to *dharma*, is likely to cause disorder, wisdom requires continuance of such custom (*ibid.*, 199-200; 224-32).

Lingat concedes that the rule of *dharma* thus did not become a juridical rule until "it entered into behaviour and was accepted by the population as a customary rule" (*ibid.*, 202). But he maintains that this "admitted predominance" of custom did not render the *sastric* rules any the less authoritative. The *sastric* rules provided the framework for juristic activity: juristic activity, in turn, provided the framework for more precise articulation, adoption and limitation of the rules of custom. Juristic activity put custom in its own place as it were. A customary rule in contradiction with *dharma* "is not capable of extension": the unorthodox rule of custom has no chance of extending its domain." Lingat insists:

The rule of *dharma* has an unlimited power of radiation. It offers itself as a model to every group. It fills gaps in custom and insinuates itself into the customary structure. And once it is established there it is fixed thereafter; it is and remains *dharma*, the group's law. (*Ibid.*, 203)

Lingat concludes by saying that the crucial difference between the Western legal system and the classical Hindu legal system, is that while the former are founded upon the notion of *legality*, the latter rests upon the notion of authority. In the former "the primacy belongs to the positive law and in particular to the statute", the other "sources, by no means inconsiderable are only subsidiary to it": whereas in the Hindu classical law the *sastric* precepts were seen to be law "in the sense that the word is used in natural sciences, a law which rules human activity."

To what extent can we say with Lingat that the classical Hindu law based itself upon the notion of *authority* as distinct from the notion of *legality*? According to Lingat, the Hindu king had no true legislative power, the power to make ordinances "on his own initiative and pleasure." This can be seen from the fact that the "royal legislation which is foreign to *dharma* remains largely unknown to us" (*ibid.*, 231). Largely but *not* wholly: for, Lingat does recognize some instances (in South India) of a number of royal ordinances which clearly constitute "infractions" of *sastric* rules (*ibid.*, 227; see also Derrett, 1968 :75-97). This, however, does not lead him to the conclusion that the king must

be "understood to be *de facto* qualified to legislate without being bound by the precepts of the *sastras*" (Lingat, 1973, : 277). Lingat does not feel that the royal recognition of custom constitutes any exercise of legislative power: such recognition is not an act of the legislator but rather one of the administrator "concerned to keep peace between the subjects." Lingat even suggests (here following Yajñavalkya) that even when thus royally recognized, an individual to whom custom applies may disobey it on the ground that it conflicts with the precepts of *dharma* (*ibid.*, 228-229). Nor, finally, does the exercise of judicial power by the king result in any positive law: "even though his judgements are law-in-action they remain singular and unrelated, staccato, without any future" (*ibid.*, 259).

Thus, by and large, we have, here a denial that the classical Hindu law knew any 'positive' law, enacted by a 'sovereign' and, entitled to obedience on that very ground alone. The authority which sustained law was *dharma*, transcendent and immutable, an eternal moral law of interdependence which no one could conscientiously disobey. Lingat's conclusion, as a historian of ideas, may well be persuasive. But would historians of events, in ancient and medieval India, be able to accept or support Lingat's thesis? Indeed, even at the level of history of ideas, one might relate to Lingat his own criticism of the classical commentators: like them, he too pays very little attention to *Arthashastra*. The latter contains, at any rate normatively, the science of positive law.

Conversely, how far is it correct to say that Western legal systems are based on the notion of *legality* as described by Lingat? What is just he says, is that which is *legal* (that which conforms to law): "law-in-action, which effectively governs relations between people, is deduced directly from the law" (*ibid.*, 257). Surely, the close interaction of religious and natural law thought in evolution of 'Western' law and its institutions until later Middle Ages does not fully support the idea that *legality* (in the sense here used) was the basis (sole or even prominent) of 'Western' legal systems. Nor, despite the rise of nation states and of legal positivism, is the concept of 'legality' either wholly devoid of, or so fully identified with 'justice'. Indeed, is it possible to articulate adequately the notions on which "Western juridical systems are based" through any one central notion, whether it be 'legality' or any other? (*cf.*, Jackson, 1975 : 4)

2

LAW AND SOCIAL CHANGE :
THE COLONIAL EXPERIENCE

'High-Culture' Law and Social Mobility

The relation between custom and *dharma*, between people's law and state law, underwent fundamental change during the colonial period. Both administrative exigencies and high colonial policy made non-interference with religiously based law a desideratum. But such a policy could not immunize the existing laws from fundamental change, especially when colonial authority had to create a national legal system for the governance of the country. Such a system, naturally, "affected the balance between divergent indigenous legal traditions" (Rudolph & Rudolph, 1967 : 269). The story of how those changes occurred has been meticulously told by many, but perhaps most authoritatively by Duncan Derrett (1968 : 225-320 ; see also Rudolph & Rudolph, 1967 ; Jain, 1966 ; Galanter, 1964). It should suffice here to stress briefly a few distinctive aspects of the transition.

During the initial period of administration, dual system of courts were established with jurisdiction over all matters—civil, criminal and commercial. The Presidency town courts included royally established Supreme Courts, with English judges and lawyers ; the *mofussil* (or 'back-country') courts included *sadar* (chief) courts, manned by judges drawn from the civil service and had Indian pleaders. There was "less formal procedure and less English law" in these 'back-country' courts (Galanter, 1964 ; Jain, 1966 : 81-192). The applicable law also varied. Noteworthy for

9

CONCLUSION

At almost every point in this survey, we have lamented the paucity of sociological research into legal processes and institutions. And yet we have been able to locate considerable materials to warrant an extended survey of themes, problems and literature pertaining to sociology and anthropology of law in India. This conjuring trick, as it were, has been partly attained by feretting out, and often even superimposing, legal sociological themes and frameworks on most studies which were not directly or self-consciously concerned with socio-legal reality. But as we look back upon the ground thus traversed, it is clear that in many areas of social sciences there exist, even if slenderly, unacknowledged starting points for sociology and anthropology of Indian law. Even as we invite the attention of academic lawyers and legal researchers to this fascinating body of materials we would be remiss not to pointedly direct the attention of sociologists, economists, anthropologists and political scientists to the fact that many of their concerns do distinctly involve a more sophisticated grasp of legal processes and institutions than what they have so far displayed in their work. One hopes that in the coming decades there will evolve in India a *true fellowship of social science learning* where men of law will share the complementary concerns of their fellow social scientists and the latter will regain the central insights of the founding fathers of sociology concerning the importance of law in social structure and social transformation. Unless a close fellowship of this nature emerges, neither lawpersons nor social scientists can effectively assist the search for social development and justice.

POSTSCRIPT

Compensatory Discrimination Policies

The literature on the policies and practices of compensatory discrimination continues to grow. Indian law teachers have begun exploring the problematic of reservations policy with becoming sociological maturity (Parmanand Singh, 1982; Anirudh Prasad, 1980); the justification of these policies at a philosophic or jurisprudential level has also begun (see, e.g., M.P. Singh, 1981-82). In addition, of course, the well-known work of Andre Beteille (1982) continues to explore the enigma of equality at the level of social philosophy and practice. There is also a notable growth of scholarly focus on violence associated with, mostly, anti-reservation movements (Desai, 1985; Baxi, 1985a). If, in what follows, we highlight Marc Galanter's *Competing Equalities* (1984), the justification is provided by the possibility that this important work will influence not just further thought and research but more immediately affect judicial policy-making in the area of reservations.

In *Competing Equalities*, Marc Galanter (1984) offers a monumental account of contemporary India's struggle against the "heritage of deprivation" (p. 239). This work will continue to provide for years to come an authoritative source book of information concerning the law, policy and administration of compensatory discrimination programmes (CDP). What is more, a discerning reading of the book yields alternative strategies for state and social action. Both the protagonists and antagonists of CDP will find in this book ready material for their campaigns. In this sense, Marc Galanter may find both fulfilment and frustration in the manner in which the book is read and used. In this sense, too, the very strength of the book constitutes its central weakness. It seeks to present a *balanced* exposition of policies and programmes of compensatory discrimi-

nation. It does not seek so much to justify, philosophically or ideologically, compensatory discrimination; but rather explores it as a 'going concern' in contemporary India. Nor does it offer a critique (in the Marxian sense) of the ideology and institutions of compensatory discrimination. It avoids advocacy as well as critique. What it offers is a clinically ruthless account (at points close to being value-free) of the successes and failures of policy and implementation. The book thus provides an arsenal of material for both advocacy and critique; and offers a fine illustration of the resilient best in the tradition of the liberal sociology of law.

Perhaps, the reason why Galanter avoids ideological critique of compensatory discrimination is that he finds in India a lot of approaches towards a critique but very little hard-headed social scientific analysis. His work constitutes a comprehensive indictment of the Indian social science (including socio-legal) research establishment. Time and again he laments shortfalls in scientific data for policy; and urges studies in a whole variety of directions (*ibid.*, 50, 52, 54, 57, 63, 64, 69, 90, 97, 105, 110, 113, 115-16, 229, 234). In contrast, opinions and value-judgments concerning compensatory policies abound (*ibid.*, 72). Confronted with this situation, the book ends up suggesting a research agenda through a fairly imaginative identification of 'alleged' benefits and costs of CDP (*ibid.*, 81-82): each rubric in this identification offers worthwhile arenas for social science research and analysis.

Marc Galanter overwhelmingly demonstrates the fact that compensatory policies and programmes have not emerged as a priority research arena in social sciences (a theme by itself in the sociology of social sciences in India in particular, and an Indian sociology of knowledge in general). Perhaps, one reason for this is the fact that "too much" law accompanies the evolution of compensatory policies. And the Indian social scientists notably the sociologists and economists—finding the law somewhat arcane—have taken the easy path of ignoring it altogether. They have, by and large, ignored its relevance to social structure and transformation, in the process impoverishing both law and sociology. Galanter's study is an inspiring testimony to the scope of mutuality of learning between law and other social sciences. This constitutes a second level at which the book could be rewardingly studied by social scientists in India.

The third level at which this book might be equally profitably read is the level of analysis of authoritative discourse. A few hundred words of the text of the Indian Constitution (*ibid.*, 569-574) and a couple of hundred thousand words in 113 judicial decisions (*ibid.*, 501) constitute the realm of discourse. Clearly, this is a discourse in which "courts are accorded a leading role" and a discourse which is "characterized by considerable cognitive disarray" (*ibid.*, 356). And yet this "cognitive disarray" is highly

functional:

By permitting exceptions that blur boundaries, by accrediting variations that dislocate hierarchic markers, and, by refusing a single authoritative picture of the group contours of Indian society, the courts help to disestablish the traditional picture of that society, a picture which provided legitimacy for traditional relations of domination and hierarchy. *Marc Galanter (1984: 357)*

It is noteworthy that Galanter is able to arrive at this deep-structure understanding of authoritative discourse, without recourse to any explicit theory of power, ideology, insurrection and language which are constitutive of discourse (Foucault, 1977, 1978, 1980; Guha, 1983).

And this last feature provides us with a fourth level of reading this book. It is a notable example of policy science analysis. In this genre, the principal focus is on a set of authoritative decisions termed 'public policies' which generate (and legitimate) 'programmes'. It describes in fascinating detail the complex career of compensatory discrimination policies and programmes. Its prime conclusion that the progression of policies—their enunciation, elaboration, development—is, on the whole, commendable (e.g., Galanter, 1984, 534-38, 352-59) but the implementation of programmes is, on the whole, deplorable (*ibid.*, 40-83, 546-52, 522-33). Galanter provides many reasons why this is so. Perhaps, (aside from mutability and ambivalence of policies themselves) the most salient is the *dvija* (twice-born) explanation: he constantly reiterates the gulf between sophisticated judicial policy-makers and the "administrators and clerks" who have to implement the programmes. These are people with "less education and sophistication, fewer resources for fact-finding, less time for deliberation" (*ibid.*, 545). The book celebrates the principal themes of policy sciences. Policies achieve their goals only if: they are based on maximum relevant social knowledge, they are formulated and disseminated with clarity and consistency and not liable to shifts, they generate programmes which are oriented to goals of the policy and not just tasks and there are organic linkages between policies and programmes. Such linkages, in turn, are possible only when "administrators and clerks" become worthy recipients of policy-messages, and when the optimum mix, generating sustained judicial intervention, of "organization of parties, supply of legal services, doctrinal inventiveness and changes in institutional incumbents" (*ibid.*, 596) becomes available to oversee programmes. Put another way, massive transformation of policy-making structures, and of implementing structures (including the legal profession and the judiciary) are necessary, if not sufficient, conditions for the success of compensatory discrimination policies and programmes. It lies clearly outside policy science approach to essay an examination of the pre-history and history of relations of power, ideology and conflict, which alone can furnish the motive force or objective conditions for such trans-

formation. It is thus no accident that a 625 pages book on law and backward classes in India has not devoted even a marginal space to 'caste wars', 'atrocities' and 'agitations', if not on their own terms, even as variables affecting the progression of policies and vicissitudes of implementation.

Marc Galanter offers us an absorbing account of agonized attempts by policy-makers, including courts, at the identification of "backwardness for the purpose of determining the beneficiaries of the CDP" (*ibid.*, 155-281). Articles 15(4) and 16(4) of the Constitution speak respectively of "socially and educationally backward classes" and "other backward classes". Galanter acknowledges that the crucial term here is "class" but doubts whether that term really expresses any conclusive constitutional intent (*ibid.*, 209).

It is, perhaps, necessary for Galanter to maintain that the Constitution neither "commands" nor "forbids" recourse to caste (*ibid.*, 208) in the reconstruction of "backwardness" for the purpose of meliorative state action. He asserts that the Constituent Assembly debates do not mean "class" in Marxian or Marxist sense; classes rather mean "communities", which may include all sorts of groups, including caste and "caste-as-class". But his analysis of the debates in Chapter 6 of the book does not compel this conclusion (*ibid.*, Ch. 6; pp. 204, note 69, 208).

Those who deal with legal interpretation and exegesis know that it is difficult often to maintain the distinction between 'discovery' and 'imputation' of intent to the authors of a legislative text. This problem is, of course, common to law as well as humanities and other social sciences. But in law, at least, there is no theory of reading which could discipline exegetical effort or chasten interpretation. We cannot pursue this aspect any further here. But this much is tolerably clear. If one looks at the only two places where the expression "backward classes" occurs, namely, Article 15 (4) and 16 (4), there would be at least some room for saying, with Marc Galanter, that the constitution-makers used the term "class" generically, inclusive of all sorts of social groups including caste, communities and class. However, one inclines to a radically opposed view when one looks at the Constitution as a whole. The Constitution designates groups for which it shows special solicitude in distinct terms. It speaks of scheduled castes and tribes, educationally and socially backward classes, other backward classes, religious and linguistic minorities, untouchables, those specially vulnerable to exploitation and the weaker sections of the people.¹ The constitutional text is elaborately written; the choice of phrases is carefully made. These phrases have not been amended away. And indeed any amendment to the Constitution

1. See Articles 15 (4), 16 (4), 17, 19 (5), 23, 24, 30, 46, 330, 332, 334, 335, 338, 339, 340-342.

replacing the word "class" by "caste" in Articles 15 (4) and 16 (4) for "weaker sections" in Article 16 would be liable to judicial invalidation on the ground that it violates the essential features of the basic structure of the Indian Constitution. This is so because the Constitution promulgates an egalitarian social order, free of distinctions arising from caste, sex, domicile and religion. The values recited in the preamble are also fundamental to any reading, and theory of reading, of the Indian Constitution.

From all this, it is clear that the Constitution forbids recourse to caste in reconstructing "backwardness" for the purposes of state action. What it commands is recourse to "class" in reconstructing backwardness. Galanter offers an excellent account of how "class" is conceptualized and reconceptualized by the state agencies, especially the High Courts and the Supreme Court.

At the same time, he offers a contrary thesis. Because the Constitution neither commands nor forbids the recourse to caste, it is all a "question of policy" (*ibid.*, 206) whether, how much in what ways and for how long, "caste" may be taken to reconstruct backwardness for the purposes of state action. What is more, he finds that "caste units" are "useful"; and they should not be condemned *per se* (*ibid.*, 214). The argument goes further: not merely is recourse to caste "useful", other competing criteria for identification and measurement of backwardness are simply not good enough.

But what does one mean by "caste" in this context? Galanter advances a conceptual distinction between "castes" as "community" and as "status groups" (*ibid.*, 199, 222). If classes are to mean to include "communities", castes incarnate themselves as 'classes' (*ibid.*, 188-204). Once determinations are made that certain caste communities are "backward", the further determination that they are also "educationally and socially" backward, often requires recourse to caste as status group. But the concept of status is quite problematic and even when it is sorted out, the question of relation between 'low status' and social backwardness remains an unsettled, and unsettling, question (*ibid.*, 229-240). Galanter, however, leads us to the conclusion that "the trend is to think of social backwardness in terms of heritage of deprivation", visualized as "the accumulated effects of low position in a social hierarchy" (*ibid.*, 239).

Why should 'caste' be used significantly to determine backwardness for the purposes of state action? May not income and occupation provide a significant measure of backwardness? Galanter answers this last question in the negative. The heart of his objection to economic as distinct from communal criteria pulsates in a curious paragraph (*ibid.*, 275). Galanter maintains that "when backward communities are designated, the lion's share of benefits would go, of

members of designated castes." Even so, there is "some reason to hope for a 'trickle-down' that will spread and multiply the benefits", since the relatively better-off members of such castes "are linked to their less-fortunate caste-fellows by ties of kinship, loyalty and mutual support." Galanter insists that the well-off recipients of benefits "might be expected to play a representative function." On the other hand, there is "no self-evident reason to think that the recipients under an economic test will serve this kind of representative function, tangible or symbolic, for those in the lowest groups." And when an "income test is used, there is little reason to think that those at the bottom will be indirectly benefited."

As to this last point, one would have thought that the sole function of income/occupation criteria would be to benefit those at the bottom of the heap. That it has not occurred for "higher echelon benefits" (like admissions to the medical and technology courses) is true (*ibid.*, 274). But can this failure be elevated to an ontological principle? It cannot be said as a matter of first principle that imaginative rescasting of CDP on these criteria, and a matching rectification of administration, is to be *a priori* ruled out.

That leaves us with the "trickle-down" principle. Here Galanter invests caste with mythopoetic characteristics. Caste sentiment, caste consciousness will somehow ensure that even those who pre-empt a lion's share will enable them to be legitimate representatives of redistribution. Nothing in the book substantiates this expectation. Indeed, all the data given presents grounds for contrary expectations. For example, Galanter laments the "listlessness" of administration, its "thoughtlessness about goals" concerning the CDP. He goes further and indicts all legislators including the scheduled group legislators who have "paid little attention to the reports of the Commissioner for the scheduled castes and tribes" (*ibid.*, 69). Other studies (cited in Baxi, 1984) have demonstrated the conclusion that legislative reservations, are devices to co-opt, control and depoliticize scheduled castes and are, therefore, more of an exercise in social control than in redistribution.

Even if we were to assume that those who benefit substantially by CDP perform a representative function, it is not clear why they should be performing it in relation only to the CDP benefits. Indeed, if the better-off caste members were solicitous of "their less-fortunate caste fellows", the latter would not have continued to remain so less fortunate. And, indeed, in discharge of either their symbolic or tangible "representative" functions, they would have been the chief articulators of policies and programmes which benefit their "less-fortunate brethren".

The rejection of economic criteria, and the vigorous espousal of 'caste as class' criterion, shows the vitality of Nirad Chaudhari's thesis in *The Continent of Circe* (1965). Even when one recognizes, as does

Galanter, that the Constitution does not prescribe or proscribe caste criteria, even when one is out of sympathy with the repressive aspects of caste hierarchy and ideology, one finds it difficult to explore even the possibility of invoking other secular conceptions or criteria (like class) for the purpose of state action. Even, *Competing Equality* is unable to transcend the essentially Hindu view of life.

These differences do not diminish the high achievement of Galanter's study. Its major contribution is the clarification of the discourse on the ways of reconstruction of backwardness in contemporary India. Even when he does not decipher the structure of politics as an aspect of this discourse, his meticulous analysis of the rhetoric and reality of the CDP makes an enduring contribution towards its overall understanding. Above all, this study holds out a prospect that Indian social scientists would begin to appreciate the major role that law and courts have played, and have to perform, in the transformation of the Indian society. If, as Galanter demonstrates, the "contribution of the judiciary to social reconstruction" is affected by the "failure to come to grips with the immense variation and complexity of group structure of Indian society" (*ibid.*, 540), it becomes imperative, at least for the concerned social scientists in India, to devise ways in which to assist courts to achieve maximal clarity. Social scientists ought to remember that judicial action has been so far the most crucial social force preventing the use of constitutional provisions "as justification for a regime of communal quotas" and in inhibiting "runway expansion of the category of Other Backward Classes" (*ibid.*, 535). Galanter's book celebrates this thwarting of the will to power; social scientists ignore this achievement at their own peril in a traumatically changeful India.

Subaltern Studies

The Indian literary tradition, in law and history, has as yet not witnessed the emergence of that genre of historical writing which can be called the social history of law, *a la* E.P. Thompson (1963, 1977) or M. Foucault (1977, 1978, 1980) or J.W. Hurst (1964) or M. Horowitz (1977). To be sure, there are prospects of excellent beginnings; the two volumes of the *Cambridge Economic History of India* (Dharma Kumar, 1982; Raychaudhuri and Habib, 1982), Dharma Kumar's analysis of property (1985), David Arnold's work on dacoity (1984), Oliver Mendelsohn's study of pathology of land disputes in Rajasthan (1981), Richard Washbrook's analysis on colonial legal social formation (1981-82) and Bhuvan Pande's small note on criminalization of the working classes in India (1981-82) provide very encouraging signs of possible progress towards an Indian social history of law.

A more sustained focus on social history of Indian law is available in the works of Ranjit Guha (1983) and his associates (Guha: 1982, 1983, 1984); Guha's seminal work modestly entitled as *Elementary Aspects of Peasant*

Insurgency (Guha, 1983) charts several new paths for a fresh understanding of history and sociology of law in India. The central insights of this work do not permit bald summations; still, it remains necessary to demonstrate how our understanding of law as a social process can be deepened by an invitation to close study of the *Insurgency*.

Firstly, Guha demonstrates how law structures violence. When prescriptions of the law organize a will to power, they structure the very social identity and individual persona of the dominated. The creation of the identity of a subaltern is thus among the prime functions of the law as an organization of hegemony. The creation of "negative class consciousness" (*ibid.*, 23-28) and its maintenance requires assertion of dominance through law and force. And this task is performed by legal codes; Guha demonstrates how *Manusmriti*, interpreted as a semiological system of coding, sanctifies a range of verbal and non-verbal signs of deference and distance, into which is embedded a whole way of constructing and reconstructing social reality of domination and subalternity (*ibid.*, 35-76). Kautilya identified verbal violence (*vakparushyam*) as a distinct form of violence and the classical system of punishment for such crime of pollution ranged from cutting of the tongue, or insertion of a red hot "iron nail, ten fingers long" into the mouth or alternately pouring of "hot oil" into mouth and ears. The code here functions as "linguistic control in an authoritarian society" (*ibid.*, 46). This control extends not just to speech but also to what Foucault acutely describes as "administration of silence" on the subaltern. The classical Hindu law, similarly, reinforced non-verbal behaviour control, whether through rigorous sartorial norms, control over facial appearance, or through enforcing norms of social distance in public places. And insurgency, in such political economy contexts, consists in "prescriptive reversal" (*ibid.*, 36) and "massive and systematic violation of these words, gestures and symbols which had the relations of power in colonial society as their significata" (*ibid.*, 39). The process of inversion aimed at appropriation or destruction of "the insignia of...enemy's power" and hopefully abolition of the "marks of...subalternity"; but in the colonial era even this process of inversion, ultimately, used the "borrowed language", the "semi-feudal language of politics" to which the peasant rebel "was born" (*ibid.*, 75-76).

Secondly, the law manipulates ambiguity in dealing with insurgency—and this proposition is true of all legal systems, ancient or modern. The ambiguity relates to the categories: "crime" and "rebellion". Guha demonstrates that these two categories have their distinctive codes of violence. But collective defiance of authority has, unlike individual crimes, the character of being "necessarily and invariably public and communal events." Guha generalizes the proposition as follows: The criminal may be said to stand in the same relation to the insurgent as does what is conspiratorial (or secretive) to what is public

(or open), or what is individualistic (or small-group) to what is communal (or mass) in character. In other words, crime and insurgency derive from two very different codes of violence.

Ranjit Guha (1983 : 79)

When this difference in codes of violence is not perceived, insurgency or rebellion is regarded as crime, a conspiratorial crime. This synonymy often occurs because of "conceptual inertia"; this often enough is aided and abetted by the notorious fact that "massive uprisings" in India are often preceded by a "sudden rise in the incidence of rural violence" (*ibid.*, 81). Guha analyses this strikingly well by reference to "starvation crimes" (*ibid.*, 82-90), and violence against moneylenders (*ibid.*, 91-94). But rebellion in such situations marks the beginning "if no more than that, of a recognition of their identity as a class-for-itself." For the rebels, crime in this changed social context signifies "an integral part of a comprehensive system of defiance—a *parole* in a new language: in short, it changes codes." This code-switching is perfectly clear to the rebel. Guha enables us to understand why code switching on the part of the masters—lumping both kinds of violence as crime—is their ready response as the managers of the people: this is the only "code which they know how to handle" (*ibid.*, 89). But a social historian has a choice to make: he can think like a *daroga* or a rebel. Colonial historiography often makes historians think like a *daroga*; it also condemns this kind of violence. The rebel historian regards such violence as "the highest form of protest" and would seek to justify it. The "duplex character" of violence is an intransigent feature of reality; it need not be such for ways of understanding and conceptualizing reality (*ibid.*, 107-108).

Thirdly, this duplex character of violence pervades the inner working of insurgency as well. The code of violence embedded in or constituting insurgency extends not just outwards but also inwards, not just to enemies without but enemies within. The insurgent uses force to "generate solidarity" within his ranks. Clearly, this use of physical force is criminal from the standpoint of the *daroga* or a historian who thinks like a *daroga*. On the other hand, it constitutes an inescapable, if bloody, necessity of an emergent class struggle. Passive or active collaboration with the enemy represents a "contradiction among the people themselves"; in a situation of insurgency, it gets transformed into "a contradiction between people and their enemies" and the insurgents "are remarkably quick to recognize this" (*ibid.*, 198). "Solidarity/betrayal constitutes a well-defined element of rebel consciousness" (*ibid.*, 109); and the insurgent consciousness is not historically enabled to make "fine distinctions between classificatory foes and real ones" (*ibid.*, 201). Collaboration with the police or the system is "a replication of peasant subalternity" at the very historic moment of struggle against it (*ibid.*, 202). Rebel violence against such 'foes', a

kind of "spiritual fratricide" in which "a brother must be sacrificed for the sake of solidarity"; in the ultimate analysis, "represents the peasant-rebel's war on alienation within his own class and against his *alter ego*" (*ibid.*, 219).

The "ambivalence of the deed" (*ibid.*, 88) arises because insurgent violence is "wired at the same time to two different codes": the "code of individualistic and small group deviance from the law where it originates and collective social defiance which adopts it"; it thus bears "the twin signs of a birth-mark and a becoming" (*ibid.*, 108). The modes through which insurgency "extricates itself from the placenta of common crime" and establishes "its own identity as a violence which is *public, collective, destructive and total!*" (*ibid.*, 109) should be of interest to students of law and social change since resistance and repression, defiance and dominance constitute in themselves forces for change, even if the change, for colonial India up to 1900 to which Guha's study is dedicated, is of the type which produces and reproduces "the rival paradigms of landlord authority and peasant rebellion" (*ibid.*, 336).

The fascination of what Ranjit Guha has achieved through *Insurgency*, of course, goes beyond messages for historiography, colonial or otherwise (see Guha, 1982 : 1-8) or new approaches to restructuring discourse (see Guha, 1983 : 1-43). Important as these messages and methods are for the development of social history of law in India, the central message of Guha's achievement for the contemporary sociologist of the Indian law consists in a call for an exploration of how the Indian law and state produce and reproduce subalternity and rebellion and how the subaltern violence produces and reproduces state power and law.

Decolonization has entailed a radical change of the normative structure of justification of state power through constitutional and legal prescriptions. At the same time, for the impoverished masses of India, legal processes and institutions remain insidiously colonial. Clearly, the structuration of subalternity is not as overt in contemporary India as compared with the 'semi-feudal' and 'colonial' India depicted in *Insurgency*. The state law, at a normative level, does not foster negative class consciousness. Indeed, the subaltern in his struggle for "prescriptive reversal" of repressive local law-ways (or non-state legal systems) has now available a whole variety of symbols and ideological representations in the Constitution of India. Paradoxically, the ideology of the Constitution which legitimates state power is used in subaltern struggles in Independent India as a counter-ideology to delegitimize the dominant formations of power.

The modes of legal repression in contemporary India, like the insurgency of subalterns, acquired a duplex character. The state power is mobilized both within the law and outside the law for repression. The mix of legal and alegal or anti-legal modes of suppression (the latter in

form of standardless use of force through security and para-military forces, fake 'encounters' by the police with 'Naxalites', 'dacoits' or 'extremists') has tended often to create a situation unmasking the criminogenic nature of state power. Violence directed against the articulation of constitutionally justified demands of the people, by or on behalf of the state, is increasingly seen as criminal, at least by the victims and solidary groups. Police atrocities are, by definition, perceived as excesses of lawful power.

Notions of 'insurgency' and 'counter-insurgency' also become problematic in such contexts. The use of force and even terror to maintain dominance is often conceptualized as anti-people insurgency against the Constitution; and a rebellion against this is articulated as counter-insurgency. The so-called law and order operations under state auspices in this situation tend, therefore, to get assimilated to the original insurgency against the Constitution by the dominant classes; or in other words, the state power is seen to reproduce the insurgency, justifying rebellion in aid of constitutional values and vision. We encounter here multiple inversions of 'crime' and 'insurgency'.

All this represents the emancipatory potential of the Indian Constitution, which is a product of a bourgeois revolution at a historical juncture where the bourgeoisie wish to deradicalize the radical discourse of the Constitution to sustain the present power/dominance configurations. There emerges thus a contradiction between need for legitimate power (power justified at constitutional terms) and the need to practise repression by dominant power blocs to preserve their dominance. Collective political violence in Independent India and the modes of repression to counter it reflect contradictory reality of state and law rather acutely (Baxi, 1982).

The three volumes of *Subaltern Studies* provide us with ways of sculpting our understanding of the present processes by identifying the modes of appropriation of subaltern insurgency by the national independence movement (see G. Pandey, 1982 : 143; S. Amin, 1984:1; D. Hardiman, 1984:196; S. Hennigham, 1983:130; A. Das, 1983:180). These studies highlight the dialectic between the autonomy of subaltern movements and their skilful appropriation by the nationalist movement. The appropriation, often amounting to their annihilation thrived on an appeal for unity in a common struggle for anti-imperialism. "But at the end of the day, since such generalized unity was in any event impossible, the appeals served the needs of "a particular kind of alliance"; and this kind of alliance almost always amounted to a "statement in the favour of status quo and against any radical change in the social set-up when the British finally handed over the power" (G. Pandey, 1982: 142 and 187). The studies highlight in rich detail the relative autonomy of the peasant movements, both in terms of their origins and dynamics; and their

handling of contradictory claims from the nationalist leaders to collaborate with their immediate exploiters (landlords, moneylenders) in the interest of anti-imperialist struggle. The colonial administrator's response often perceived the structural roots of discontent more sharply; but their recipe was a standard one. Amend the law here and there, forgetting that both the landlord and the landless regarded these laws merely as "paper threats". If this fails, try massive repression. This recipe is heavily utilized by Independent India's administrators.

But the neo-colonial role of law, its processes and institutions, acting in sharp contradiction to the value-premises of the Indian Constitution is an aspect which needs to be fully understood. Indeed, one wonders whether subaltern studies in relation to contemporary India can bypass the centrality of law both to the structuration of subalternity and of insurgency.

Social Action Litigation

Normatively, the Indian Constitution signifies a great assault on subalternity; it identifies the marks of negative class consciousness as a part of the genetic material of the Indian legal system and systematically proceeds to delegitimize these. Caste, creed, colour, sex and religion are not relevant to the status of a citizen in a free socialist democratic republic; social backwardness is to be reconstructed on new secular terms; the historically disadvantaged groups have to be helped by various specific measures. The insignia of agrarian serfdom (bonded labour) and untouchability are to be vigorously discredited. The Constitution is the source of legitimation of state power; and the state power may not be any more legitimated wholly on the grounds which justify the structuring of subaltern social identities.

The Constitution thus sets the state in contradiction with civil society and the law flowing from the Constitution attacks structure of subaltern reproduction. At the same time, there arises a contradiction between social identity of the makers and implementers of the law; if the law-makers cannot continue to claim constitutional legitimacy by using law overtly for the purposes of structuring subalternity, they can, as the next best, seek to so affect the working of the law as to perpetuate and reproduce subalternity. The 'law' thus becomes a highly contradictory reality and process (Baxi: 1985c).

In other words, state law creates great expectations which, in its actual implementation, it does not often enough seek to fulfil. People's movements for the fulfilment of these expectations create further contradictions: the constitutional legitimacy of such movements cannot be openly denied, yet to wholly concede these claims would be to bring about qualitative changes in the structure and management of distribution of

political power. Repression has to be practised and also justified. But it is not easy to justify standardless use of force, which erases the dividing line between legal and extra-legal repression. Such repression is articulately condemned by the wielders of the public power and yet it has to be allowed. This, in turn, creates the need to manufacture appearances of accountability: indifferently strategized and slow moving criminal prosecutions (which rarely have the objective of or result in repressing the repressors) and cosmetic devices of judicial enquiries and commissions of enquiry serve this vital function.

The tasks of managing repression in a liberal constitutional democracy are thus highly complex and require a high degree of innovative energy. Since no *de jure* construction of subalternity through the law is legitimate, *de facto* imposition of it, and its maintenance, involving camouflaging legal devices, constantly remains problematic.

When subaltern movements are tinged with constitutional consciousness; governance becomes even more acutely difficult. They now assert their entitlements, not only at the level of rhetoric but at that of social action. When especially they seek to put the Constitution to action by activating the relative autonomy of the judiciary, the deployment of judicial power to enhance the countervailing power of subaltern movement does indeed create discord among the governing institutions. The executive and the legislature are seen at default compared with the judiciary. Inevitably, after a series of attempts to curb pro-people uses of judicial power or to make such exercise of power ineffective, the executive power of the state has to accept the new social learning arising out of encounter with the judiciary. All this, obviously, aggravates the dynamics of governance.

In the late seventies and early eighties the meteoric rise and growth of social action litigation (SAL) shows how law can be used to counter subalternity. A full account of this development occurs elsewhere (Baxi, 1985c); scholarly reflection has, uncharacteristically enough kept pace with the exponential development of SAL (see Gandhi, 1985; P. Singh, 1981-82; Menon, 1982; Agarwala, 1985; Massey, 1982).

Essentially, SAL signifies a democratization of judicial remedies. It is now possible for individuals or social action groups to write simple letters to Justices and Courts, which raise issues of violation of democratic rights of the Indian people; such letters are treated as writ petitions (a new form of jurisdiction which has been described as the "epistolary jurisdiction"). Usually, such matters relate to the violation of rights by the state executive agencies either by way of excesses of power (blinding of alleged dacoits, torture in custody) or by non-performance of categorical statutory duties (non-enforcement of laws relating to migrant labour, bonded labour, minimum wages, protective laws generally concerning unorganized workers, inaction in the face of treating Indian human

beings as chattels): The SAL petitions expose the lawlessness of the Indian state. When allegations are denied, as they usually are, the problem of fact-finding would have posed insuperable problems but for the imaginative device of the appointment of socio-legal commissions of activists and experts, upon whose reports further arguments proceed. The Supreme Court does not proceed to judgment in most cases; rather, through a series of interim orders, it ensures effective protection of rights (the "creeping jurisdiction"). The Court has now begun ordering both financial compensation (damages) and other compensatory arrangements in kind for proven violations of rights.

The Court is not always effective; the intransigence of local authorities remains a problem in few situations (Agarwala, 1985); healthy development of contempt jurisdiction looms large on the SAL agenda. So far, the Court has adopted a non-adversarial approach; social action litigation is differentiated as litigation without winners or losers, as an act of partnership between social activists, justices and the executive to solve, as far as possible, amicably, problems of lawlessness of the state. To expect the SAL processes to transform immediately the structures which engender state lawlessness is to expect too much of a fledgling innovation. But the process of accountability, a task to which appellate judicial process is admirably suited, has begun in right earnest; lost causes have been recovered and are at the centre of constitutional adjudication in contemporary India. Analyses of SAL which condemn it for relative inefficacy in changing structures of governance or focus on doctrinal problems or question the institutional competence of courts raise important problems requiring analysis and remedial measures. But they seem to fail to locate the overall significance of the political economy of SAL. We highlight this aspect, albeit briefly, in the concluding part of this summary review.

SAL has, first of all, done invaluable function of exposing the contradictory reality of law, namely, the *co-presence* of rule of law with the reign of terror. Whether it is the case of undertrials languishing in Bihar prisons for an eternity without trial or the blinded men of Bhagalpur or the tortured bodies in jails or women's remand or children's home, or fake police encounters with 'Naxalites', dacoits, extremists or rape by public officials of women in their custody or bonded and wage slavery—all these situations brought before the Supreme Court of India by way of SAL demonstrate, as Marx used to call them, the "circumstances of reckless terrorism" and the *policemaniac* character of the state. Even the bare facts of the reign of terror coexisting with the rule of law so far unknown to cosmopolitan Indian judges, leaders of the Bar and others now confronted them with the challenge of understanding the contradictory reality of the law (as rule of law and as reign of terror) and to manipulate it in ways which would assist the subaltern people.

Secondly, the appellate courts, and especially the Supreme Court, has begun to appreciate the true meaning of the relative autonomy of the law as adjudication. Although the law—as ideology and ensemble of institutions—as legislative, executive and judicial power represents the "centralized unity" of state power (Poulantzas, 1975), adjudication may be relatively autonomous of the executive (Baxi, 1985d). The denial that judges make law is an attempt to perform an ideological task of preventing adjudication as emerging from an arena of expression of class struggles, of articulation and dynamics of interaction between the legislature and the executive. SAL in India illustrates this dynamics at a crucial juncture of maturation of a bourgeois political order in India. The progression of SAL should be of interest to any serious state theorist for this reason, as also for the many inversions it entails. Not the least among these inversions is the fact that the ideology of the *written* constitution is being used as a counter-ideology to that of the *unwritten* constitution (see, for fuller analysis, Baxi, 1985d : 1-20).

Thirdly, the development of SAL calls for ideological reorientation of adjudication towards a jurisprudence of emancipation and legitimation of struggle for liberation by the oppressed groups in the Indian society. The SAL is, slowly but perceptibly, restructuring the Indian judicial discourse (Baxi, 1985d). This is an unprecedented and remarkable development quite likely to survive the onslaughts against it by those who were accustomed to the use of judicial power and process only by a privileged few to protect *their* interests and values.

Fourthly, for those involved in struggle against subalternity the SAL processes create a new kind of political space from reign of terror and soften the repressive uses of the law and state power. At micro-levels where these struggles are necessarily waged on behalf of what Babasaheb Ambedkar used to call the *Atisudras* (the real social and economic proletariat) this is a significant new gain; it helps to assault negative class consciousness fostered or forced by local power-centres and introduces changes in the power relations and structures at the local level. In this sense, it has been demonstrated that even when courts cannot by themselves perform the tasks of liberation, given the will, they can make the tasks of those who struggle for emancipation a little less onerous.

Of course, this new courage in social action by justices and courts may be, in the eyes of bourgeois history, no more than a massive attempt at creating stakes and loyalties to a system of law and politics which is disintegrating in its own deadweight (Baxi, 1982). It may also represent, unbeknown to the principal *dramatis personae*, a massive attempt to co-opt the insurrectionary impulse into the national mainstream. Recourse to law may be seen, by some action groups in struggle, as a way to perpetuate the hegemony of the system which promises rule of law but reproduces only the reign of terror for the subaltern.

struggle through courtroom it may, at the end of the day, depoliticize popular consciousness, create new dependencies and rob the movements of self-reliant, participatory character.

Such dangers are always present in an intra-systemic war against subalternity. History is a conscientious objector to all predictions. Awareness of these pitfalls of SAL must remain everpresent; and there should be no confusion that the *dramatis personae* do not write the script. They articulate, ultimately, the script; and the script is written by men as agents of massive social forces and as creators of such forces. At the present conjuncture, all that can be said concerning the achievement of the SAL processes is that it seeks to inhibit production and reproduction of subalternity through the law, by sharpening the contradictions among the ruling blocs and by depriving them of the rather easy forms of legitimation of power.

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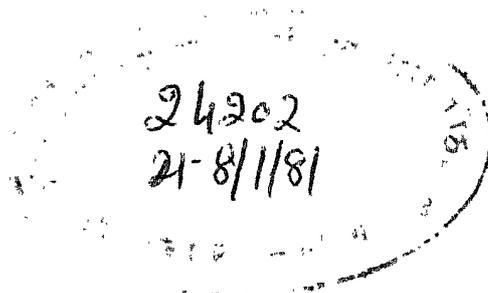
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DHARMAŚĀSTRA AND JURIDICAL LITERATURE

J. Duncan M. Derrett

Synopsis

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1. *Introduction*

Dharmaśāstra means 'the teaching (or science) of righteousness'¹, and includes what the modern European understands by 'law,' without, however, exhausting that topic. The Asian idiom of norm-expression can easily be mistaken for law-teaching. India is not unique in this respect. The elaborate Indian texts dealing with legal procedure², no insignificant part of the dharmaśāstra (hereafter 'the *śāstra*'), could well mislead readers into assuming that the *śāstrīs* (professors of the *śāstra*) were laying down rules analogous to the *iura*, or even the *leges* of the Romans. India, in reality, shares with Islam and with Judaism the belief that righteousness is an independent science of greater importance than mere day-to-day administration, and that the teacher's duty is to exhort, and to set standards of conduct, based overtly upon transcendental considerations, recognising that decisions will be reached by judges, arbitrators, or others, upon principles of ethics, custom, or policy, but hoping that they would, if properly educated in righteousness, tend or endeavour to give a just decision. The assertion that Jesus of Nazareth was not a lawyer and did not occupy himself with law³ is a symptom of the same misunderstanding, but with the opposite effect. In the ancient East, in teaching norms one treated of law and was to that extent a jurist, but one was much more. The Indian teacher of the techniques of dispute-settlement would indeed be a specialist in a branch of the *śāstra*; but unless he projected his study as a facet of the attainment of truth and enhancement of a supernatural order (not the mere quietening of complaints or enforcement of a royal policy) he would not be a dharmaśāstrī.

The historical passage from dharma to law forms a part of the successful study by R. Lingat⁴. It is not a story which is easy to summarise, as it is unfamiliar to Europeans, for whom the corresponding passage was from custom to law, a shorter step. It is easier to evaluate the task before the authors of the *śāstric* literature if we comprehend that what we understand as 'law'⁵ did not then form a science; whereas the dharmaśāstra was the queen of the sciences. The *śāstrīs* appeared in a different guise from other writers and maintained a different outlook. They were not entertainers, nor mere purveyors of informa-

¹ On the meaning of *dharma*, Kane, HD I², 1-6. For Lingat see Bibliography below. K. G. Goswami Sastri, *Calcutta Rev.* 1938, 194-202. L. Rocher, 'Het positieve recht in het oude Indië . . .,' *Indonesië* 7 (1954), 296-319. J. Gonda at *Tijdschrift voor Philosophie*, 20 (1958), 220-268. R. C. Hazra, 'Dharma: its early meaning and scope,' *OH*, 7/1 (1959), 15-35; 8/1 (1960), 7-34. For Dharma as a deity see J. Gonda, *JRAS*, 1971/2, 120-33.

² S. Varadachariar, *The Hindu Judicial System* (Lucknow, 1946). L. Rocher, 'The theory of proof in ancient Hindu law,' *La Preuve: Recueils de la Société Jean Bodin*, 18 (1964), 325-71. S. S. Dhavan, 'Judiciary in ancient India,' *Allahabad Univ. Law J.* 2/1 (1967), 17-31. R. C. Hazra, 'The judicial *pramānas* . . . Gautama and others,' *OH*, 16/1 (1968), 1-56.

³ P. Noll, *Jesus und das Gesetz* (Samm. gemein. Vorträge 253: Tübingen, 1968).

⁴ *Les Sources du Droit dans le Système traditionnel de l'Inde* (The Hague, 1967). For the English edition see Bibliography below.

⁵ Rules capable of being enforced by, or recognised as essential by, state courts.

tion. True, Indians have always enjoyed being told their duties. But it was never the object of the jurists to please (even when they were devising easier penances); it was to instruct. The personal contribution of the writer was submerged, or forgotten. Our basic sources (below, pp. 24–47) are pseudonymous and the scanty autobiographical details of commentators rather conceal than illuminate their personal involvement or even identity. Even the regions of origin of the latter may still be unknown. A requirement of any History, namely chronology, must therefore be prejudiced from the start.

No scholar, no matter if he were a great-grandfather, could expect his compositions to have any effect⁶, to survive into several manuscript copies, unless he related the wisdom of ages in a contemporary guise. His name would add nothing to its value, which lay in its being accepted and transmitted as a true statement of transcendental verities. His work would be valued if it conformed to permanent values and agreed with life as it was lived. Jurists could not abrogate the past. The well-known theory of the Four Ages of the universe was an apology for the incapacity of contemporaries to observe dharma in its entirety⁷. There was no question of innovation. If a group of scholars wished to render previous writings obsolete⁸ it was because they purported to digest, project and continue all that was worthwhile in the past—their effort was one of salvage, not abrogation. The skill of the *śāstrī* lay in teaching the authoritative texts accumulating in his hands as but one faithful link in the chain of good tradition. The behaviour of judges could not impair that tradition. Official obedience (at times) to the *śāstra* could not enhance the reputation of any *śāstrī*; indifference to it could not diminish his prestige. The *śāstra* taught what would give supreme bliss, or what would create *pāpa*, *aniṣṭa* ('sin'). No empirical art or science could compete with that.

The *śāstra* contains no rules of law which must be followed by judges on pain of illegality, but only precepts. These are addressed to the individual who performs the penance, instals an idol, dedicates a tank to the public's use, or does any act appertaining to *dharma*; some are addressed to the king (or his officer) regarding the keeping of the peace, detecting crime, awarding damages, imposing fines, etc.: a great many of them in the characteristic optative mood⁹. A precept may also be laid down in an impersonal form, that such-and-such a thing must be done to a person¹⁰. The word *arhati*^{10a} is used of conduct the sub-

⁶ Medh. on Manu I, 9; V, 13. On 'human' authors (!) see Kane, HD, III, 827–9; V, 1259–60.

⁷ See below, n. 157.

⁸ See below, n. 331. Toḍarmal's object was more modest (below, n. 337).

⁹ *syāt* (as at Manu VI, 1), *vaset* (ibid), *gacchet* (ibid. 3), *cintayet* (ibid. VII, 221); *vivāsayet* (ibid. VIII, 123), *prakalpayet* (ibid., 322, 324). Kane, HD, V, 1226. A twin optative, with different subjects: Manu IX, 279.

¹⁰ *kāryo 'rdha-pādikaḥ* (Manu VIII, 325); *na sākṣi nṛpatiḥ kāryaḥ* (ibid., 65). *daṇḍyaḥ* (passim). An indicative negative followed by the optative of positive advice is illustrated by 'a smṛti' at Dh. k. 1589: *sthāvare vikrayo nāsti, kuryād ādhim anujñayā*.

^{10a} As at Manu VIII, 323.

ject should do, or should suffer. Where legal *principles* differ, the court is placed in a dilemma; where they overlap it has a discretion; where they contradict each other it is paralysed. But in the realm of *precept* different teachings or clashing opinions are not fatal, for the one who makes the decision is equally protected whichever he opts to follow. He makes his prime decision when electing to follow any of them. Now to mistake precepts for principles is to risk misjudging the system. It is clear that the British (mistaking the *śāstra* for a system akin to Canon Law as they knew it) made this mistake; and their contributions to Indian legal literature must be viewed against this background. They had no inward knowledge of the civilization they undertook to protect, and thus could not have applied the precepts even if they had recognised them as such. The vast discretion of the Hindu judge of pre-British times could not figure in Anglo-Indian jurisprudence after about 1800, when the loose system of referring cases to arbitrators¹¹ ceased to prevail.

Dharma (from the root *dhr-*, 'to hold')¹² comprehends acts which a person is under any duty to fulfil (*iti-kartavyatā*)¹³, provided that it has a moral, social, or superstitious significance, and does not arise from mere convenience.¹⁴ The occult value of each performance is also within *dharma*. *Adharma* means the untoward effect of a prohibited act (including sin). *Dharma* is positive duty, *adharma* the reverse. Some customary practices are not within *dharma* if they have no occult value, but *dharma* may require non-deviation from śāstrically acceptable customary practices.¹⁵ *Dharma* certainly comprehends crises such as in road accidents¹⁶, and the compensating of persons who have been injured and the deterring of individuals who would otherwise be criminally negligent¹⁷. Methods of adjustment of rights in use in various regions may attain the honour of being incorporated in statements of *dharma*; but they may not, and there are many obvious gaps. It was an error on the part of eighteenth-century foreign students of the few *śāstric* texts then available to them to expect to find a complete code of law, ready-made, on European lines.

Dharma long preceded a literature devoted to it. The reflective classifying of actions arose first in Vedic times when intellectuals first became self-conscious about the variety of ritual performances. Ideas which had become unstable

¹¹ Evidence of Boughton Rouse alluded to in Derrett, 'Nandakumar's forgery,' Eng. Hist. Rev. 1960, 235. J. Z. Holwell, *India Tracts* (cited by Derrett, RLSI, 275 n. 2).

¹² See n. 1 above.

¹³ Medh. on Manu II, 6 (*yat puruṣasya kartavyam pratyakṣādyavagamyā-vilakṣaṇena svabhāvena śreyah-sādhanam*). Also Jaimini, *Mīmāṃsāsūtra*, I. 1, 1 (*codanā-lakṣaṇah*). A subjective definition: Somadevasūri, *Nītivākya-mṛta*, 8 (*abhyudaya-niḥśreyasa-siddhiḥ*); Haradatta on Gaut. I. 1, 1 (*karma-janyo 'bhyudaya-niḥśreyasa-hetuḥ*).

¹⁴ Medh. cited in last n. Kane, HD, III, 835 (explaining Śabara on Jaimini I. 3, 4).

¹⁵ Medh. on Manu VIII, 41, 46. Kane, HD, III, ch. 33.

¹⁶ See below, n. 137.

¹⁷ Texts quoted by G. Jha, HLS, I, ch. xvi.

or evanescent were trapped in verbal formulae; these originally related only to occult matters, or secular matters (like the sale of sacrificial materials) which were thought to have a great occult significance, and therefore required meticulous attention such as merely practical contexts did not yet demand. When the results of an act could be fully demonstrated (a 'seen' act)¹⁸ no intellectual effort was called for. It was with regard to the so-called 'unseen' acts that sentiments and usages needed to be put down in solemn form before doubt fragmented them or reform overtook them. As we know from other contexts the effort to formulate and to commit to memory any description of behaviour (and still more its conventional justification) is an effort of creative genius of the first order. The desire to set what was fluid is one found at all ages, and has been experienced in Africa amongst social groups acting spontaneously^{18a}, utilising outsiders' help¹⁹, or under political pressure²⁰. When such a (falsely called) 'codification' has occurred it appeals strongly to other groups: those that are able to imitate it will do so, but others will plagiarise or adopt it, even if the practices do not wholly coincide²¹. It is extremely difficult for an illiterate group to say what its customs are²², and a 'code' will be welcomed from a distance, and even incorrect statements will be tolerated with relief. Antiquated practices thus become fossilized, and obsolete usages retain a value on an occult basis: but this is a small price to pay for an objective criterion, and a taste of certainty. The migrations of peoples through India, the difficulties of communication, often braved (no doubt) and seldom without notable effect on the traveller and his section of society, the gradual enchantment of non-Aryan tribes and peoples with Aryan ideas and occult learning (not to speak of the charm exerted by a fair complexion!) lent value to little compendia of norms, and the

¹⁸ On the *dr̥ṣṭa-adr̥ṣṭa* dichotomy see Kane, HD, III, 827, 836–8.

^{18a} The Basutos compiled the Laws of Lerotholi in c. 1900 (information supplied by A. N. Allott). The case nearest to that of many Hindu smṛti writers is that of the Basters of Namaqualand (S. W. Africa) (E. Fischer, *Die Rehobother Bastards* . . ., Jena, 1913; W. P. Carstens, *The Social Structure of a Cape Coloured Reserve*, Cape Town, 1966) who, in 1872–4, spontaneously committed their laws to writing and recapitulated them (Law Book of the Rehoboth Bastards, in Union of S. Africa, Report of the Rehoboth Commission, U. G. 41–'26, Cape Town, 1927, 79–92) under the influence of the Bible and a memory of the existence of Roman-Dutch law (information supplied by N. Rubin).

¹⁹ The Laws of Akim Abuakwa (of Ghana) were the fruit of the services of Registrar Dr. Danquah. A British officer in charge of Buganda courts produced a book on Baganda law.

²⁰ Since c. 1960 an official scheme to restate the customary laws of Tanzania has been afoot. The movement in Kenya: E. Cotran, Report on Customary Criminal Offences in Kenya (Nairobi, 1963); Report of the Commission on the Law of Marriage and Divorce (Nairobi, 1968); Report of the Commission on the Law of Succession (Nairobi, 1968).

²¹ See below, n. 40.

²² *Kali Pennamma v. St. Paul's Convent* 1972, Kerala Law Times 12. A people may have no provable custom at all (!): *Kochan v. Mathevan* AIR 1971 S. C. 1398.

increase of Aryanization must have owed as much to them as it spurred on their revision and elaboration.

Other ancient systems of jurisprudence would lead us to expect certain features in Indian written texts: some duly present themselves, some do not. India's special conditions of life, viz. the immense area, the coexistence of different levels of culture, different races and religions and mutually unintelligible languages, assisted the spread of an overarching systematic presentation of precepts, while preventing a descent to more than a superficial level of detail or beyond quite restricted practical instruction. Many demands of a system of law were never met. Yet daily purposes were in the front of the stage. No one now seriously believes that there is a pattern of human social development through which every society must pass²³; yet it would be natural to expect the *śāstra* to conform to developments seen in Roman and Jewish law. Some early features are missing, or slightly represented because Gautama, for example, or Manu obliterated less perfect attempts on their predecessors' parts. But it may be that some features which would otherwise argue for maturity never arrive because India's special characteristics forced her to aim consistently at other goals.

This chapter of the History is concerned with the literature, and the reader is referred to the *Handbuch der Orientalistik, Indien*, and to the *International Encyclopedia of Comparative Law*, for brief accounts (respectively) of the content of the *śāstra* as related to its place in Indian law. Questions of intention, diction, style, method, and production will occupy us here, such as were posed by the two thousand and more works²⁴ that are available to us, or may be made available to us if our adequately-preserved manuscripts receive their just proportion of editorial attention.

2. *The longevity and flexibility of the literature*

The *śāstra*, even in its decadence, did not cease to respond to the needs of society, though (as is inevitable with a traditional science) it was in style and approach that adjustments were made, rather than in substance. Nineteenth-century authors, from the front-rank encyclopedist who wrote the *Śukra-nīti-śāra*²⁵ to the humble pandit or pandits who wrote the *Śvaśrū-snuṣā-dhana-samvāda*²⁶, still took (in the first instance silently, in the second overtly) as their basic authorities works composed centuries before in answering current questions, with respectable results. The literate public's interest in the ancient

²³ J. W. Burrow, *Evolution and Society* (Cambridge, 1966); A. S. Diamond, *Primitive Law Past and Present* (London, 1971), reviewed by B. S. Jackson, *LQR*, 88 (1972), 266-70.

²⁴ Kane, *HD*, I (1930), 677-760. Omission will have been balanced by doublets (works appearing under several names). An example of the riches awaiting enterprise is the *Dvijarājodaya* (S. L. Katre, *NIA*, 6/7 (1943), 145-55).

²⁵ Kane, *HD*, I², 272. L. Gopal, *BSOAS*, 25 (1962) 524-56.

²⁶ See below, n. 330.

science is not dormant²⁷ and the texts can still be put to practical use from time to time²⁸. A late *smṛti* work under the name Parāśara²⁹ was republished with a Hindi commentary as recently as 1968³⁰.

It might be argued that the basic sources (below, pp. 24–47) stand out like islands in a lake of fluctuating opinion, and that here, as in other fields, the giants of the past (e.g. ‘Manu,’ and the Mitākṣarā ?) dominate, and must do so if the *śāstra* is to keep its character. Further, it may be objected that if the *śāstra* had been capable of original growth in this century the violent upheavals in the realm of family laws from 1955 onwards would not have occurred. The sources and the content of the rules in legal contexts were not subject to change at the option of any jurist. The Veda could not be denied as the ultimate source. This handicap, inherited from the era when a national conception of what was expedient was unthinkable, marks out the unreformed Hindu law as an archaic system strongest where it least contemplated change (as with the Jewish and Islamic laws also). Yet the mode of treatment tended to adjust to the times, and the style of presentation moved gradually with the public’s needs; changes in tone and approach are very noticeable in the early British period, but they did not start then. We shall consider the motives and achievements of the *śāstric* writers rather than their opinions on controversial topics, which were so very numerous, but even so we shall find a good deal of room required merely to illustrate such features as are appropriate here.

The earliest surviving texts containing legal rules appear to be the brāhmaṇas and upaniṣads. The *saṃhitās* of the Veda only allude to such topics in passing³¹. Even the brāhmaṇas and upaniṣads do not seek to teach rules, though allusion to them is often poetically or pedagogically advantageous. *Dharma* was amongst their topics, and the commentators (below, pp. 47–59), who were concerned with law, often treated them as sources of authority. Moreover a self-conscious form through which norms might be stated and propagated preexisted Alexander the Great. Students and teachers already had their characteristic relationship as the Greek accounts testify³². Megasthenes (300–290 B.C.) found

²⁷ R. L. Narasimham, *J. Indian Law Inst.*, 11 (1969), 321–7. Justice K. Sadasivan, *Kerala Law Times*, 1972/1, *Journal sect.*, 3–8 at p. 4.

²⁸ *Śāstric* sources are used in, e.g., *Manorama v. Rama* AIR 1957 Mad. 269; *Guramma v. Mallappa* AIR 1964 S. C. 510; *Saraswathi v. Anantha* AIR 1966 Ker. 66; *Shibu v. Padu* 1966 *Kashmir Law J.* 389, 396; *Rabindra v. Narayan* PLD 1967 Dacca 745; *Shiromani v. Hemkumar* AIR 1968 S. C. 1299; *V. D. Dhanwatey v. C. I. T.* AIR 1968 S. C. 683; *Rajaram v. Bala* (1970) 73 *Bombay Law Reporter* 766; *Pichandi v. Ramaswami* AIR 1971 Mad. 204; *Laxmi v. Babu* AIR 1973 Raj. 89.

²⁹ See below, p. 39.

³⁰ Ed. Daivajña-vācaspati Śrī Vāsudeva (*Haridas Skt. Ser.* 273, *Chowkhamba Skt. Ser.*, Varanasi). *Kāśinātha’s Dharmasindhu* (n. 366 below) was edited with a Hindi comm. of Vāsiṣṭha D. Miśra in the same series in 1968.

³¹ The Dh. k. rightly includes Vedic material, manifestly differing from the other sources in style and scope.

³² F. Jacoby, *F. Gr. Hist.* 715 F. 33 (59). J. W. McCrindle, *Ancient India as described in Classical Literature* (Westminster, 1901), 65; the same, *Ancient India*

administration of law going on without the need to refer to statute or written record³³. The latest texts in the *śāstra* appear about the mid-nineteenth century³⁴. The posts of Hindu Law Officers of the High Courts of Bombay, Calcutta, and Madras were abolished in 1864 and the incentive to write original works ceased. Fading for somewhat less than a century already, the *śāstra* came to an effective end then. It is still studied as a branch of Sanskrit, and as a school of traditional mores; the qualification of 'Shastry' is still sought, by a diminishing number of candidates. True the opinions of the jurists including Jagannātha Tarkapañcānana (fl. 1785) are still in use, for they were cited and expounded in judgments of the High Courts (1862-) and Supreme Court of India (1950-) without a break till today³⁵. But this after-life is *sub modo*, for those that expound the law were not trained in the technique of the literature, and have no responsibility for its health and viability. Where the *śāstra* is still resorted to by the courts those who resort to it will hardly wish to be bound by it where its precepts are contradicted by their sense of utility, or where the will of the people, expressed in Parliament or in the State legislatures, has pushed *śāstric* ideas aside³⁶.

With a formal limit at 1864, we possess an enormous quantity of material superior in bulk and variety to the Roman law, and of more obvious continuity. Writers in about 1850 appeal to authors of the first millennium B. C.³⁷, and this rivals the comparable longevity of the Jewish law, in which modern writers cite not only the Torah of Moses but also authors living between 100 and 500 A. D. Roman law ceased to be applied not long after it reached literary perfection in the sixth century A. D., and Jewish law has not been applied since A. D. 135 in respect of penal law, nor since the beginning of the nineteenth century in respect of civil law (except, in minute areas, for marriage, divorce, and succession). But the *śāstra* was effective in respect of crimes as late as 1815 and contracts as late as the 1850's in some parts of India^{37a}, a few portions of the

as described by Megasthenes and Arrian, 2nd edn. (Calcutta, 1960), 98-9. For the system see Kane, HD, II, 321-3; S. C. Banerji, JOR, 27/1-4 (1957-8), 74-8.

³³ Derrett, JAOS, 88/4 (1968) 780-1, referring to Jacoby, F. Gr. Hist. 715 F. 32.

³⁴ See below, n. 330. Derrett, RLSI, 270-1. Śarabhoji's Vyavahārārtha-smṛti-sāra-samuccaya (a simple digest of smṛtis: loan copy available from Tanjore S. S. M. Library) belongs to c. 1798-1833. Kane, HD, I, 631.

³⁵ See n. 28 above.

³⁶ Expression of opinion by Justice Ganesan in Kanna v. Krishnaswami AIR 1972 Mad. 247. For the Modern Hindu Law see Derrett, Critique of Modern Hindu Law (Bombay, 1970), and (Madras) Hindu Marriage (Madras Amendment) Act, 21 of 1967 (Critique, §. 383).

³⁷ The Śvaśrū-snuṣā-dhana-saṃvāda (at VI. 1) (n. 330 below) refers to the AB. VI. 7. See below, n. 97.

^{37a} Derrett, RLSI, 264, 293-4. V. Parabrahma, Vyavahāra-darpaṇa, is of special interest. See also F. W. Macnaghten, Considerations on the Hindoo Law (Serampore, 1824), ch. 7 (taken from Jagannātha); T. L. Strange, Manual of Hindoo Law, 2nd edn. (Madras, 1863), ch. 14.

latter are in force still³⁸, and the whole of family law is available to be consulted and enforced, subject to the Indian reforms of 1955–6 (as subsequently amended) and subject to Hindus' having largely abandoned inter-caste marriage (now reviving slowly as a sign of cosmopolitan fashions within modern Hindu society). The courts frequently had difficulty in ascertaining and applying the *śāstric* rule, a misfortune springing from a literature which has largely been misunderstood. But the method adopted by the British since 1772 in Bengal, Bihar and Orissa, and later in other parts of the peninsula produced a uniformity and certainty which would have been impossible if that misunderstanding had not occurred.

The literature, no doubt as a result of conscious policy, retained a flexibility of a special kind beyond developing techniques. It was able to extend its appeal further and further into sections of the public which voluntarily came within its reach. More and more avenues were used to attract and hold attention, and this has by no means ceased. Within this pattern of cultural extension there lies the hard fact that in securing the approbation of the British administrators in 1772 *śāstrīs* of Bengal vindicated for the *śāstra* what was virtually a new field for Hinduism at its most consciously normative: they used their rulers as a means whereby what had formerly been of suasive authority reappeared as positive law.

3. *The responsibility of the jurists and the fate of their undertaking*

Before we turn to the authors and their works, their styles and their sources, we must reflect further on what they aimed to achieve. The need for a *śāstra* on this subject is shown by the texts' contents and stance. It was not enough that Hindus should know their customary laws, or that their village headmen, or, ultimately, their rulers could be relied on to enforce them. No literature might have emerged, had that been the case. Just as Eike von Repgow (fl. 1221) stated, interpreted and perhaps amended Saxon customary law in the *Sachsenspiegel*, so, but at an earlier period, Indians stated, analysed, and selectively amassed the customary laws of certain countries: in both cases the impetus came not from certainty and security, but the want of both. The peace, and the revenue, depended on justice. In a complex society the co-equal justness of divergent or even incompatible usages needed to be proved. By the time of the *dharma-sūtras*, when legal norms began to appear, when ritual and superstitious practices ceased to occupy *śāstrīs'* minds exclusively, the identity of customs, their appropriateness and authority were in grave and widespread doubt. The educational process, well known in India, whereby superior classes 'taught' inferior classes how to live, required that the customs of the former should be examined and recorded, so that there might be a standard against which all

³⁸ The 'pious obligation' and '*damduppat*' for which see Derrett, Introduction to Modern Hindu Law (Bombay, 1963) or N. R. Raghavachariar, Hindu Law, 6th edn. (Madras, 1972).

status-seeking societies could be judged. Customs varied; the faculty of imitation required that some usages must be disapproved or neglected if others were to be propagated; some standards had to be forged by intensive observation and comparison, pursuing the effort of recording with an eager reflection upon what had been recorded; and the resulting intellectual essence (which did not codify any customary law) offered a mirror to the Hindu public in its wild diversity. This intellectual construct would enable it to expound its ways to lower classes (perhaps the nucleus of the *Sūdras*), and newly Hinduised tribes, which wished to improve their status and their supernatural expectations (e.g. a 'better' re-birth) by imitation—provided that by so doing they would not encroach upon the privileges of superior classes. The intricate task (not completed by the end of the twentieth century³⁹) of inspiring the aspiring without encouraging them to infringe upon the property or the prestige of their 'betters' was successfully undertaken with delicacy and realism—reassuring the superiors that they were not threatened and reassuring the inferiors that their status as followers was, in *dharmic* terms, profitable to them.

As the *Sachsenspiegel* was adopted in many foreign areas, beyond Germany let alone beyond Saxony; and just as the town-laws of Magdeburg and other 'mother' cities were adopted in many new, less evolved communities, and authoritative interpretations of Magdeburg law in Magdeburg became law also for regions far from that city in distance and circumstances⁴⁰, so also in India caste after caste accepted *śāstric* works as authoritative though this was hardly contemplated by their authors, and ancient texts went to the length of declaring their habitats unclean and their example fit only to be shunned by the righteous⁴¹! As new texts issued in new areas they were taken up as authoritative, if sometimes rather less enthusiastically, in the 'mother' regions whence *dharmā* was thought first to have set out on its missionary journey through the sub-continent⁴². The concept of local *dharmā*, familiar to the *smṛtis*⁴³, gave way gradually to the concept of 'good custom' as a source of a general *dharmā*⁴⁴. Works of authority began to appeal primarily to the student-devotees of a particular *śākhā* of the Veda, but despite this claim to sectional loyalty they proceeded as if they were to be followed everywhere. Similarly sectarian works, aiming principally to instruct devotees of Viṣṇu or Śiva, entered the main stream of *śāstric* authority and were cited indifferently⁴⁵.

³⁹ P. B. Gajendragadkar, *Secularism* (Bombay, 1971), ch. 12.

⁴⁰ G. Kisch, *The Jews in Medieval Germany*, 2nd edn. (New York, 1970), 62–4.

⁴¹ V. N. Mandlik, *Vyavahāra Mayūkha* (Bombay, 1880), iii–vi. Kane *HD*, II, 134.

⁴² Works from the Mithilā 'school' make scanty use of southern authors, which no doubt were known and consulted, however.

⁴³ Kane, *HD*, III, 858–62.

⁴⁴ *Ibid.*, III, 825–7, 853–5; V, 1264, 1280.

⁴⁵ See below, p. 36.

The rules enshrined in our literature were repeated in maxims of statecraft and politics⁴⁶, in the epics⁴⁷, and in specialist works on ritual and on the plastic arts, where, as often, these impinged upon social needs: thus a work on architecture would contain ritual provisions, concerning itself with caste privileges, and therefore caste definitions, relating to the functionaries of that mystery⁴⁸. In course of time a quantity of *śāstric* information, handily encapsulated in easily memorised verses, found its way into folk literature, and re-entered through an unexpected door the social milieu from which its inspiration originally came⁴⁹. The Pañcatantra has an abundance of *śāstric* texts, not always aptly cited⁵⁰.

The jurists helped kings to find advisers who knew what the law ought to be, and particularly the law that demanded the loyalty of the prestige-bearing classes, Brahmins and Kṣatriyas; they took upon themselves the task of propounding law, *inter alia*, for all the subcontinent. They purported (as we have seen) to do much more than that, and yet much less. They taught the *dharma* of all the four castes (*cāturvarṇya*). There never was an Indian law-book which contained all the rules any court would enforce. The Sanskrit word for law (*naya*) hardly figures in the literature. Records of customary rights of Punjab villages (*riwāj-i-ām*) compiled under the British⁵¹ prove that such surveys could have been made at earlier periods, and jurists were at times aware of this⁵². Some industrious kings may well have compiled records of customs, and royal charters of customs must certainly have been enrolled in a record-house. But that it was a universal or consistent practice need not be supposed. Diet, climate, invasions, natural disasters (not to speak of indolence) would have frustrated even the most comprehensive and best-intentioned research. Thus the *śāstra* took an interest in custom, but jurisprudentially. It taught the king to evaluate custom and (optimistic as this seems) to abolish customs repugnant to *dharma*⁵³. So prejudiced an approach could provide a study of custom in the abstract⁵⁴; it could not codify customary law objectively.

⁴⁶ Kauṭilya contains *smṛti* stanzas: Kane, HD, I², 185, 199–200. For a close examination of the examples see L. Sternbach, JAOS, 88 (1968), 719–20 (Manu), 721 (Kāty.) and Sternbach's chapter on Gnomie and didactic poetry in this History of Indian Literature.

⁴⁷ Kane, HD, I², 335–45, 353.

⁴⁸ Inscriptions studied by Derrett (n. 140 below).

⁴⁹ By way of the Cānakya-nīti collection. L. Sternbach, JAOS, 79/4 (1959), 233–54; *ibid.*, 83/1 (1963), 49, 63, 64. The same, Juridical Studies in Ancient Indian Law (Delhi, 1967), II, ch. 26.

⁵⁰ L. Sternbach, Juridical Studies (*cit. sup.*), II, chh. 19, 22, 23.

⁵¹ Digested by Rattigan, Digest of the Civil Law of the Punjab, 13th edn. (Allahabad, 1953).

⁵² References at Derrett, RLSI, 162 n. 2.

⁵³ See last note.

⁵⁴ As in the Paribhāṣā-prakāśa of Mitra-miśra's Vīramitrodaya, or the Saṃskāra-kāṇḍa of Devaṇṇa-bhaṭṭa's Smṛticandrikā.

Since customs ought to be imitated outside their home-region only when they were reasonable and authentic, of long standing, approved by experts in the traditional culture, men in touch with the unseen world, and knowledgeable in the Veda, it followed that the teaching of customary law must be subordinate to teaching about righteousness, a universal requirement, easily exported. Neophytes would see that obedience would bring them near to supersensory merit, and at one blow foster their prestige and enhance their expectations from agriculture. For a king who enforced *dharma* did not suffer drought⁵⁵: that theory was difficult to disprove if a sceptic ever dared to try⁵⁶.

Laws may be many, *dharma* is one. Perhaps before the more famous *sūtras* or *smṛtis* were written the theory gained ascendancy that all authoritative texts spoke with one voice, that all contradictions were only apparent⁵⁷. Having avoided the difficulty posed by the changing of hundreds of customs spontaneously—not to speak of phases induced by imitation—the jurists found themselves in another, viz. that they must teach primarily by way of exhortation. Brahmins were warned that they risked excommunication for breach of a myriad of rules, the factual sediment of the *śāstra*⁵⁸. Kings were warned that unless they strove to enforce the *śāstra*'s principles, protecting the *cāturvarṇya*, they would suffer natural calamities, or the dreaded rule of the jungle (*mātsya-nyāya*)⁵⁹, in which the treasury and so the throne would collapse⁶⁰. *Śāstrīs* promised rulers joys in Indra's heaven if they did the righteous and abstained from the unrighteous action. This was their message⁶¹. It called for a compassionate application in those very contexts (the king's policies) where rigour would have been more efficacious. But *dharma* is 'enforced' only by the long arm of fate. Law-in-action, amongst the Hindus, was amended piecemeal, unpredictably, on the basis of royal proclamation⁶², in the slow uneven growth of court practice, and the gradual erosion of rules adopted into the *śāstra* under the pressure of customs which had never persuaded the jurist of their intrinsic worth. These developments paved the way for the modern phenomenon, observed since the legislative abolition of suttee at the latest, that whatever the unchanging (*sanātana*⁶³) *dharma* may say, the rules running in the courts may answer to the

⁵⁵ Manu III, 76, XII, 99. Kane, HD, III, 3.

⁵⁶ Cārvāka ideas are not reflected in *śāstric* works as they are in the Mahābhārata. Manu refers to sceptics at II, 10–11. Heretics: Kane, HD, III, 834–5, 843. Ballālasena does not use heterodox works: *ibid.*, I, 340. Nāstikas: *ibid.*, V, 1206.

⁵⁷ *eka-vākyatā-nyāya*. References at Kane, HD, V, 1341 (s.v.). Medh. on Manu VIII, 165.

⁵⁸ On *pātitya* and excommunication see Kane, HD, IV, 10–13, 105.

⁵⁹ Bhār. on Manu VIII, 130. Kane, HD, III, 21, 30.

⁶⁰ Kāty. 44–45; Nār. XVIII, 15. Kane HD, III, 26–7 touches on the 'right' of revolt.

⁶¹ Manu VIII, 386–7. Nār. Introd. I, 74.

⁶² Derrett, JAOS, 84/4 (1964), 392–5 (see Kane, HD, I², 569–70).

⁶³ On 'sanātanism' in the 'Hindu Code' controversy, Kane, HD, V, 1629. Swami Bharati Krishna Tirtha, *Sanātana-dharma* (Bombay, 1964).

ruler's pleasure, granted that the orthodox will repine thereat. The theoretical standards of the unseen world are not expected to be reproduced in the 'seen' world uniformly.

Thus the way was prepared for the statutory abolition of *sāstric* rules (e.g. 'sitting *dharna*') under the British⁶⁴, and the more recent introduction of institutions (e.g. divorce⁶⁵) incompatible with the *sāstra*. The latter would, before 1772, be looked to, and its precepts used in difficult cases or where the basis of the State was somehow seen to be at risk. Abstaining from codifying custom, the jurists determined to aim at enlarging the *sāstra's* prestige with judicial advisers and the educated classes in positions of power, and (to that end) to develop jurisprudence as a science. But, undertaking that reasonable task they forfeited an opportunity to wed the public's love of its own particular customs to its belief in the overarching concept of righteousness. It ultimately accepted that righteousness is ever valid, but that the day-to-day practice had a temporary, secular validity irrespective of its truth or falsity in transcendental terms. The characteristic want of principle shown by Hindus in litigation⁶⁶, and their tolerance of visionary statutes⁶⁷, stem from this. Unlike Muslim law until the second half of the twentieth century, Hindu law has continuously been subject to variation in practice: the more readily for the knowledge that no legislature can tamper with *dharna*, which is beyond amendment. The jurists wrote for their own day, indeed, but under the eye of eternity. Some Sanskrit writers contemplated a time when *dharna* would no longer gain translation into practice, would no longer be the recognised norm⁶⁸. This was not clairvoyance—it was a logical postulate from their original undertaking. Abhorrence of an inevitable eventual decadence acted as one of the main incitements to righteous living from the time Hindu society recovered from its last shocks of invasions and ravages of a predatory foe until the consolidation of British rule seemed to bring the 'prophecies' to pass⁶⁹.

⁶⁴ J. Shore, Asiatic Researches⁴ IV (1807), 330–2; Bṛh. X, 94. Kane, HD, III, 438. Bombay Regulation VII of 1820. R. Ranchhoddas and D. K. Thakore, Indian Penal Code, 22nd edn. (Bombay, 1959), 433 (comm. on Indian Penal Code, sec. 508). On British interference with Hindu traditional law: Kane, HD, III, 821, 972.

⁶⁵ Hindu Marriage Act, 1955. Previously: Bombay Hindu Divorce Act, XXII of 1947; Madras Hindu (Bigamy Prevention and Divorce) Act, VI of 1949.

⁶⁶ Derrett, RLSI, ch. 11; Critique of Modern Hindu Law, App. IV.

⁶⁷ E. g. the Dowry Prohibition Act, 28 of 1961.

⁶⁸ Viṣṇu-purāṇa IV, 24, VI, 1 (H. H. Wilson, The Vishnu Purana, ed. R. C. Hazra, Calcutta, 1961) (cf. Manu I, 82). For other references see V. R. Ramachandra Dikshitar, Purāṇa Index I (Madras 1951), 333–4 (s. v. Kaliyuga). Kane, HD, III, 923–6. Toḍarānanda, I (1948), 384–5.

⁶⁹ 'Śukra' was chosen as pseudonym by the author of the Śukranītisāra (n. 25 above); in the Kali Age the ṛṣis associated with *dharna* (as contrasted with *nīti*) were no longer adequate authorities! The Mahānirvāṇa-tantra (late 18th cent.) contemplates Muslims and Hindus and perhaps Christians in religious communion (XI, 130). It repeats the condemnation of men of the Kali Age at I, 37–50; XI, 3–4.

4. The limitations imposed by the task upon language and style

A change overcomes Sanskrit between the metrical lawbooks and the digests (below, p. 52–7). The ancient sources have a spontaneity which suggests that Sanskrit was a living language amongst the leaders of intellectual life. The quality of versification is high, and not a few couplets, dealing with general principles of an 'unseen' character, or even with more mundane matters, have a beauty and appropriateness which, seeming facile, are the work of refinement⁷⁰. On the other hand the 'bogus' *smṛtis* (pp. 19, 40) lack style, their versification is often poor⁷¹. It could afford to be so, it seems, since information, not delight, was the object of composition. The authenticity of ancient style is great. Imitators, when they do not copy their predecessors verbatim, deviate slightly, not always to advantage⁷². The hack took over from the artist. Coming to the digests and commentators we note a more limited linguistic apparatus. The commentator supplies synonyms for words even where no ambiguity was to be feared⁷³. Commentators' sentences leave much to be desired. A tasteless, sprawling style develops, a lingua franca, owing perhaps its sometimes inconsequential meanderings to the influence of the Dravidian house language of many of its authors. Sanskrit, a vehicle for academic training, acquired the characteristics of the rather run-down Latin used in Europe in the fourth century. And India never entered a humanist phase in which vocabulary was purified, idiom revived, and the technical literature interlarded with self-conscious cultural assertion. The *śāstrīs*' pedantry revelled, instead, in analysis, enumeration, and a search for ever more exhaustive treatment. Enumeration as an aid to learning and to the examination of students abounds in our *śāstra*⁷⁴ as it does in the Mishnah of the Jews⁷⁵—similar needs produced similar techniques, in both cases in defiance of artistic requirements.

⁷⁰ Manu VIII, 81 is well composed; XI, 238 is beautiful.

⁷¹ Brhan-Manu (Dh. k., 1252): *brahmadāyūgatām bhūmim hareyur brāhmaṇī-sutāḥ | grhaṃ dvijātayāḥ sarve tathā kṣetram kramāgatam ||* Matsya-purāṇa (Jha, HLS, I, 494; Dh. k., 1892): *adravyāṃ mṛta-patnīm (sic) tu saṅgrhaṇan nāparādhnyūāt | balāt pariḡrhaṇas tu sarvasvaṃ daṇḍam arhati ||* Skanda-purāṇa (Hemādri, Caturvarga-cintāmaṇi, Dāna-khaṇḍa, 1033): *yas tu vrkṣaṃ prakurute chāyā-puṣpa-phalopagaṇaṃ | pathi divye naraḥ pāpāt santārayati vai pitṛn ||*

⁷² Matsya-purāṇa (HLS, I, 494; Dh. k. 1892) is evidently based on (and a revision of?) Manu VIII, 364. 'Dakṣa's' jejune text in the Smṛticandrikā (HLS, I, 269) is based on classical models, the third line betraying the decadent touch.

⁷³ Lakṣmīdhara, Kṛtyakalpataru, Vyavahāra-kāṇḍa, 288: *dhānyam vrīhi-yavādi*. Ibid., 433 *nirṣṭam dattam*. But the glosses at 111 are probably useful. Vijñāneśvara, Mitākṣarā on Yājñ. II, 68: *dāna-silā dāna-niratāḥ, kulīnā mahā-kula-prasūtāḥ*. Space is wasted with such explanations. Nṛsiṃha-prasāda, Śrāddha-sāra, 47 exemplifies such a word-for-word interpretation even in a digest.

⁷⁴ Judicial procedure: Nār., Introd., I, 8–9; pledges: Brh. XI, 17 (HLS, I, 153); injuries: Brh. XX, 1; slaves: Manu VIII, 415; corrupters of women: Manu IX, 13; impotent men: Nār. XII, 11–13.

⁷⁵ E.g. Shebuoth I, 1 (H. Danby, The Mishnah, 1933, 408).

Dharmaśāstra and Juridical Literature

15

Though we know that the public demanded translations of Sanskrit authorities in medieval times^{75a}, translations of whole Sanskrit works into regional languages appeared very late. They acquired no authority⁷⁶. The *śāstra* was so highly contextual that an acquaintance with its rules in the chapters, e.g. of succession, would not enable one to dispute with, still less to correct, a *śāstrī* whose education was in the original sources.

In what follows we may for the present confine ourselves to the *sūtra*, or epigrammatical, and *smṛti*, or metrical sources upon which the commentators worked. The beauties of Sanskrit lie usually in a crispness of diction, sonority of cadence, and contrast between assonance and dissimilarity of meaning. Play with sounds and with double meanings^{76a} would have been expected; every opportunity might have been taken to exploit ambiguities and nuances. But the function of the *śāstra* would not tolerate overt ambiguity, and literary niceties must give way to practical exigencies. A digest-writer, or commentator, can place more or less ornate verses in his incipits or colophons, and that is all⁷⁷. Our authors need to be short, to eschew repetition, to be unambiguous, plain, definite, unnuanced in their statements. Few of these latter were not injunctions, and most of them were exhortations ('so said Manu,' 'such is the eternal *dharma*'). Irrelevance, doubt, hesitation, subtlety (as, unfortunately, at Manu VIII. 332) were all out of place. Alternatives, where inevitable, must be few and clear. Normative passages might hover between the directory and the mandatory⁷⁸, for some readers might opt for the one interpretation, or the other. The recommendations of *dharma* must be stated, however, not implied or hinted. The only luxury was the arrangement of items in an order pleasant and memorable to the ear, if a choice seemed relevant, rather than logically desir-

^{75a} Annual Report (of Epigraphy) (South India) No. 558 of 1904 (12th cent.): see n. 140 below.

⁷⁶ A Telugu trans. of a part of the *Mitākṣarā*: Derrett, RLSI, 257 n. 1. M. Kandaswami Pulavar made a Tamil summary of the *Smṛticandrikā* in 1826 (Derrett, RLSI, 228 n. 1). The *Vyavahāra-darpaṇa*, *ibid.*, 264. T. K. I. Ramanujacharya's Tamil trans. of Manu (Madras, 1907), and S. S. Parvatishankar's Gujarati trans. of Manu (Ahmedabad, 1941) were probably not intended to help with judicial work. From the last decades of the 19th century works provided to serve Anglo-Indian judicial administration accumulated: see British Museum catalogues of printed books in the Indian languages, indexes, s. v. Law; also India Office Library catalogues under the heading 'Law.'

^{76a} A rare example of a play on words (*putra* = son/seedling), *Matsya-purāṇa* in Hemādri, *Caturvarga-cintāmaṇi*, *Dāna-khaṇḍa*, 1050: *daśa-kūpa-samā vāpī daśa-vapī-samo drumah | daśa-druma-samah putro, daśa-putra-samo drumah ||* For similar exaggerations of relative importance (a common *śāstric* idiom) see, e.g. Manu VIII, 338.

⁷⁷ Lakṣmīdhara, *Kṛtyakalpataru*, *Vyavahāra-kāṇḍa* has a single verse opening and then a *pratiṅṅā* (table of contents) in 37 verses. Hemādri begins his sections with verses. *Vijñāneśvara* thought little verses desirable, e.g. at the commencement of the *dāyabhāga* section. Modern editions of *śāstric* works also favour verse proemia.

⁷⁸ A problem for the British judiciary: Derrett, RLSI, 78–80.

able, letting the verse make its own logic⁷⁹. Yājñavalkya III. 157 is more attractive in Sanskrit than in translation (it is about the qualifications whereby an ascetic may become immortal):

stryālokāmbha-vigamaḥ sarva-bhūtātma-darśanaṃ |
tyāgaḥ parigrahāṇām ca jīrṇa-kāṣṭhya-dhāraṇam ||

‘Separation from seeing or touching women, apprehending all creatures as oneself [cf. III. 65], putting off all appurtenances [human and material] and putting on ragged ochre robes . . .’

On the other hand rules and propositions would seldom fill a stanza exactly: it was a commonplace for the jurist to complete his lines with ‘soft’ words having virtually no meaning⁸⁰. And if his material slightly exceeded what his couplet could command, words such as *ādi* and *ca* were used (like our ‘etc.’) to include what the author had perforce to omit⁸¹. Or if the verse was too tight an essential *api* might be left out⁸². Some slovenly results ensued. Obsolete or ambiguous terms were tolerated⁸³ or even the use of the same word in two senses in close proximity⁸⁴. The versifier must always watch the *avagraha* (mark of separation, apostrophe) carefully⁸⁵. Hard lines might be tongue-twisters⁸⁶. Ugly lines could occur having little precise meaning,⁸⁷ and there was the occasional bad verse which obscurely projected difficulties greater than any it solved⁸⁸. Sometimes allusion was resorted to, which was hardly

⁷⁹ Items quoted at p. 45 below.

⁸⁰ Pleonastic *tu*, *api* and *tathā* are common. *iti smṛtam* is as common as it is unnecessary. *tattvataḥ* (e.g. p. 23 below), *dharmataḥ* are line-fillers. Exigencies of metre are the excuse offered by commentators for awkwardnesses: Medh. on Manu I, 20, 30, 107; II, 6 (trans. G. Jha, I, 203) et alibi. Kane HD, I², 339. Pleonastic *iti sthitiḥ* is common, but *iti śāstra-viniścayaḥ* at Kāty. 638–9 is not a line-filler (Kāty. reconciles divergent smṛtis antecedent him).

⁸¹ A famous example: Vijñāneśvara’s (and others’) reading and interpretation of Yājñ. II, 143c (Colebrooke II, xi, 1–6; cf. readings at Dh. k. 1443). In smṛti style *ca* often has an augmenting force: Vijñāneśvara on Yājñ. II, 135 (Nirṇayasāgara edn., 221; Colebrooke II. ii. 6); *ibid.*, I, 45, 80, 132; III, 227. Bhār. on Manu VIII, 58, 190; IX, 231; X, 3. Medh. on Manu IX, 2. Kullūka on Manu II, 5; IV, 130. J. Jolly, Institutes of Vishnu, Introd., xxxv–vi. Rabbinical interpretation of scripture also attributes augmenting force to ‘and.’

⁸² Bhār. on Manu XI, 162.

⁸³ Kāty. 116 (*icchā-pravartaka*); Manu VIII, 325 (*chūrikā, ardha-pādika*), IX, 219 (*pracāra*). Medh. on Manu IV, 152 (Jha, trans., 426–7).

⁸⁴ Manu VIII, 63–4 (*āptāḥ*).

⁸⁵ *’lubdha* in Manu VIII, 77 (see variants at Dh. k. 257). The bad verse attributed (wrongly?) to Kāty. by the Ṭoḍarānanda and the Viramitrodaya (digest), Kane’s edn., 466 (see his notes at 59, 207) creates infinite embarrassment.

⁸⁶ E.g. Yājñ. III, 276–7.

⁸⁷ Yājñ. II, 139 (an attempt to improve upon Manu IX, 211–12?): text and translation in chaos. Cryptic stanzas: below, n. 268.

⁸⁸ Manu VIII, 103, 188, 240, 252; IX, 122–3, 287.

informative⁸⁹, even allusion to other authors, with no assurance that the reader or hearer had acquired, let alone mastered, the text referred to⁹⁰.

In the prose portions of the *sūtra*, its greater bulk, vagueness could creep in, distracting and misleading for the newcomer. It was assumed that copies would not be acquired by the non-expert, or by one who did not have access to an expert. Works written nominally for beginners might be none too clear at all points⁹¹; but these are pitfalls into which authors of all ages have fallen.

The choice of vehicles will be raised below (pp. 24–5). We must postpone, too, the attention called for by the enframing or encapsulating of statements of *dharma* within mythical propositions. Yet we must note that unless a recommended *dharma* is plainly derived from ultimate antiquity and divine wisdom (found as a nominal source in western lawbooks too⁹²) it lacks suasive force with a sceptical audience, whose problems cannot be solved by appeals to convenience or to any authority smacking of prejudice or bias. The apparently unnecessary or overelaborate framework thus subserves a real teaching function.

5. *The march of the sūtra: its development of techniques and absorption of topics*

In spite of linguistic handicaps, texts needed to have a fixed meaning, and required to be 'construed' according to canons of interpretation which utilised the literal sense, the sub-context, the wider context, and so on. It was assumed that the text was verbally authoritative, that its inspiration lay in the syllables themselves. From these meaning must be elicited. Context apart, short texts were customarily used to support arguments not obviously in their authors' minds: thus texts had two lives, within, and outside their contexts. Buddhist and Jain scholars, occupied in parallel tasks⁹³, denied the authority of the Veda. But

⁸⁹ E.g. Manu VII. 214–15.

⁹⁰ Kāty. cites Bhṛgu and Br̥h. frequently; Nār. and Manu refer to Vasīṣṭha. On the other hand Kāty. *mānavāḥ sadya* (823) alludes with adequate summary to Manu and Gautama (hardly verifiable: Kane's Kātyāyana-smṛti-sāroddhāra, 290 n.).

⁹¹ The Bāla-kṛīḍā (below, p. 49) is at times cryptically concise. The Dāyabhāga portion is translated by S. Sitarama Sastri (Madras, 1900) and a comparison with Vijñāneśvara's Mitākṣarā (trans. by Colebrooke or Gharpure) at once reveals the advantage of the latter. For the expression *bāla-bodhārtham* see Kane, HD, I, 292.

⁹² G. Kisch, op. cit., 316, 342. Until well into the 18th cent. (R. O'Sullivan, *The Spirit of the Common Law*, Tenbury Wells, 1965, chh. 3–4) it was accepted that fundamental law was natural law, upon which divine positive law rested, and positive human law was binding so far as it was not repugnant to these: natural and divine laws were treated as active sources of law (D. Lloyd, *Introduction to Jurisprudence*, 3rd edn., London 1972, ch. 3). In India what was propounded as a supernatural law took the place of 'natural law' in the West, and neither divine nor human legislation figured, intellectually.

⁹³ For Jaina law see C. R. Jain, *Jaina Law* (Madras, 1926); Padmaraja Pandita, *A Treatise on Jaina Law and Usages* (Bombay, 1886); R. Williams, *Jaina Yoga* (London, 1963). An example of Buddhist juridical work in Skt.: Sanghasena, ed., *Sphuṭārtha Śrighanācāra-saṅgraha-ṭīkā* (Tib. Skt. Works Ser. 11: Patna, 1968). P. V. Bapat, *ABORI*, 52 (1971), 1–30 (on Buddhist law).

the orthodox *śāstrīs* became committed to the proposition that all authority was derived from the Veda ultimately. Vedic texts were thought to have been lost, when *smṛtis* could not be traced back to a surviving Vedic corpus⁹⁴. *Smṛti* began to share Vedic infallibility, and was construed with the aid of the Mīmāṃsā, the science of construing Vedic ritual texts⁹⁵, not available to 'heretics.'

Texts of doubtful provenance and indeterminate merits thus acquired a certainty. Maxims existed whereby jurists reconciled texts seemingly conflicting⁹⁶. Any viewpoint could be supported in most controversies. The Veda was cited (inappropriately, as philologists would contend) in many a legal quandary⁹⁷. A flexibility emerged which was the despair of British observers. If canons of interpretation were established, it might be thought, differences of construction of texts would be progressively eliminated. On the contrary, the method was used in such a way that each scholar could, with the same equipment, arrive at original conclusions: this subserved the needs of a constantly varying public.

With this assurance of infinite adjustment to local requirements, the *śāstra* grew rapidly. Manuals for Brahmin practitioners in sacrifices, mentors of the twice born if not of the Śūdras also, developed into a more ambitious genre of publication. Jurisprudential questions were tackled extensively, and the topics of judicial procedure (*vyavahāra-mātrikā*) and civil law (*vyavahāra-padas*) were explored in greater depth. Theoretical certainty, consistency, and universality (subject to recognised divergences of customs between 'Easterners,' 'Southerners,' etc.) eliminated obsolete or disfavoured stanzas, silently dropping what could no longer be used profitably⁹⁸. This intellectual confidence, a would-be juridical imperialism, had another by-product. For matters subject to wild fluctuations in practice, and which could seldom be contentious except within sub-sects in the management of their shrines, found entry to the *śāstra*. By the fourteenth century it embraced everything which could claim admission on the basis of traditionality, provided it had an 'unseen' character. A *smṛti* rich in 'unseen' matters was actually provided with a *vyavahāra* section upon

⁹⁴ Kane, HD, III, 826, 830-1; V, 1259, 1377.

⁹⁵ A. S. Nataraja Ayyar, *Mīmāṃsā Jurisprudence (The Sources of Hindu Law)* (Allahabad, 1952). Kane, HD, III, ch. 32; V, chh. 28-30. Maxims actually used by Aparārka are conveniently listed in an appendix to the edn. (*Ānandāśrama Skt. Ser.*).

⁹⁶ Kane, HD, III, 283, 832-4, 863-6, 443; V, 1273-4.

⁹⁷ Maskari strikingly relies on a Vedic passage when explaining Gautama VII, 25. On the inheritance of women TS. VI. 5, 8, 2 is constantly discussed. In the context of suttee ṚV. X. 18. 7 (Kane, HD, II, 634) (used, e.g. at Hemādri, *Caturvarga-cintāmaṇi*, *Prāyaścitta-kāṇḍa*, II, 1892, 45-9); and in the context of suicide ŚB. X. 2. 6, 7 figures (Medh. on Manu VI, 32; Kane, HD, II, 927; IV, 606). Above, n. 37. Vāj. S. XL. 3 (*Īśāvāsyopaniṣad* 3) is misunderstood in the *śāstra*: Kane, HD, IV, 606. L. da Cunha Gonçalves, *Direito hindú e mahometano* (Coimbra, 1924) persists in the practice of relying on Vedic propositions: Derrett, at ZVR, 74/1 (1973). P. V. Kane, *Vedic Basis of Hindu Law* (Dharwar, 1936).

⁹⁸ F. G. Baudh. II. 2. 50 (Dh. k. 1388).

the slenderest foundation by its commentator, Mādhava⁹⁹. The ultimate result was an unmanageable mass of material, produced for enthusiasts, in books that took much effort to prepare, and which might figure in hardly more than two or three copies in any one of India's many kingdoms. The method of compilation was to place together uncritically all available passages from works of various ages and of various levels of authority (drawing hugely on the purāṇas), rather like the method of the elder Pliny, whose encyclopedic Natural History (A. D. 76) is known to have been compiled by exhaustive note-taking and a reproduction of the notes, arranged subjectwise, with a minimum of commentary.

Thus many topics became available to students of the *śāstra* which had not figured in the sūtras or the ancient smṛtis, and to this end texts were foisted on the wider public as the writings of renowned sages whose hypothetical original works had perished. The true age of some of these texts, which appear first in the fourteenth century, will never be settled; what gives them their authority (as Lingat rightly suggested¹⁰⁰) is the fact that the digests incorporate them.

We are bound to notice the scope of these developments; what follows, tedious as it is, is by no means exhaustive. In these digests—and we may take as examples Hemādri's Caturvarga-cintāmaṇi, a work of the fourteenth century which extends to 6741 pages though, as we shall see, it is very incomplete, and Mitra-miśra's Viramitrodaya (i.e. the digest of that name) a work of the seventeenth century of even greater bulk—appear such questions as follow:— Gifts (i.e. gifts having an occult value)¹⁰¹: (i) definition of gift; (ii) elements of gift (i.e. time, subject-matter, etc.); (iii) its occult reward; (iv) classical types of gift and their ceremonial, e.g. *tulā-puruṣa*; (v) the relation of the type of gift to the season or date; (vi) gifts having endless rewards; (vii) minor gifts (e.g. flowers, lights, music, trees). Vows¹⁰²: (i) definition of *dharma*, further definitions (a small encyclopedia of useful religious knowledge); (ii) praise of vows; (iii) general quality of vows and the right to perform them; (iv) individual vows and their methods; (v) vows appropriate to certain days, arranged according to the calendar up to the 14th day of the half-month (!); (vi) vows on special days, e.g. Śiva-rātri, the full moon, new moon, and other moments; (vii) vows to propitiate planets; (viii) vows appropriate to various months; (ix) and seasons; (x) year-long vows; (xi) miscellaneous vows (including suttee). *Śrāddha* (commemorative rites to propitiate the dead)¹⁰³: (i) definitions of *śrāddhas*; (ii) rewards for *śrāddhas*; (iii) definition of 'ancestors,' and (iv) of deities connected with the ceremony; (v) place and, (vi) time for celebration; (vii) qualifications of Brahmin guests; (viii) those not to be invited; (ix) material offerings to be used; (x) implements; (xi) invitations; (xii) preparations;

⁹⁹ See below, p. 54.

¹⁰⁰ The Classical Law of India, 132.

¹⁰¹ Hemādri, Caturvarga-cintāmaṇi, Dāna-khaṇḍa.

¹⁰² Ibid., Vrata-khaṇḍa.

¹⁰³ Ibid., Pariśeṣa-khaṇḍa.

(xiii) sequels; (xiv) scattering rice; (xv) offering the rice balls (*pinḍas*); (xvi) *śrāddhas* at *tirthas* (places of pilgrimage); (xvii) special *śrāddhas*, including *śrāddhas* offered to oneself. Time¹⁰⁴: (i.e. the occasion for performances and its calculation), auspicious and inauspicious moments, astrological data, times for intercourse and for *saṃskāras*, and for religious acts including installing idols. Penance¹⁰⁵: in general; particular penances for murder, liquor-drinking, theft, cow-slaughter, killing various animals, cutting down trees, teaching the Veda for a fee, forgetting one's Vedic text, insulting a teacher, being ignorant, selling forbidden objects, cultivating the soil, receiving forbidden objects, and so through innumerable individual sins catalogued separately, e.g. sale of a man, sale of oneself, sale of a son, sale of a wife, sale of mother, etc., sale of daughter, sale of various articles named in series (including selling a *śāstric* or *purāṇic* book, or selling one's own name), appropriating a hoard, or lands, jewels, and children, and many articles individually named; being a false witness, having intercourse with an outcaste woman (*cāṇḍālī*) or a Muslim (*turuṣkī*) and a huge range of sexual 'misdeeds;' telling lies, living in a wicked village, abandoning one's wife, seeing the menstrual blood of a unmarried daughter; eating forbidden foods or during fasts; working or eating in blue garments; marrying out of turn, accepting a dead man's bed, performing ritual services for bastards, abandoning one's virtuous wife without cause, and many other acts of bewildering variety and astonishing number; finally a description of the main categories of penance, the marrying (of defective persons) to a banana tree; and the importance of performing penances.

The *Viramitrodaya* has a *rāja-nīti* section with vast citations from the *purāṇas*, amounting to 493 pages; the *vyavahāra-prakāśa* (relying principally on the *smṛtis*) has 568 pages; the definition section has 116 pages drawing on dictionaries, *purāṇas*, and works such as the *Chāndogya-pariśiṣṭa*, *Grhya-pariśiṣṭa*, and *Maitrāyaṇīya-pariśiṣṭa* and the *Mahābhārata*; the *saṃskāra-prakāśa* (including marriage) has 1026 pages; the section dealing with purity and purification has 244; with *śrāddha* 382; with *tīrtha* (missing from Hemādri) 610; the daily duties of the householder, including dietary rules and hospitality, occupy 565; that dealing with worship of deities 383; seasons and times 278; auspicious signs and qualities 660 (both these last use secular literature and astrological material extensively); and finally the *bhakti-prakāśa*, dealing with worship of Viṣṇu, has 175 pages.

6. Law and religion. The need for exhortation and the role of memory

Our last paragraphs emphasise that the greater part of the *śāstra* was not 'legal.' The section on *vyavahāra* appeared as a minor section and even at its greatest bulk was only a fraction of the literature. For any infraction of the *śāstra* the sanction of excommunication could be applied in any region where

¹⁰⁴ Ibid.

¹⁰⁵ Ibid., *Prāyaścitta-kaṇḍa*.

zeal was adequate, and membership of one of the four *varṇas* was still valued. Until modern times excommunication for cow-slaughter was known, and penances for crossing the sea (and so living abroad) were inflicted as recently as the period of the First World War. Yet a great many topics were essentially voluntary, and a systematised superstition figured largely in them. Gifts and charities came (and continue to come) within the religious aspect of the *śāstra*, and law intervenes only when one asks how endowments shall be regulated¹⁰⁶. European students of the *śāstra* early concluded that law and religion were inextricably connected in the Hindu mind¹⁰⁷. More accurately, religion encapsulated, and enhanced the reality of, law in the minds of those subject to the *śāstra*; religious principles helped the jurists to make a cogent, coherent, and plausible corpus out of the many injunctions which the *śāstra* contains¹⁰⁸.

But it is incorrect to say that all injunctions were merely religious. Merit would, indeed, be earned by compliance, and demerit incurred by unauthorised deviation. The conscience could be satisfied if the elders of the community agreed with a particular *śāstric* viewpoint and accepted the individual's compliance with it. But in such cases the traditional text, fortified by the elders' approbation, drew its sanction (in their own minds) not from their assent, but from the supersensory quality we have already discussed. Vyavahāra, on the other hand, into which the greater part of practical law was inserted, was based upon injunctions the sanction behind which was reason and practical utility¹⁰⁹. The *nīti-śāstra* and the *vyavahāra* portions of our *śāstra* were based upon observation and a comparison of practical alternatives, in which a conjecture of what would give the widest satisfaction played a role¹¹⁰. Whilst expecting *vyavahāra* (the juridical procedure) to be taken seriously by judicial assessors, the jurists brought it within their concern because the purposes of the Veda could not be carried out without secure tenure of property, or the consistent settlement of disputes (*vivādas*) which could not be prevented from going to court. All civilizations regulate the acquisition and protection of proprietary rights, wherever those may lie. The Veda could hardly function if Brahmins were not legitimately born, of verifiable descent, properly set up as householders: considerations which call for the chapters on marriage, initiation

¹⁰⁶ Ancient and modern branches of legal learning are combined in P. N. Saraswati, *Hindu Law of Endowments* (Calcutta, 1897); P. R. Ganapati Aiyar, *The Law relating to Hindu and Mahomedan Religious Endowments* (Madras, 1905). Āgamas are cited and considered in *E. R. J. Swami v. State of Tamil Nad AIR 1972 S. C. 1586*.

¹⁰⁷ Sir H. S. Maine's error (under the influence of James Mill) persisted. Derrett, *Juridical Review*, 1959/1, 40–55. G. W. Keeton, *Question* (London), Jan. 1971, 78–86 (quoting S. S. Dhavan).

¹⁰⁸ Derrett, *RLSI*, ch. 3.

¹⁰⁹ *Mahābhārata*, XIII, 135, 137 (crit. edn.). Medh. on Manu II, 6 (text, 58; trans., 177); VIII, 72. Kane, *HD*, III, 874–5, 878–9; V, 1261–2.

¹¹⁰ Last note. Medh. on Manu IX, 213.

(*upanayana*), the status of *snātaka* (the accomplished student), and the daily duties of the householder (*gṛhastha*)¹¹¹.

Thus there was an ultimate religious reason why the details of law should fall within the *śāstris'* scope, even if the rules did not derive from the Veda. There was no religious sanction behind a breach of *niyamas* (regulatory rules, 'facultative rules') with which even the *vyavahāra* section is filled¹¹². If the *śāstra* was basically exhortation, the *vyavahāra* rules were exhortation at one remove. Righteous kings would feel meritorious in applying the *śāstra*, unless valid customs derogated from them. This two-tier intellectual system continued in operation, with a succession of Brahmins qualified as teachers of all branches of personal and social regulation right through the Muslim periods down to the 1780's when the British put the status of Court Pandit on an official footing, and a system of training was inaugurated¹¹³.

The epics, purāṇas, and other literature took for granted the supremacy of the great tradition, and no non-Hindu way of life was alluded to except in terms of contempt¹¹⁴. Deviations could be tolerated if consistent with the presuppositions of the *śāstra*, not otherwise. This gave an especial value to the textual tradition, the ultimate referee of orthodoxy. The notional scheme of the four *varṇas* proves that India valued a theoretical arrangement which justified the social institution of caste whilst not depicting any territorial caste-structure effectively¹¹⁵. Had the texts faithfully enshrined a local phenomenon their authority would have been prejudiced. No one was alarmed when the jurists collectively forgot to which castes the texts referred¹¹⁶! The reality of caste has never been doubted, testified to most convincingly by those elements in the population which attempted to evade it by conversion to other religions.

It will readily be understood that conversion to Jinism or Buddhism did not alter the rules of law applicable in secular matters. Heterodox scriptures, and the men trained in them, were rejected as authorities by the *śāstra*¹¹⁷; but this did not mean that the converts had ceased to be governed by *śāstric* rules as a whole. A Jaina might not observe the law of *śrāddha*, but his contracts would come within the purview of the *vyavahāra* system. Jaina and Bauddha books found no footing in *śāstric* circles, and indeed their contribution to ancient Indian legal history remains to be worked out since Burma and Śrī Laṅkā between them provide no literary evidence of a distinct Bauddha jurispru-

¹¹¹ Derrett, RLSI, 119.

¹¹² Ibid., 78 n., 131-2, 174 n. 1, 186 and n. 2. For an example, Manu IX, 118 is a *niyama* acc. to Bhār. On the category see Kane, HD, V, 1229.

¹¹³ Derrett, RLSI, 235-7.

¹¹⁴ On *anācāra* see ibid., 103, 193. Kane, HD, I, 508 (*Anācāra-nirṇaya*, no particulars).

¹¹⁵ The topic in inscriptions referred to below, n. 140. Also V. Raghavan, 'The Vaiśya-vaṁśa-sudhākara . . .', Vol. Pres. to Sir D. Ross (Bombay, 1939), 234-40 (Kane, HD, III, 252 n.). See also next note.

¹¹⁶ Animadversions by Derrett, JESHO, 7/1 (1964), 120 (Note).

¹¹⁷ Manu II, 10-11; IV, 163; XII, 96; Yājñ. III, 242; Brh. I, 33. See above, n. 56.

dence¹¹⁸. Legal definitions to be found occasionally in ancient non-*dharmaśāstra* works in Sanskrit make no special contribution, and do not disturb the flow of *śāstric* tradition¹¹⁹.

The *śāstra* is a gigantic complex of propositions, interlocking, cohering through the efforts of some hundred generations of scholars of various persuasions within Hinduism. As we have seen, whatever the actual origin of the rules, or the motive for retaining them, an occult value attached to the whole as a corpus. The first requisite for a *śāstrī* is a retentive memory. Reciters of epics and purāṇas had (as they have) magnificent memories and the composers of didactic works stretched to the limit the population's capacity to develop a copious memory. Vague apprehension would be fatal in this science. The pandit's mind, in which originality is not looked for, is the repository of the material which, with whatever interpretation or none, is to be handed on to the next generation. Teachers would rely upon their memory, and mnemonic devices would be welcome. A verse such as Manu VIII. 126 is designed with this in mind:

anubandham parijñāya deśa-kālau ca tattvataḥ |
sārāparādham cālokyā daṇḍam daṇḍyeṣu pātayet ||

'Having duly ascertained (i) the motive, (ii) time, (iii) place; and having considered (iv) the condition and (v) offence, he shall inflict punishment upon those deserving it'¹²⁰.

Thus tables of contents¹²¹, anticipatory indexes to books, would be memorised; and books themselves would tend to be written in a memorable form, using either association of ideas (many clues have, alas, escaped modern students who are not brought up in the ancient culture) or the jingles of an easy verse structure. The verse form never ceased to attract. Śrīdhara-cārya (A.D. 1150–1200) wrote his *Smṛtyarthasāra* partly in verse; Kavikānta-sarasvatī, his contemporary, compiled his *Viśvādarśa* in verse (unfortunately his prose commentary remains unpublished)¹²²; and nearer our own day the *Vyavahāra-mālā*, a Keralite production of the eighteenth century, has many quotations from *smṛtis* and also a great number of verses by the compiler, so as to be an entirely verse work.

In course of time compositions increased, texts of similar sound and meaning abounded, slips of memory occurred, and one author's text was attributed to

¹¹⁸ See n. 93 above. On the *Niti Nighanduwa* see H. W. Tambiah, *Sinhala Laws and Customs* (Colombo, 1968), 38–42.

¹¹⁹ The appearance of *smṛti* material in Śabara's commentary on Jaimini (Kane, *HD*, V, 1277) has no effect on *smṛti*. Nor the eulogies of *Vyavahāra/Daṇḍa* in *Mahābhārata* and connected literature: P. K. Gode, *Stud. in Ind. Lit. Hist.* I (1953), 212–4; Derrett, *BSOAS*, 15/3 (1953), 598–602. Patañjali, *Mahābhāṣya* on Pāṇini II. 3, 50 (on property) has no effect on the *śāstra* (Derrett, *ZVR* 64 (1962), 34 n. 63). *Yoga-sūtra*, II. 30 defines theft, but in terms of *śāstra*.

¹²⁰ Other examples are at Manu VIII, 45, 49, 179.

¹²¹ As at Manu I, 111–19; VIII, 3–7. See n. 77 above.

¹²² *J. Univ. Bombay* 7 (1938), 66–98.

another. One line from a stanza of one author would be misremembered with a second line from another source, and both attributed to the traditional author of the first¹²³. Further, as re-editions of old texts emerged, earlier versions circulated with them, and cross-contamination of texts occurred, as scribes compared manuscripts of various ages and provenances. Originally, no doubt, it was the spoken word that counted, the tone of voice, context, and drift of a series of verses eking out the meaning; and for this a written text would be a poor substitute. In the ancient world *silent* reading was very rare. These characteristics persist: even prose commentaries are more intelligible when read aloud. With the increasing bulk of works, the fallibility of memory, and the shortness of life, recourse to comprehensive written materials, intended to be a jurist's *vade mecum*, became desirable. Variant readings, even of the most casual origin, having proliferated and become noticed¹²⁴, the digest-compilers were compelled to become textual editors. Readings disappeared which the philologist and even the legal historian might have preferred. On the other hand the digest might retain a *smṛti* in an early form which had been eliminated from the surviving copies of the bare *smṛti*. Scribes would unconsciously 'correct' or spoil both, but the commentator's drift might corroborate an otherwise insecure or unsupported reading. From the seventh century at the latest books were the prime sources of study, and we find verses inserted or omitted from the basic texts at the editor-commentator's discretion¹²⁵. Classes committed to memory what was recited to them from such vehicles. A self-conscious and sophisticated educational system was in operation^{125a}.

7. Students, audiences, and the media chosen to instruct them

(I) The primary material taught in *sūtra*, *smṛti*, or *purāṇa* form

Classical Indian education visualised a teacher teaching a small group of students of various degrees of ability, proficiency and seniority, face to face. A teacher of basic texts would seldom teach advanced theoretical work, but

¹²³ Derrett (cited n. 140 below), at 39, 54–5. *māhīsyena karanyām tu rathakārah prajāyate / nāsyopanayanam nejyā nādhānam ca niśidhyate* || This is Yājñ. I, 95ab with an untraced (low quality) addition.

¹²⁴ Viśvarūpa on Yājñ. I, 1, 2, 51; II, 119, etc. Medh. on Manu I, 16; III, 119; IV, 99, 185, 226, 229; VIII, 53. Caṇḍeśvara, Vivāda-ratnākara ad Yājñ. II, 258 (Dh. k.892; cf. Kṛtya-kalpa-taru, Vyavahāra-kaṇḍa, 436). Jagannātha (Colebrooke's Digest) V.ii. 102 (Madras edn., II, 268). Raghunandana, Śuddhi-tattva (Calcutta, 1908), 11.

¹²⁵ Viśvarūpa on Yājñ. I, 252; cf. Kane, HD, I², 424. Bhār. and Medh. on Manu IX, 93. See also commentators on Manu VIII, 182–3. Medh. incautiously incorporated a stanza (at Manu VIII. 51) from Bhāruci's commentary on the previous stanza! At Manu I, 105 Medh. has an additional verse.

^{125a} The uses of a verse form in detailing legal rules were appreciated in modern times. Tekchand published an abridged metrical trans. of the Indian Penal Code (1860) (Meerut, 1895) (J. F. Blumhardt, Catalogue of the Library of the India Office II/2, London, 1900, 27). An English 'smṛti' is John Surrebutter (pseud.), Pleader's Guide (London, 1796).

he could combine the functions with different classes, as it were. The earliest method was to compress the teaching until it received the form of a pure mnemonic¹²⁶. The words were a mere series of hooks upon which detailed teaching could be hung. It is interesting that the compilers of the Babylonian Talmud experienced the need to provide the same¹²⁷. Students already had a good verbal knowledge of the Ṛgveda if not other Vedic *saṃhitās* also, and references to Vedic performances could be extremely brief¹²⁸. Education in Vedic ritual was, as we have seen, the starting-point of this process historically, and the Brahminical monopoly of teaching was inevitable. The *śāstra* was a 'mystery,' a complex of professional secrets. No Śūdra would memorise such material, and his want of right to undergo *upanayana* was a permanent obstacle to his functioning within the *śāstra*, until very recent times. As a result purāṇas were compiled for cross-*varṇa* sects, so that even Śūdras might have 'scriptures' which they could learn.

The *sūtras*, the crisp prose aphorisms, then typified cryptic teaching, arranged so as to recall to the student, long after he had begun to earn as a scholar or ritual expert, what he had learnt in his teacher's school. Schools inevitably differed, sometimes openly¹²⁹. Ideas which had not progressed beyond the ideal when they were propounded were prescribed as *dharma*. Different *sūtra*-authors could be compared; lesser teachers, noting discrepancies, reconciled them out of deference for all traditional texts. Anonymous *sūtras* acquired the names of ancient, perhaps fictional sages; these were either the ancestors of the Brahminical clans or teachers of a recension of the Veda. Such attributions did not prevent teachers from proposing to suppress, or to denigrate views incompatible with their own. But the ancient world's comparative indifference to consistency enabled contradictory *sūtras* to coexist for an immense period.

The most extended example of the *sūtra* form is not in our *śāstra* but in its sister science, *arthaśāstra* (the treatise passing under the name of Kauṭilya)¹³⁰. Except as a device to concentrate teaching in the minimum space, thus maximising the importance of the teacher-pupil confrontation in the school, it has serious limitations. *Sūtras* are hardly suitable for students whose docility has waned with increasing maturity, for older pupils require reasons, and wish to learn their precepts in the round. A poetical statement attracts if it contains its own explanation, or, more characteristically, repetition, declamation, exaggeration, or some memorable maxim. A lapidary style suited students that wanted to possess a final solution. The form, then, characteristic of the so-called *dharmaśāstras* or *smṛtis* is of couplets¹³¹, in which some rudimentary

¹²⁶ E.g. Āp. I. 1. 2, 2; *ibid.*, 39; I. 1. 4, 19; 22; Gaut. I, 20; 58; V, 1; IX, 5.

¹²⁷ Bab. Tal., Ber. 57b (two examples).

¹²⁸ Manu's *itīti ca* (or *vā*) at XI, 252 is the ultimate in succinct allusion.

¹²⁹ Kāty. 823.

¹³⁰ See the relevant chapter in this volume.

¹³¹ Usually the *śloka* (*anuṣṭubh*), but other metres are found, e.g. at Bhāradvāja, Dh. k. 900. The *Triṃśacchlokī* (-1655) is in thirty *sragdharā* stanzas (Kane, HD, I, 292).

literary qualities remain, despite the subject-matter. The *smṛti* form dramatically presents the essence of many classes, sometimes as a lecture to a mythical audience, and even as a condensation of previous accounts successively boiled down¹³². Manu is the extreme example of the literary device whereby the whole of *dharma* is represented as Bhṛgu's version of Manu's revelation of what he learnt direct from the Self-existent himself.

When moral questions arise style adds something to matter: but when the topic is, e.g. road accidents, language is barely enhanced by the exigency of metre, even an accommodating one.

Some greater *smṛtis*, those of Manu, Yājñavalkya, and Nārada, survive entire. Brhaspati is in fragments, more or less confidently restored by an assemblage which has not disdained to place side by side contradictory verses attributed to the same author in digests. Kātyāyana is an important *smṛti* similarly rescued from dispersed fragments. The book attributed to the twin authors Śaṅkha-Likhita^{132a} also has been partially reassembled by the pen of Kane. Śaṅkha is often quoted by himself. The Viṣṇu-dharma-sūtra or Viṣṇu *smṛti* is a *sūtra* produced at an age when that form was archaic but still respectable, and Viṣṇu is cited along with the *smṛtis* as a similar source of law, though its author or compiler only partially adopted the verse style. Between *sūtra*-form and *smṛti*-form on the one hand, Viṣṇu stands between the *smṛtis* and *purāṇas* on the other: Viṣṇu is encapsulated in an elaborate theatrical setting in which the god tells his spouse the essence of *dharma*, and she in turn gives details of the god's worship. In this one senses, as in Manu, the great difficulty such authors had to write *finis*.

The more evolved *smṛtis* worked upon earlier material (which may or may not be represented literally in our greater *smṛtis*), redeployed it, and restated it. Old words were often adjusted to new needs. Writers after centuries were bound to see the old sources in a more recent light, and this defeated, sometimes finally, a mere historian's hopes of reverting authoritatively to the original meaning of the earlier source.

We may not postpone further the question of chronology. Amongst the earlier prose commentaries some are securely dated, e.g. the *Mitākṣarā*. From allusions made by its author, and from internal evidence (e.g. the degree to which they require to explain the primary text, or call in aid other such texts, or refer to named or unnamed predecessors) previous prose commentaries can be relatively securely dated, within a century or so. The earliest of these cannot be older than about A.D. 600; therefore the *smṛtis* on which they rely, and which they explain, must be much earlier, not less than five centuries, since the language cannot have become obscure nor the intentions of the authors debatable, nor their texts so doubtful, in a shorter period¹³³. A civilization which preserved the

¹³² Nārada: Kane, HD, I², 308–9. Bhaviṣya-purāṇa, *ibid.*, 309–10.

^{132a} Kane, HD, I², §. 12 (300 B. C.–100 A.D.). Fragments collected by Kane, ABORI, 7–8 (1926).

¹³³ The original reading of Manu IX, 225 is irrecoverable; X, 21 is hopelessly

Veda so perfectly will not have suffered tradition to be liquified so easily. Invasions did not ravage all India, and Kerala was exempt from cultural devastation in all periods. Later *smṛtis*, such as Kātyāyana or Nārada, not to speak of Hārīta or Uśanas may have appeared later than A.D. 100, with a lower limit of, say, 400; the principal ancient *smṛtis* will have been in existence by A.D. 100 and could have emerged centuries earlier, with the *sūtras*, on the whole, anterior to them.

Two movements widely evidenced in all levels of scholarship (except that of Lingat) must, with the greatest regret and respect, be rejected. The first is the temptation, to which all have succumbed¹³⁴, to suppose that texts containing more information are later, because more 'evolved'¹³⁵; nor may we rank authors in order of precedence according as one quotes or appears to comment upon another. Even traditional complete *smṛtis* do not embrace all the material passing in commentaries and digests under their supposed authors' names. Verses attributed to one author in one text bear another attribution elsewhere. The ancient *smṛtis* cite each other. Lingat's sarcasms¹³⁶ are amply justified. 'Early' texts contain 'evolved' material and later texts contain simple unduly generalized propositions. Manu alone has the precepts on road accidents¹³⁷; adoption (surely an ancient institution) figures more largely in 'later' texts¹³⁸. The methods of escape from these dilemmas, such as assuming the currency of various versions or 'editions,' and imputing to 'interpolations' any incongruities with an overall theory of relative age, fail to convince. Nor can we work out to which periods of ancient Indian history the various *smṛtis*, or even the rules appearing in them, belong¹³⁹. We have no evidence of the shape of the texts—all too fluid in themselves—before the prose commentators; our inscriptional evidence confirms the fluidity and incompleteness of scholarship even at so favourable a period for research as the eleventh and twelfth centuries¹⁴⁰.

confused. Yājñ. II, 139 is in chaos. A variant reading of Manu XII, 83 is preserved by Bhār., of which no other trace is known. Two versions of a text may be cherished simultaneously, e.g. Kāty. 857 (*caturthāṃśa* / *trīyāṃśa*). See Kane's Kāty., 301–2.

¹³⁴ Mayer, Mazzarella, Sen-Gupta, Kane too (HD, I², 236, §. 6).

¹³⁵ Bṛh. XII, 5 seems improved upon by Viṣṇu V, 60–64 (HLS, I, 395), but that tells us nothing about priority. Progress must have occurred regionally, chronologically, and in point of literary capacity; but the information is concealed from us. Kane, HD, IV, 190.

¹³⁶ Op. cit., 127–8. B. Ghose, IHQ, 3 (1927), 607–11 (also at IHQ, 5, 1929, 367–75—a critical review of J. J. Meyer's *Gesetzbuch und Purāṇa*, Breslau, 1929), commented upon by Kane, HD, I, v: '... no certain chronological conclusion about individual authors can be drawn ... from their views on certain points.'

¹³⁷ VIII, 290–6. HLS, I, 410–1.

¹³⁸ Vasiṣṭha, and the Kālikā-purāṇa (on which see Kane, HD, I, 448). Lingat, op. cit., 129.

¹³⁹ Thus works such as S. K. Maity, *Economic History of N. India in the Gupta Period* (Calcutta, 1957) and V. R. Ramachandra Dikshitar, *Gupta Polity* (Madras, 1952) are based on unstable foundations.

¹⁴⁰ Ins. A. R. No. 558 of 1904 (= South Indian Inscriptions 17, 1964, No. 603) and A. R. No. 479 of 1908 (both noted at R. Lingat, *The Classical Law of India*,

Small adjustments to up-date a traditional text to meet the needs of a local and temporary juncture could easily take place, sophisticating the total textual tradition. 'Interpolation' could be another word for a general process, akin to fermentation, signifying that the *sāstra* was alive. No statement, therefore, as to the relative age of the complete *smṛtis*, or their origin at any place or time can be based on more than guesswork. The speculative structure raised by Jayaswal¹⁴¹ should serve as a warning. A timeless picture of the culture is possible, hardly more.

The scene changes when we reach the prose commentaries. The vital step of turning precept into an incipient rule of law has occurred. The jurists drew their inspiration from a timeless well of tradition. This critical assessment disagreeably affects scholars' work prior to Lingat, including Mazzarella, Ruben, and, frequently, Kane himself. But it is a small price to pay for a truer insight into the literature. Of significance is the development of *vyavahāra*, and its failure to be reabsorbed into *arthaśāstra*. A great many rules, especially in the area of debts, were projected upon a righteous basis, independent of what custom authorised without respect for *dharma*¹⁴². Even with this apparent handicap comparative work went on up to the time of the latest verse compositions¹⁴³. Until the (original, not the modern) Bhaviṣya-purāṇa research, comparison, and reflection continued to refine the jurist's basic material. To place any text in time or place is thus futile.

A good picture of the courses that might have been followed by the *sāstra* is obtained if we compare, in outline, the contents of the earlier works. The Gautama-dharma-sūtra is generally agreed to be the oldest dharma-sūtra (600–400 B. C.). An independent work, not associated with other *sūtra* materials as are the sūtras of Āpastamba, Hiraṇyakeśin and Baudhāyana, it is composed entirely in prose. The charge of illogical or unsystematic arrangement (made

1973, 273–4) studied by Derrett at Prof. K. A. Nilakanta Sastri 80th Birthday Felicitation Vol. (Madras, 1971), 32–55.

¹⁴¹ K. P. Jayaswal, *Manu and Yājñavalkya, a Basic History of Hindu Law* (Calcutta, 1930). See Kane, HD, I², 335, 340, 447.

¹⁴² Medh. on Manu VIII, 164; IX, 209. The remarriage of widows or (customarily) divorced women is almost totally ignored by the *sāstra* as incompatible with *sāstric* ideals of the permanency of marriage. The rules relating to 'righteous' interest, the methods of exacting payment of debts, and the liability of male issue to pay their ancestors' debts show traces of being idealistically structured. S. K. Jha, 'Usury in medieval India based in Vidyāpati's *Likhanāvali* [A.D. 1418],' JAS, 10 (1968), 46–8 (on Vidyāpati see B. Bhattacharya, ISPP, 8 (1966–7), 251–7). The *Lekhapad-dhati* also (Derrett, RLSI, index, s.v.) evidences variations from the *sāstra* by agreement (ancient Babylonian law reveals a similar phenomenon). The topic of the *ātātāyin* (assassin: Dh. k. 597, 1650–5), a famous *sāstric* crux, is an example: L. Rocher, 'Vīramitrodāya on the right of private defence,' BDCRI, 12 (1954), 442–62.

¹⁴³ The *Smṛtisamgraha* as quoted at Dh. k. 1142, 1157, 1194, 1384, 1529. Verse digests: *Dāya-daśa-śloki* (below, n. 321) and the *Triṃśacchloki* of Bopa-deva-bhaṭṭa on *aśauca*.

against the great Roman jurists up to the beginning of our era)¹⁴⁴ confirms the relative age of this compilation. Gautama cites no previous author but Manu (not necessarily our Manu-smṛti), an archaic characteristic. The order of topics, and the small role of *vyavahāra*, is instructive. The chapters may be summarised as follows: — (1) sources of *dharma*; *upanayana*; (2) rules for the uninitiated and for the student; (3) the four stages of life; (4) the householder; (5) intercourse, five daily sacrifices, hospitality; (6) respect, rules of precedence; (7) means of livelihood for a Brahmin; (8) the king and Brahmins learned in the Veda; the forty *saṃskāras* and eight spiritual qualities; (9) observances of the *snātaka* and householder; (10) the four *varṇas*; taxation; sources of ownership; (11) *dharma* of kings; administration of justice; (12) punishments for various crimes; (13) impurity; (15) *śrāddhas*; (16) Vedic study; (17) dietary laws; (18) duties of women; (19) penance; (20) abandoning a sinner; (21) sinners; (22) some specific penances for killing and adultery; (23) other penances; (24) secret penances; (25) alternative penances; (26) special penances; (27) Lunar penance; (28) partition of family property, women's property; kinds of sons; inheritance. We cannot tell whether the last section was added as an afterthought. Its concern with *vyavahāra* and its want of connection with what precedes suggests that it may have been.

Āpastamba's *dharma-sūtra* belongs to 450–350 according to Kane, who sees in it specific references to Jaimini's *Mīmāṃsā-sūtra*. It includes verses, which are quotations, being otherwise an aphoristic work. It is long, detailed, and critical in tone. A versified Āpastamba-smṛti existed, on daily rites, *śrāddhas* and penances, quoted in digests from the twelfth century. Portions found their way into a verse Āpastamba, a recent fabrication. The contents of the *dharma-sūtra* may be summarised as follows:—(I. 1) the sources of *dharma*; the *varṇas*; the teacher; *upanayana*; (2) the student; (3) his duties, continued in (4); (5) his penance and etiquette; (6), (7) serving the teacher and the final fee; (8) the *snātaka*; (9)–(12) Vedic study, and textual authority and usage, also the daily sacrifices, continued in (13); (14) deference; (15), (16) sipping water and dietary rules; (17) forbidden foods and untouchability; (18) accepting food from inferiors, forbidden foods (19); (20) rituals and forbidden trades, also in (21); (22) knowledge of the soul; (23) avoidance of faults leading to perdition; (24–29) penances for various crimes; tainted parents and their issue; (30), (31) *snātakas*; (32) ditto and their connubial intercourse and study and taboos. (II.1) habits of married people; (2) rebirth and some penances; (3), (4) ritual purity and sacrifices, hospitality; (5) the teacher and guests, and self-restraint; (6)–(8) hospitality; (9) stinting oneself; (10) begging and laws of humanity; the king must enforce penance; (11) privileges of Brahmins and marriage; (12) observances after marriage and reprobated marriage-arrangements; (13) sons, legitimate; and illegitimate; undharmic ways; sons cannot be alienated; bride-prices; (14) partition of property; (15) customs; (16)–(20) *śrāddhas*; (21) the four stages

¹⁴⁴ P. Stein, *Regulae Iuris* (Edinburgh, 1966), ch. 2.

of life; (22), (23) the *sannyāsin*; (24) immortality through offspring, etc.; (25), (26) the king and administration; adultery; (27), (28) various punishments; (29) degrees of criminality; trials; other dharmas are to be learnt from women and men of all castes.

This detailed but not exhaustive summary reveals the presence of legal material, more systematic than Gautama, more juridically aware, yet still confused. *Vyavahāra* is still not identified and separated for specialist treatment. The role of *vyavahāra* will be noticed when we look, in much less detail, at other sūtras and smṛtis. Āpastamba, anticipating our Manu, introduces, as is evident from II. 25, more than an aroma of *arthaśāstra*; *arthaśāstra* learning in systematic shape already existed.

Baudhāyana is attributed by Kane to 600–300: 'All these dates are more or less tentative and there is no finality about them . . .'¹⁴⁵. Passages in Baudhāyana agree with others in Āpastamba and the relationship between the two is in doubt. Some would think the former more systematic than the latter. Praśna I deals with dharma, studenthood, the snātaka, purification, inheritance; sacrificial purity and instruments; castes; the king; the five great sins; punishments; witnesses; marriage; holidays. Praśna II deals with penances; partition; sons; exclusion from inheritance; adultery; means of subsistence in time of distress; duties of the householder; twilight prayers; bathing; the five daily sacrifices; eating; *śrāddhas*; sons' spiritual benefit; *sannyāsa*. Praśna III deals with self-denying householders; hermits; penances; texts; purificatory oblations; purification generally. Praśna IV includes further penances, muttered prayer, sacrifice in fire; uses of Vedic texts. This last portion may be an interpolation. The *vyavahāra* element is still very small, dwarfed by non-legal elements. Sin and impurity overshadow crime. The mixture of elements is shown by Baudh. II. 1. 2. 1–8: 'now offences causing loss of caste:—making voyages by sea, stealing the property of a Brahmin or a deposit, giving false evidence regarding land; trading with merchandise of any description; serving Śūdras; begetting a son on a Śūdra female, and becoming (thereby) her son.'

The king's assumption of the duty of keeping *varṇas* to their dharmas, a historic moment not known to recorded history, brought the law of *varṇas* and *āśramas* (including much of *ācāra*, e.g. marriage) into a potential separate category of *śāstric* study. Yet the marriage and succession chapters, so closely interdependent, never gained integrated treatment until the Anglo-Hindu law textbooks of the nineteenth century and early twentieth.

The dharmasūtra of Vasiṣṭha¹⁴⁶ is known for its passage on adoption; but it specialised in *vyavahāra* no more than did other sūtras. Kane attributes Va-

¹⁴⁵ Kane, HD, I², 52–3.

¹⁴⁶ Ibid., §. 9. T. Dutta, 'Vasiṣṭha-dharma-sūtra-stha katipay durbodhya sūtrer pāṭh,' OH, 11/1 (1963), 33–46. A Vasiṣṭha-smṛti-vivṛti by one Kṛṣṇa-panḍita 'dharmādhikārī of Benares' was published from Benares in 1878. Bühler used it for his trans. of the *sūtra* in the SBE ser., if it is indeed the Vidvānmodinī, of which nothing else is known.

siṣṭha to between 300 and 100 B.C.¹⁴⁷. He copied material from Baudhāyana and Āpastamba, or their sources. Vas. chh. 25–28 are in verse, and other chapters have some verses, some of which reappear in Manu, and some prose passages resembling Manu. Did Vasiṣṭha borrow from Manu? The reverse is possible, also both may have drawn from a common source. Kane finds Vasiṣṭha eclectic¹⁴⁸; he has ancient as well as notably less ancient rules. *Vyavahāra* occupies a greater space. Of the thirty chapters, ch. 1 deals with the king and his rights and duties; 2 contains the famous 'righteous' rates of interest; 3 treasure trove and self-defence; 15 adoption; 16 the administration of justice, testimony, proof, and perjury; 17 sons, partition, *nīyoga*, inheritance; 19 the king's duty to protect and punish; and subsequent chapters elaborate on penances. An editor of older sources still saw penance as the appropriate way of controlling many social and criminal offences. Juridical analysis is present, but it cannot leave the shadow of social control of a more comprehensive kind than the king can wield. It never did so entirely.

The smṛti of Manu¹⁴⁹ is the most famous of the lawbooks. Its unique quality is its combination of all the features beloved by Hindu society in a treatise on Duty. Bühler would have derived it from a hypothetical Mānava-dharma-sūtra¹⁵⁰, but this is without foundation. It is plain to the western eye that Manu ingested productions of centuries¹⁵¹, and his present text was not composed in one piece, as the false climaxes show¹⁵². Despite awkwardnesses, its contradictions (due to attempting to satisfy dissimilar groups)¹⁵³, and its over-compressions and allusive attempts to embrace learning from the *arthaśāstra*¹⁵⁴, which it has adopted into the study of *dharma*, Manu remains the principal *dharmaśāstra* though no legal commentary accepts it as exhaustive or final. Its age, perhaps between 200 B.C. and A.D. 100, was not yet one of compulsive ency-

¹⁴⁷ Kane, HD, I², 105.

¹⁴⁸ Ibid., 106, 109–10.

¹⁴⁹ Kane, HD, I², §. 31 (pp. 306–49). K. Motwani, *Manu: a Study in Hindu Social Theory* (Madras, 1934); the same, *Manu Dharma Śāstra* (Madras, 1959). K. V. Rangaswami Aiyangar, *Aspects of Social and Political System of Manusmṛti* (Lucknow, 1949). V. Raghavan, 'The Manu Samhitā,' in *The Cultural Heritage of India*, 2nd edn. (Calcutta, 1959), 335–63; the same, 'Rājavidyā: Manu and the Bhagavadgītā' in T. M. P. Mahadevan Comm. Vol. (Madras, 1962), 340–6. M. D. Paradkar, *Similes in Manu-smṛti*, (Dehli, 1960). C. Tiwari, *Śūdras in Manu* (Delhi, 1963). R. M. Das, *Women in Manu and his seven Commentators* (Varanasi, 1962). R. S. Betai, 'State of criminal law in Manusmṛti,' JGJRI, 24 (1968), 279–98; the same, *A Reconstruction of the Original Interpretations of the Manusmṛti* (Ahmedabad, 1970). M. V. Patavardhana, *Manusmṛti: the Ideal Democratic Republic of Manu* (Delhi, 1968).

¹⁵⁰ Kane, HD, I², §. 13.

¹⁵¹ Manu VIII, 42 seems to be borrowed from another context.

¹⁵² Manu XII, 107, 117. In the traditional view, however, Manu was originally composed (as it now stands) in one piece. But even Kane saw an insertion at one place: HD, V, 1265–6.

¹⁵³ See below, p. 33. Kane would doubt such an interpretation: HD, I², 343.

¹⁵⁴ See below, n. 159.

clopedism, such as is reflected in the purāṇas, to the fascination of which medieval digest writers succumbed. Manu refused to include much tempting information which must have lain to hand, but which he was content to incorporate by mere allusion. His *smṛti* was a text written by a man who knew how commentaries would be composed, and relied not only on oral exposition of his own work, but even a succession of written commentaries, in which he would not have been disappointed¹⁵⁵.

Manu does not enlarge the scope of the *śāstra* except in the sections where *arthaśāstra* was utilised, and in *vyavahāra*, where the topics have become discrete, expounded serially, in an intelligible sequence. Moral offences are not yet sufficiently extrapolated from ritual offences¹⁵⁶, a point often made against the Jewish law which is virtually contemporary. One wonders whether his society feared these, to us, distinct classes of wrongdoing more nearly equally than modern man will.

Book 1 opens the mythical encapsulation, the Creation, told in two stories (like Genesis); the universe and transmigration are thus harnessed to the story of *dharma* which is to unfold. Bhṛgu tells a third story of creation, this time cyclic. Incongruous elements are not visualised as incompatible. Differing notions are equally true. The Four Ages of the universe reveal the diminution of humans' capacity to fulfil *dharma*¹⁵⁷. Another myth explains the origin of the four *varṇas*; the preeminence of the Brahmin order being asserted (for the first of many times). This book ends with a summary of the rest of the work, and the promise of system is not belied.

Book 2 concerns the student, appropriately prefacing a promise of endless bliss to one who studies the *śāstra*. Its sources are the Veda, the *smṛti*, the example of those that know it, and the customs of the good. Book 3 is devoted to the householder, marriage, and *śrāddhas*. A poetic and dramatic style sets off the information¹⁵⁸. Book 4 describes the householder's means of livelihood; miscellaneous rules of daily life; Vedic study; the moral framework of life; the avoidance of sin; preparation for the hermit's stage of life. Book 5 deals with forbidden food; ritual impurity and mourning; purification of people and things; the duties of women. Book 6 introduces the hermit and the ascetic, and ways in which the Supreme Brahma may be attained; the search to escape transmigration; the householder's responsibilities and privilege in the search for 'liberation.' Book 7 concentrates on the king and his liability to be corrupted. The *arthaśāstra* contributes heavily to this book¹⁵⁹. Taxation, peace and war, and

¹⁵⁵ Kane, HD, I², 346–8.

¹⁵⁶ J. M. Macfie, *The Laws of Manu* (Madras, 1921), 14–15 (unsympathetic).

¹⁵⁷ The interpretation of R. Lingat, JA, 249 (1961), 487–95 (= Cont. Ind. Sociol. 6 (1962), 7–16). On the kali-varjyas see Derrett, RLSI, 88–9. B. Bhattacharya, *The Kalivarjyas* (Calcutta, 1943). Kane, HD, III, 927–68. Also *ibid.*, V, 1270, 1629–70.

¹⁵⁸ Manu III, 224–5 explains the need to offer food (in a vessel) with both hands; III, 266–72 explains the satisfaction of the manes from various (including meat) dishes: poetic expression of banal practices, intrinsically irrational.

¹⁵⁹ D. Schlingloff, WZKSO, 9 (1965) 1–38; Derrett, ZDMG, 115 (1965), 134. T. R.

the king's daily routine end a tightly-packed little treatise. Book 8 deals with judicial administration, procedure, the topics of litigation, some of which resemble criminal prosecutions; miscellaneous social rules figure; some classes are exempt from taxes; washermen are enjoined to wash clothes gently; the king should fix tolls at ferries. Book 9 deals with husband and wife, including *niyoga* (levirate); discipline to be administered to a wife; marriage engagements. In this book Manu recognises the practice of taking bride-prices amongst Śūdras, which he condemned in Book 3. The idealistic and normative character of the *śāstra* is revealed here as in its treatment of *niyoga*¹⁶⁰. Next comes inheritance, and partition of estates, with alternative rules showing that Manu approved different practices, perhaps from different regions. Gambling and betting, the mortal sins, some miscellaneous rules authorising the king to act against rogues, an encomium of the king and advice to show deference to Brahmins, complete the Book. Book 10 tediously informs us about the mixture of *varṇas*, allotting occupations to the mixed castes. It ends with the dharma of a Śūdra, whose duty it is to serve Brahmins. Book 11 is devoted to penances, which have appeared very briefly before, but begins anomalously with religious gifts and the duty of a king to see that a Brahmin's wants are supplied. There is much unresolved conflict between the various forms and prescriptions of penances for various sins—the notions of various communities evidently find expression here. Book 12 deals, less satisfactorily than any other Book, with sins, the philosophic identification of the individual soul and the fruit of sins, judgment, rebirth, and related matters, such as the three qualities (*guṇas*) of existence, action and abstention from action, the authority of the Veda, the belief that the Self pervades everything—this brings Bhṛgu to a mythical evocation of Brahma, so that the encapsulation within a mythical and religious framework is rounded off.

The name of Manu has nothing to do with his fame¹⁶¹. The compiler's achievement has brought lustre to the name. System, enthusiasm, an overarching concept of the world and of man and duty are found, and the meeting of poetic and dramatic gifts with a sense of definite statement. Compromise, accumulation of material, all with restraint, urge upon any student of the *śāstra* the advantages of attempting to comprehend this work.

In the Yājñavalkya-smṛti, with only 1010 verses (1003 in Viśvarūpa's text, 1006 in Aparārka's) in comparison with Manu's 2700, we find a greater compression. Manu II, 243, 247, 248 are compressed into Yājñ. I. 19; Manu III, 46–48,

Trautmann, Kauṭilya and the Arthaśāstra (Leiden, 1971), ch. 6 (see T. Burrow, JRAS, 1971/2, 199). The deformation of Kauṭilya undergone in Bhāruci's comm. is similar to that of the explicit quotation of K. by Nārāyaṇa, Vyavahāra-śiromaṇi (Ms.: Kane, HD, I, 293 n. 648b; apograph at S.O.A.S., London, 42), which Chintamani corrected at AOR, 4/2 (1939–40), Skt. 29, cf. n. 5 (see n. 322 below).

¹⁶⁰ P. Mukherjee at OH, 11/1 (1963), 1–14 (also the same at OH, 9/1, 1961, 47–59). Interest in *niyoga* revived in modern times: Macfie (n. 156 above), 93–5.

¹⁶¹ About 'Manu(s)' see Kane, HD, I², 306–10.

50 figure as Yājñ. I, 79, and Manu IV, 84–5 as Yājñ. I, 141¹⁶². It is clear that Yājñavalkya knew Manu and tried to improve on him. The mythical framework is reduced to nothing as the sages approach Yājñavalkya in Mithilā and ask him to impart *varṇāśrama-dharma* to them¹⁶³; but the insistence on supernatural authority, the religious goal behind all *dharma* is not abated¹⁶⁴. Book 1 deals with *ācāra*, the ritual aspects of life, including the duties of the *varṇas* and *āśramas* and in particular marriage with the minimum information necessary to avoid incest and imprudent matches. Book 2 deals with *vyavahāra*, the eighteen 'titles' of law. The book is capable of standing alone. Book 3 deals with penances. Its concision enabled it to rival Manu. Less effort of memorisation would serve the student; to that end a crudity of sound and oddity of vocabulary might be rather advantageous than the reverse¹⁶⁵. Smooth stanzas are more readily confused and make a lesser claim on the memory. Yājñavalkya has many commentators, though less than Manu¹⁶⁶. His conciseness gave rise to serious differences of opinion as to his meaning, and the divergences between the jurists attributing their theories to his text leave us with the suspicion that 'Yājñavalkya' relied too heavily on an oral gloss in his own school, which achieved less durability than he had expected. There is no connection between our Yājñavalkya and the Yogi Yājñavalkya who composed a work of that name or the Bṛhad-yogi-yājñavalkya, which is not a *dharmaśāstra*, but a yoga work.¹⁶⁷ The date of our text is placed by Kane between A. D. 1 and 200 'or even a little earlier'¹⁶⁸. The Agni-purāṇa (placed by Kane about A. D. 900) copies Yājñavalkya extensively (chh. 253–8 take 280 verses from Book 2 of Yājñ., and most of the rest come from Nārada), and thus we can reconstruct the text of Yājñ. as it was about 800–1100 from the variant readings in Viśvarūpa, the Agni-purāṇa, and Vijñāneśvara's Mitākṣarā. Material to the same end is available from the Garuḍa-purāṇa also, chh. 93–106 of which draw confessedly upon Yājñavalkya, with many verses summarising or paraphrasing him. Both purāṇas testify to a text which agrees in part with Viśvarūpa's, in part with the Mitākṣarā, and in part remains independent of both¹⁶⁹. This resembles the pattern which has been discovered in the Manu-smṛti¹⁷⁰. Both the major smṛtis, equally attractive to

¹⁶² Kane, HD, I², 430–1. On Yājñ. and the Arthaśāstra see R. C. Hazra, OH, 12/2 (1964), 19–34 and G. Harihara Sastri, 'Arthaśāstra Vyākhyā,' lxii–lxiii (JOR, 37, 1967–8). H. Losch, Die Yājñavalkyasṛti (Leipzig, 1927).

¹⁶³ Yājñ. I, 1–2.

¹⁶⁴ Yājñ. III, 65–194 exemplify this.

¹⁶⁵ Yājñ. III, 96–9 illustrate this.

¹⁶⁶ Viśvarūpa, Aparārka, Vijñāneśvara, Śūlapāṇi—four to Manu's nine medieval commentators (cf. edition of J. Dave, commenced in 1972). Raghunandana cites Devabodha as a commentator on Yājñ., but he is otherwise lost (Kane, HD, I, 703).

¹⁶⁷ Kane, HD, I², 449–57. B. Bhattacharya, Studies in Dharmaśāstra (Indian Studies, Calcutta, 1964), 11–13.

¹⁶⁸ Kane, HD, I², 443, 447.

¹⁶⁹ Ibid., 424–9.

¹⁷⁰ The text as read by Bhār. and Medh. may be compared with other readings obtained from digests (G. Jha, Manu Smṛti, Notes I, Calcutta, 1924). F. László.

teachers at all levels of instruction, had unsettled texts by about A.D. 800, testimony less to uncertainty of transmission than to their working character. The treatment of Yājñavalkya by his two older commentators and by Aparārka on the one hand, and by the compilers of those two purāṇas on the other affords opportunity for a close examination of the techniques of *smṛti*-composition.

Br̥haspati, Kātyāyana, and Nārada are earlier than A.D. 600, but though they must be located *somewhere* in Indian history no evidence, internal or external, sufficiently connects them with an era. The great detail of the *smṛtis* might suggest that they not only portray an era exhaustively, but ought to indicate which it is, but this is illusory. Br̥haspati¹⁷¹ seems to have been the first jurist to reveal his methods, and it is no accident that the *vyavahāra* portions outweigh the rest. All but a tiny fraction (of what authenticity?) is in the *śloka* metre. True, we have only what commentators and digest writers garnered, and we have some verses repeating a point in different words, and even contradictions¹⁷²: but what survives may fairly exemplify what used to exist in connected form. In Aiyangar's edition the *vyavahāra* section occupies 29 paragraphs and 228 pages, the *saṃskāra* section 77 pages and 560 verses; the *ācāra* 101 verses (the division between *saṃskāra* and *ācāra* is Aiyangar's), the *śrāddha* 155 verses, the *āśauca* (impurity) 78, the *āpad-dharma* (*dharma* for times of distress) 53, and the penance section 90 verses. Nor is *vyavahāra* prominent only in bulk. Br̥haspati covers in detail aspects ignored or slightly handled by Manu and Yājñavalkya. On procedure he wrote what amounted to a little treatise. On the drafting of documents he brought deep study to bear, and in all fields he shows a critical mind, with no fear of contradicting his predecessors (holding Manu, however, in great respect)¹⁷³. It is more interesting that he reinterprets ancient formulae and maxims, giving them a new slant¹⁷⁴. Commentators find it desirable to adduce Br̥haspati frequently. Kane draws attention to his independence.¹⁷⁵ In the verse *dyūtaṃ niṣiddham* Br̥haspati says 'Manu forbade gambling as it destroys truth, purity, and wealth; but others allowed it, provided a share was given (in the profits) to the king'¹⁷⁶. In the verse *śastrādibhiḥ* he says 'If a man kills a cow with a weapon, etc., he should perform the penance laid down by Manu, but if he kills a cow by forcibly restraining it, then he should perform

Die Parallelversion der Manusmṛti im Bhaṣya-purāṇa (Abh. K. M. 40, 2: Wiesbaden, 1971).

¹⁷¹ Kane, HD, I², §. 37. K. V. R. Aiyangar's reconstruction of Br̥h.: Kane, HD, I², 491 and critical comments by L. Renou, IJ, 6 (1962), 81–102; Études Véd. et Pāṇ. XI (Paris, 1963) (supplementing Jolly's trans.).

¹⁷² Br̥h. XXI, 7 (on affrays) seems to be contradictory of XXI, 5, and XXI, 13 is out of tune with the latter. Br̥h. (Aiy.) XXVI, 97 (on the widow's right to land) is hard to reconcile from XXVI, 99–100 (which seems to deny it).

¹⁷³ Kane, HD, I², 328, 486–7.

¹⁷⁴ See below, n. 279–80. Even Manu incorporated ancient maxims: IX, 3.

¹⁷⁵ Kane, HD, I², 329.

¹⁷⁶ Br̥h. (Aiy.), XXVII, 1.

the penance laid down by Aṅgiras or Āpastamba¹⁷⁷. He seems to criticize Manu at IX, 219 in the verse *vastrādayaḥ*: 'those who declared clothes and other things to be impartible have not considered the position that the wealth of the rich may consist of clothes and ornaments.'

Kātyāyana wrote in verse on *vyavahāra* alone. The collection of scattered verses made by Kane as far back as 1933¹⁷⁸ extends to 973 verses. It is not likely that the writer on *śrāddha* and other non-*vyavahāra* topics in prose, or prose and verse, bearing the name Kātyāyana, was the author of the *vyavahāra* work¹⁷⁹. Brhaspati will fascinate the jurist as an interpreter in verse, anticipating the commentators who interpret in prose, but Kātyāyana, along with Nārada (whose work survives in two recensions)^{179a}, will be the primary source most nearly agreeable to the comparative legal historian, for his abundant information. Nārada is the author to give detailed information on impotence¹⁸⁰; Kātyāyana summarises effectively the complex law on the property of females¹⁸¹. Less concerned to debate previous views, Kātyāyana and Nārada in different ways illustrate the art of crystallising legal propositions in memorable and crisp diction. It is their results alone that we are given, seldom or never their reasoning, nor the history of the ideas, a tradition which adhered from the *sūtra* period onwards¹⁸². Nārada is rich on the king's powers and duties¹⁸³, and Kātyāyana explains the status of custom, and the necessity to harmonise that intractable source of law with *śāstric* jurisprudence¹⁸⁴. A topic figuring in Brhaspati¹⁸⁵ also, it had evidently deserved particular attention between the time of Yājñavalkya and A.D. 600. Had the *śāstra* rejected all custom as unauthoritative it would have lost the day, but its subtle and ambiguous tolerance of custom and dependence from it, enabled it to conquer by the attraction which *dharmic* living had for social groups whose customs had little in common with the ancient Aryans of the Ganges Valley. In the end an apocryphal *smṛti* says that ancestral customs are more important than any rule in all the *śāstras*¹⁸⁶.

¹⁷⁷ Brh. (Aiy.), II, vi. 38gh–39ab, referring to Manu XI, 108–15, Aṅgiras 27 in Jivānanda's edn., I, 556; Āp. I. 9. 26, 1.

¹⁷⁸ Kātyāyana-smṛti-sāroddhāra (Bombay, 1933). Kane had not seen the *Vyavahāra-nirṇaya* nor most of the *Kṛtyakalpataru*. K. V. R. Aiyangar, in S. M. Katre, ed., Vol. Pres. to P. V. Kane (Poona, 1941), 7–17. S. C. Banerji's critique is repelled by Kane at HD, I², 84–9 (on Banerji himself, *ibid.*, 290). On Aiyangar, HD, I², 505–6.

¹⁷⁹ Kane, HD, I², 502.

^{179a} *Ibid.*, §. 36. T. R. Chintamani, in C. K. Raja Pres. Vol. (Adyar, 1946), 154–96. Nārāyaṇandra Smṛtitīrtha, ed., *Nārada-smṛti* (Beng. trans. and comm.) (Calcutta Skt. Coll. Res. Ser. 38: Calcutta, 1966).

¹⁸⁰ N. 74 above.

¹⁸¹ Kāty. 894–816.

¹⁸² Examples: Āp. I. 3. 11, 1; I. 11. 31, 16. At I. 11. 32, 25 one cannot tell whether prudence or superstition backs the precept.

¹⁸³ Nār. XVIII.

¹⁸⁴ Kāty. 37–51, 225, 884A.

¹⁸⁵ II. 26–31.

¹⁸⁶ Sumantu quoted by the *Smṛticandrikā*, *Samskāra-kāṇḍa*, 9.

The law can be seen progressing upon two paths. Brhaspati as a jurist is matched by the purāṇic writer who showed juridical reflection in the old Bha-
viṣya-purāṇa¹⁸⁷. Kātyāyana and Nārada, traditionalists, fix the law in lapidary
phrases. But for the Viṣṇu-smṛti we should wonder at the reappearance of
juridical material in the purāṇas. None of the techniques exemplified by Brhas-
pati, Kātyāyana, or Nārada (as we possess them) concerns itself with mythical
aspects of *dharma*. The sanctity of the *śāstra* and the utility of *vyavahāra* in
particular are unquestioned. Confident that the presuppositions of the *śāstra*
will not be debated, Kātyāyana and Nārada seem to adopt a 'secular' tone. The
Viṣṇu-smṛti¹⁸⁸, which is a puzzle, stands between the thought-world of Manu
and that of the Vaiṣṇava purāṇas. The smṛti is encapsulated in a heavy sheath
of myth¹⁸⁹, the worship of Viṣṇu occupying a substantial place¹⁹⁰. This smṛti is
a bridge between the philosophical Hinduism of Manu (reminiscent of the Bha-
gavad-gītā) and the epics on the one hand, and the sectarian purāṇas on the
other. Yet the law stated in it is traditional. A late commentator utilised this
text, and hung upon it some peculiar views of his own¹⁹¹. Transitional in
psychological approach, the smṛti is transitional in style: without apparent
reason passages change from prose to verse—yet we note that the more obviously
legal parts retain *sūtra* form, as if to shelter under the style hallowed by Gauta-
ma, and others who were only gradually leaving the *sūtra* form, such as Śaṅkha-
Likhita and Hārīta (see below). Transitional in yet another respect, the Viṣṇu-
smṛti is overwhelmingly concerned with the ritual aspects of Hindu life. Much
of the law of crime figures as if it were still a department of sin-and-penance
(Viṣṇu XXXIV, 1–2 reads: 'Sexual connection with one's mother, daughter,
or daughter-in-law are crimes in the highest degree. Such criminals in the highest
degree should proceed into the flames; for there is not any other way to atone
for their crime.' XXXIX, 1–2: 'Killing domestic or wild animals are crimes
degrading to a mixed caste. He who has committed a crime degrading to a
mixed caste shall eat barley gruel for a month, or perform the penance called
Kṛcchrātikṛcchra.'). The work has an archaic flavour. Yet its commencement is
devoted to *vyavahāra*. The duties of the king commence at III, and the very
detailed law of inheritance ends the section at XVIII. On some topics of

¹⁸⁷ Cited in the Paribhāṣā-prakāśa of the Viramitrodaya, 17, 19, 28, 42–3, 55, 63, 65, 70, 113. It is not cited by Aparārka in a *vyavahāra* context, except for the quota-
tion appearing also at the Paribhāṣā-prakāśa, 19 (Aparārka, 626), but it is abun-
dantly cited under *ācāra* and *prāyaścitta*.

¹⁸⁸ Kane, HD, I², §. 10. J. Jolly, 'Das Dharmasūtra des Viṣṇu und das Kāṭha-
kagrihyasūtra,' Abh. d. Kön. Bay. Akad. d. Wiss., Philos.-philol. Cl., 2/1 (1879),
22–82. The same, Institutes of Vishnu (Oxford, 1880), Introd. (the *sūtra* was 'the
ancient dharma-sūtra of the Cārāyaṇiya-Kāṭhaka śākhā of the Black Yajurveda').
L. Renou, JA, 1961, 163–72; BDCRI, 20 (S. K. De Fel. Vol.), 1960, 319–23.

¹⁸⁹ Renou, last note.

¹⁹⁰ Viṣṇu XCVIII–XCIX (Prthvī and Lakṣmī).

¹⁹¹ For the Vaijayantī, see below, n. 324.

vyavahāra Viṣṇu is more often cited in digests than are other sūtras! It is a slight indication of the balance that in the edition with the commentary *vyavahāra* occupies 325 out of 897 pages. And the commentary is about equally full throughout. Kane assigns the Viṣṇu-smṛti to two stages, a nucleus mostly in prose between 300 and 100 B.C., and an inflated text, with its large verse elements, of about A.D. 400–600¹⁹². Renou's close study of Viṣṇu neither confirmed nor rejected this. It remains possible that the author took his starting point in material of greater age, which may not have had the name Viṣṇu attached to it. The prominence of *vyavahāra* even in the prose passages strongly suggests an author faithful to the sūtra tradition, drawn towards the outlook of the age of the great fragmentary smṛtis.

Many sūtra writers have been preserved only in fragments. Their names recur constantly. It is curious how often incomplete or lost sūtras, and smṛtis, contain information which commentators regard as significant, even vital¹⁹³. Amongst the lost sūtras are Atri¹⁹⁴, Uśanas¹⁹⁵, Kaṇva¹⁹⁶, Kāṇva¹⁹⁷, Kaśyapa¹⁹⁸, Kāśyapa¹⁹⁹, Gargya²⁰⁰, Cyavana²⁰¹, Jātukarṇya²⁰², Devala²⁰³, Paiṭhīnāsī²⁰⁴, Budha²⁰⁵, Brhaspati (sūtra)²⁰⁶, Bharadvāja (or Bhāradvāja)²⁰⁷, Śātātapa²⁰⁸, Sumantu²⁰⁹, and Hārīta^{209a}.

¹⁹² Kane, HD, I², 125, cf. 126 (line 2).

¹⁹³ Laugākṣī's definition of *yoga-kṣema* is found essential (Kane, HD, I², 528, refs.). Marīci is essential to Aparārka (Yājñ. II, 168, p. 775) on apportionment of loss. Śaṅkha is relied upon by Vijñāneśvara (Mitākṣarā, Colebrooke, I. ii, 7; iv, 3). Uśanas is cited *ibid.* I. iv, 26. Jīmūtavāhana relies (Dāyabhāga, Colebrooke, III. ii, 25) on Hārīta, Uśanas and Paiṭhīnāsī (the last again at XI. ii, 15). Gautama (untraceable) is the basis of the Mitākṣarā doctrine of sons' birthright (I. i. 23)! Pulastya gives the rites for one bitten by a dog (Aparārka, 1136) fuller than the equally fragmentary Śaṅkha, Hārīta, Devala, and Paiṭhīnāsī.

¹⁹⁴ Kane, HD, I², §. 16. Fragments collected: Banerji, DS, 244.

¹⁹⁵ *Ibid.*, §. 17. Banerji DS, 340–4.

¹⁹⁶ Kane, §. 18.

¹⁹⁷ *Ibid.*

¹⁹⁸ Kane, HD, I², §. 19.

¹⁹⁹ *Ibid.* Banerji, DS, 291–5.

²⁰⁰ Kane, HD, I², §. 20.

²⁰¹ Kane, HD, I², §. 21. Banerji, DS, 245–7.

²⁰² *Ibid.*, §. 22. Banerji, DS, 290–1.

²⁰³ *Ibid.*, §. 23. B. Bhattacharya, *Studies in Dharmaśāstra* (Calcutta, 1964), 8–10. Banerji, DS, 247–57.

²⁰⁴ Kane, HD, I², §. 24. Fragments gathered: T. R. Chintamani, AOR, 4/1 (1939–40) (Skt.), 1–40. Banerji, DS, 299–319.

²⁰⁵ Kane, HD, I², §. 25.

²⁰⁶ *Ibid.*, §. 26.

²⁰⁷ *Ibid.*, §. 27. Banerji, DS, 244.

²⁰⁸ Kane, §. 28. Banerji, DS, 325–8.

²⁰⁹ *Ibid.*, §. 29. Fragments gathered: T. R. Chintamani, JOR, 8 (1934), 74–88. Banerji, DS, 329–40.

^{209a} Banerji, DS, 257–89. See n. 229 below.

There is a sharp difference of opinion as to the age of the Vaikhānasa-dharma-sūtra²¹⁰, which some would place as old as, or even older than Manu. Its Vaiṣṇava tendency could most easily be relied upon to place it much later (not later than, say, A.D. 900), which will make its style archaistic.

There seem to have been, once, a vast number of smṛtis available²¹¹. The number of lost smṛtis whose texts are available in quotations in commentaries and digests is very large: Aṅgiras²¹² (whose text exists in several forms in manuscript and must be regarded as virtually fragmentary), R̥ṣyaśṛṅga²¹³, Kārṣṇājini²¹⁴, Caturviṃśati-mata (in manuscript though portions on *saṃskāra* and *śrāddha* have been published)²¹⁵, Pitāmaha (Kane assigns him to the fourth to seventh centuries)²¹⁶, Pulastya²¹⁷, Paiṭhīnasi²¹⁸, Pracetas²¹⁹, Prajāpati²²⁰, Marīci (who seems to have written in prose also)²²¹, Yama (many versions are available in print and in manuscript, in some confusion)²²², Laugākṣi (verse and prose)²²³, Viśvāmitra²²⁴, Vyāsa (whose smṛti dealt with *vyavahāra*)²²⁵, Ṣaṭ-triṃśan-mata (Kane assigns him to 700–900)²²⁶, Saṃgraha or Smṛti-saṃgraha (8th to 10th cent.)²²⁷, Saṃvarta²²⁸, and Hārīta²²⁹. The Parāśara-smṛti (which seems at times to borrow from Manu) is an ancient smṛti (Kane places it between 100 and 400)²³⁰, not to be confused with the supposititious smṛtis which arose during the period of the commentators, in some cases perhaps as late

²¹⁰ Otherwise *-dharma-praśna* (ed. T. Gaṇapati Śāstri, Triv. Skt. Ser., 1913; ed., 1927, and trans., 1929, by W. Caland, Bibl. Ind. Ser.). Kane, HD, I², §. 15.

²¹¹ The long list at Yājñ. I, 4–5 is well known. See also Sarasvatī-vilāsa, 13, also Prayoga-pārijāta quoted by Mitra-miśra, Viramitrodaya, Paribhāṣā-prakāśa, 18. See n. 215 below.

²¹² Kane, HD, I², §. 39. Reconstructed, ALB, suppl. to 15–17 (1951–3).

²¹³ Kane, HD, I², §. 40.

²¹⁴ Ibid., §. 41.

²¹⁵ Benares Skt. Ser., 137–9. Summarizing the teaching of twenty-four sages: Kane, HD, I², §. 42.

²¹⁶ Kane, *ibid.*, §. 44. C. Scriba, *Die Fragmenta des Pitāmaha* (Leipzig, 1902); V. Manzini, 'La procedura ordalica . . .,' *Atti del Reale Ist. Veneto di Sc. Lett. ed Arti*, 63/2 (1903–4), 333–58.

²¹⁷ Kane, HD, I², §. 45. See n. 237a below.

²¹⁸ Kane, *ibid.*, §. 46.

²¹⁹ Ibid., §. 47.

²²⁰ Ibid., §. 48.

²²¹ Ibid., §. 49.

²²² Ibid., §. 50.

²²³ Ibid., §. 51.

²²⁴ Ibid., §. 52.

²²⁵ Ibid., §. 53. Ed. Batakrishna Ghosh, IC, 14 (1942–3), 65–98. 'Vyāsa' often represents a commentator's reference to the Mahābhārata.

²²⁶ Kane, HD, I, 239; I², §. 54.

²²⁷ Ibid., §. 55.

²²⁸ Ibid., §. 56.

²²⁹ Ibid., §. 57. J. Jolly, *Abh. d. Kön. Bay. Akad. d. Wiss., Philos.-philol. Cl.* 18 (1890), pt. 2, 505–24.

²³⁰ Kane, HD, I², §. 35.

as the sixteenth or seventeenth centuries. Dakṣa too is an ancient smṛti, in print in Jivānanda's collection²³¹.

Śaunaka, about whom nothing is known, is the author of a text containing the famous propositions on adoption to which the jurists gave full, and unfortunate, attention²³². From the ninth century on, irrespective of the development of purāṇic material, a new wave of smṛti writing occurred. The names given to the works, often prefixed (as were some older works) with Vṛddha-,^{232a} Laghu-, and so on, are chosen from the list of known authors of genuine smṛtis. The two printed collections reveal, what the paucity of citation in digests confirms, that the compilers were keen, not to digest existing smṛti material but to produce rival works which might displace ancient smṛtis, containing commonplace moral, ritual, and mythical material and (a tell-tale feature) no contribution to the topic of *vyavahāra*. The wave of 'bogus' smṛti writing, which may have extended into the seventeenth century, was not juridical in inspiration. The fragmentary smṛtis, on the other hand, are often turned to for new information.

Vyāsa quoted in the Vivāda-tāṇḍava²³³ gives us not only the widow's right of inheritance, but also detailed rules as to her religious and charitable duties, worship of Viṣṇu, etc. The expansion was clearly a desideratum. Vṛddha-Śātātapa (an utterly obscure author) sets out the different classes of *bandhus*, a proposition quoted extensively from the Mitākṣarā onwards²³⁴. Vṛddha-Manu gives valuable information on compensation²³⁵. Yama informs us about the forfeiture of an excommunicate's goods, retaining an option which major sources reject²³⁶. Quotations from Viṣṇu in the Sarasvatī-vilāsa, which cannot be found in our printed Viṣṇu, give unique information about a special tenure of land²³⁷. Vijñāneśvara finds Pulastya an essential text to qualify Yājñavalkya^{237a}.

The role of these unverifiable texts of various ages cannot be overestimated, and the same must be said of purāṇic sources. Anonymous texts, referred to simply as 'smṛti' may contain valuable supplements to the law²³⁸. Texts appear-

²³¹ II, 383-402. Kane, HD, I², §. 43.

²³² Kane gives no particulars of Śaunaka. For the adoption problem, Kane, HD, III, 664-84; for the text, *ibid.*, 1011 and Dh. k. 1363-71.

^{232a} Kane, HD, I², 111.

²³³ Dh. k. 1524.

²³⁴ Dh. k. 1528.

²³⁵ HLS, I, 292, 294, 296-7; Dh. k. I/2, lxxvii; I/3, 32.

²³⁶ Vivāda-ratnākara, 638, Vyavahāra-nirṇaya, 532: *patitasya dhanam hr̥tvā rājā parśadi dāpayet | sarvasvam tu hared rājā caturtham vā 'vaśeṣayet || bhṛtyebhyo 'nnam smaran (v.l. 'nusmaran) dharmam prājāpatyam iti śrutih ||* This borrows in part from Nārada, and expands the idea in an apocryphal passage of Manu (Vivāda-ratnākara, 637, Vyavahāra-nirṇaya, 532: *nādādīta nṛpaḥ sādhuḥ mahāpātakino dhanam ...*).

²³⁷ Derrett, BSOAS, 21 (1958), 61-81; ZVR, 64 (1962), 70-2.

^{237a} Vijñāneśvara, Mitākṣarā on Yājñ. I, 260-1.

²³⁸ E.g. smṛti quoted at Vivāda-ratnākara, 38 and Smṛticandrikā, 326 (HLS, I, 171; Dh. k. 655): *balād akāmam yatrādhim anirdiṣṭam praveśayet | prāpnuyāt sāhasam pūrvam ādhātā cādhim āpnuyāt ||* The penal provision, and the crime, are

ing once only and attributed to named authors may in fact be apocryphal. Kātyāyana is cited by the Vyavahāra-nirṇaya on partition, for a rule which seems to have been strangulated or at best invented by the author or his source²³⁹. Kātyāyana 165 A–B are only found in the commentary on the Viṣṇu-smṛti²⁴⁰, which hardly inspires confidence.

A remarkable feature of our primary sources distinguishes them, with one significant exception, from Roman, Jewish and Islamic law. They bear a certain likeness, in this respect, to decadent European medieval legal literature, and the 'maxims' of English law of the fifteenth century and afterwards²⁴¹. All the Indian sources abstract their precept, eliminating reasons; and, where reasons are given²⁴², the commentators thought it prudent to ignore them. Never is a case or actual problem referred to. If an allusion to a law-case occurs it is a mythical one²⁴³. The proposition is always dry. Surely the period when Indian jurists identified or analysed their problems in practice is far past. Even by the time of Gautama problems had been thrashed out many times before. The *Sitz im Leben* of the formula is never given. Apart from the lapidary XII Tables Roman legal sources in antiquity reflect the problem as it comes to the juriconsult: only in the Byzantine period do abstract propositions have a life of their own, and even then the occasion for the legal utterance is preserved²⁴⁴. Total abstraction arises when, in the middle ages, inelastic minds are fed with raw maxims²⁴⁵. Englishmen in India were forced to instruct the pandits who produced the *Vivādārṇava-setu*²⁴⁶ to envisage problems, e.g. 'a man died leaving such-and-such relatives, how will the estate pass?', and a series of real-life problems was envisaged and answered (as they constantly are in Islamic works)²⁴⁷, but then, too, without the reasons, which the student is left to work out for himself. The *Vivādārṇava-setu*, towards the end of the literature, throws light on a feature of all that proceeds. In contrast to other juridical literatures, the *śūstrīs* provided, at most, differences and contradictions between anonymous authors, whose texts were often doubtful, and whose reasons had usually to be conjectured. The size of India, and the great age of the intellectual endeavour, go a long way to explain this; but it is more significant that the student

unknown elsewhere. The text is assigned to Kāty. (Kane's Kāty., 527, p. 66). A list of citations of '*smṛtyantara*' not assigned to any author but relied on by jurists in *vyavahāra* contexts: Dh. k. I/2, lxxviii; even more anonymous texts figure *ibid.*, lxxix (*anīrḍiṣṭa-karṭrka-vacanāni*).

²³⁹ Vyavahāra-nirṇaya, 427, the text *kṣetrārāma-grhādīnām*.

²⁴⁰ Vaijayantī, I, p. 61.

²⁴¹ Stein, *op. cit.*, chh. 7–9.

²⁴² E.g. Manu XI, 93, 96. See above, n. 158; below nn. 271–5.

²⁴³ Haradatta on Āp. I. 11. 32, 24. The solitary instance in Asahāya's *comin.* on Nār. (Kane, HD, III, 288–9, n. 395) has an apocryphal air.

²⁴⁴ Stein, *op. cit.*, chh. 4, 6.

²⁴⁵ *Ibid.*, ch. 7.

²⁴⁶ See n. 367 below.

²⁴⁷ Verifiable from N. B. Halhed's trans. (A Code of Gentoo Laws, 1776). The Venkaṭeśvara Press (Bombay) edn. of 1888 is rare, and uncritical.

of *smṛti*, though equipped to be appointed a judge, was traditionally only a judicial assessor, skilled in normative thinking, and not in recollecting, or comparing, individual cases.

At both ends of the Manu-story (so to speak) the opposite prevailed. The Buddhist law, laid down painstakingly bit by bit²⁴⁸, arises from what appear to be a series of legislating decisions of the Buddha in known contexts. The books of Burmese Buddhist law detail the rules customary amongst Burmans of relatively modern times, never without contact with remembered problem situations²⁴⁹. The sūtras and smṛtis, on the other hand, even at their most archaic, purported to be the teaching of pseudonymous sages figuring as super-ancestors. Timeless in antiquity, the teaching purported to antedate all actual human problems. All precedents mentioned in smṛtis are mythical (Vena²⁵⁰, Manu^{250a}, Kapila^{250b}, Kavi²⁵¹, Śunaḥśepa²⁵², and Māṇḍavya²⁵³). By contrast, the *nīti-śāstra* was not averse to referring to historical, or would-be historical incidents²⁵⁴. The sages of our *śāstra* merely 'remembered' their law; it never emerged from a set of facts. Their words stood upon unquestionable personal *pramāṇa*²⁵⁵, as would be expected of a culture which, immobile or imperceptibly mobile, treated its seniormost members as oracles. 'Hindu law' was thus never a system given by a Buddha, or a Muhammad; no reformer made it, and no consensus of scholars (as with the Jewish rabbinate) could remake it. No matter what logic and *mīmāṃsā* did with the smṛti texts, it was those texts that remained the authority (hence the value of those aids to interpretation), and to trace them back to a process of human discovery would weaken their function. Hence our primary sources were not more primitive than the Roman, but more sophisticated. They were evolved out of the requirements of a civilization differently balanced, and infinitely more complex.

Examples are needed to illustrate the diversity of our material, and its attempts to achieve the very difficult task its authors undertook. The essence of what was teachable had to be put into words. Moral and legal precepts were related. Precept and statement differ, and our authors can utter each separately, or both together. "The food given by a physician, hunter, surgeon, a fowler, an

²⁴⁸ Mahāvagga and Cullavagga (trans. T. W. Rhys Davids and H. Oldenberg, Vinaya Texts, SBE, 13, 1881; 17, 1882).

²⁴⁹ D. Richardson, ed. and trans., Damathat or Laws of Menoo, 2nd. edn. (Rangoon, 1876); U. Gaung, The Aṭṭasankhepa Vaṇṇana Dhammathat (Rangoon, 1934).

²⁵⁰ Manu VII, 41; IX, 66-67. For these and other names see Kane, HD, I², 336.

^{250a} Manu VII, 42.

^{250b} Baudh. II. 6, 30.

²⁵¹ Manu II, 15.

²⁵² References at V. N. Mandlik, Vyavahāra Mayūkha (1880), 454 nn.

²⁵³ Bṛh. II, 13; Nār., Introd., I, 42, alluding to the story at Mahābhārata I, 101 (crit. edn.).

²⁵⁴ The assassinated kings: Derrett, ZDMG, 115/1 (1965), 147-8 (à propos of Manu VII, 153; Kauṭ. I, 20).

²⁵⁵ Yama, quoted in Lakṣmīdhara's Kṛtyakalpataru, Brahmācāri-kāṇḍa, 23-4 (cf. Kane, HD, I², 527-8).

unfaithful wife, or a eunuch must not be eaten' is a precept²⁵⁶. 'A man falls by not observing what is laid down, by observing what is prohibited, and also by not bringing the senses under control' is a precept masquerading as a statement²⁵⁷. Hope can masquerade as a precept: 'The seniority of Brahmins is from knowledge, that of Kṣatriyas from valour, that of Vaiśyas from wealth in grain, that of Śūdras alone from (mere) age'²⁵⁸. Maxims which show the moral and the legal overlapping, with a tendency to generalise, abound and are often successful. 'A wife, a son and a slave, these three are declared to have no property; the wealth which they earn is for him to whom they belong'²⁵⁹. 'He who, having incurred a debt or the like, does not pay it back to the creditor (or 'owner') is born in the latter's house as a slave or a servant, a woman, or a beast'²⁶⁰.

Good *smṛti* style produces a fully self-contained statement. 'Where a thing deposited is destroyed even without the act of fate or the king together with the goods of the bailee, the loss is declared to be that of the depositor'²⁶¹. But the form incurs strain. Definitions are called for, and these too have to be stated in *smṛti* form; these are then capable of being misappropriated elsewhere²⁶². Many *smṛtis* cannot deal with the topic at one blow. To correct the picture a contradictory text is required, and this is enhanced when material is taken over from earlier sources. Even Manu finds comprehension aided by attacking a topic from different angles: 'The *ācārya* is ten times more venerable than the *upādhyāya*, the father a hundred times more than the teacher, but the mother a thousand times more than the father' (II. 145); 'Of him who gives natural birth and him who gives the Veda, the giver of the Veda is the more venerable father; for the birth for the sake of the Veda gives eternal (rewards) both here and after death' (146); 'By honouring his mother he gains this world, by honouring his father the middle sphere, but by obedience to his teacher the world of Brahma' (233). Thus adjacent *smṛtis* not infrequently overlap, control, or contradict each other²⁶³.

Many *smṛtis* contain allusions, especially words in need of definition, which must be made good from elsewhere. 'What is acquired by valour and by learning

²⁵⁶ Āp. I. 6. 19, 14.

²⁵⁷ Yājñ. III, 219 (cf. Manu XI, 44). On degradation see Manu XI, 125-6.

²⁵⁸ Manu II, 155 (cf. 156).

²⁵⁹ Manu VIII, 416.

²⁶⁰ Kāty. 591. Other examples: *ibid.*, 854; Nār. I, 32; Manu IX, 1, 12, 206; Kāty. 691; Brh. XXV, 88; Yājñ. I, 85 (cf. Manu V, 448).

²⁶¹ Kāty. 598.

²⁶² Brh. XI, 54-8 (expedients to realize debts); Kāty. 173-86 (like a *sūtra* and its commentary); *ibid.*, 755 (classes of road); 678-82 (corporate bodies); 498-50 (types of interest); 564-5 (invalid debts). A definition of reunion (of family assets) had to await Brh. XXV, 72.

²⁶³ Kāty. 396-7; Nār. I, 269-70; I, 10-11. Enhanced when material is taken from other sources: Nār. I, 251, 257-8 (ordeals); I, 168-71 (on witnesses' memory); XVIII, 44-46 (gifts from kings); Manu IV, 165, 167, 169; VIII, 350-1 (on self-defence); IX, 57-63, 64-8 (*nīyoga*). Cf. Manu IV, 80 with *ibid.*, X, 125.

and what is known as wealth of the wife—all this is not liable to be partitioned by co-sharers at the time of partition²⁶⁴. Sometimes the effort to be comprehensive is too much for the author. ‘But in the case of untouchables, the lowest people, slaves, mleccas and the offspring of unions in the reverse order of caste, who commit a sin, the decision does not lie with the king. He should appoint such ordeals as are well known amongst them in case of doubt’²⁶⁵. Sometimes the *smṛti* is much too terse. ‘Should even a wholly dependent person make a contract on behalf of the family, the householder, whether in his own country or abroad, shall not rescind it’²⁶⁶. ‘Let him not take interest beyond the year, nor such as is unapproved, nor compound interest, periodical interest, stipulated interest, and corporal interest’²⁶⁷. Often it is cryptic²⁶⁸. Sometimes the cryptic formula is followed immediately by an attempt to decode it. ‘Let him eat *vighasa* always, or always dine on *amṛta*: *vighasa* is the remainder of a (ceremonial) meal and likewise *amṛta* is the residue of a sacrifice’²⁶⁹.

Homely illustrations are sometimes used²⁷⁰. Reasons, as we have seen, are rarely given, and when they are it is not clear whether it is to convince the hearer or reassure him. One begets children, not to pay their debts, but vice versa²⁷¹. One avoids liquor because of the unseemly effects of drunkenness²⁷². The wife of a slave becomes a slave because his master must be hers²⁷³. Sons produce a family and heaven: therefore women must be guarded²⁷⁴. Liquor (*surā*) is refuse: therefore one should not drink it²⁷⁵. Rebellion would occur if custom were infringed: hence the king should preserve it²⁷⁶. Where resolving alternative solutions to problems would create a new one, alternatives are put baldly side by side²⁷⁷. Views on a subject may be merely juxtaposed²⁷⁸. Settled opinion is frequently adduced, with an air of satisfaction. The reinterpretation of ancient formulae hides behind the appearance of merely transmitting traditional

²⁶⁴ Kāty. 877.

²⁶⁵ Kāty. 433. Similarly: Yājñ. I, 52; Manu VII, 154; Kāty. 192.

²⁶⁶ Manu VIII, 167. Expanded or explained at Kāty. 545 (referring to Bhṛgu), Bṛh. XI, 50.

²⁶⁷ Manu VIII, 153, amplified in Bṛh. XI, 5–11. Manu VIII, 49 is amplified at Bṛh. XI, 55–58; and Bṛh. XIV, 20–32 seem to derive from Manu VIII, 2, 11.

²⁶⁸ Nār., Introd. I, 8–9; Manu VII. 13 (Kane, HD, I², 569); VIII, 24, 185; IX, 121.

²⁶⁹ Manu III, 285 (confusion of *amṛta* with that at IV, 4–5 (only a few verses away)).

²⁷⁰ Nār., Introd. I, 38, 63, 72. Manu VIII, 350–1 states the principle of self-defence with exaggerated and unpractical illustrations.

²⁷¹ Kāty. 572.

²⁷² Manu XI, 97.

²⁷³ Kāty. 725.

²⁷⁴ Yājñ. I, 78.

²⁷⁵ Manu XI, 94.

²⁷⁶ Bṛh. II, 28.

²⁷⁷ Manu VIII, 338; IX, 164; Āp. I. 2, 11–16; 31–37.

²⁷⁸ Kāty. 823; Āp. I. 6. 19, 2–5; 7–9.

material²⁷⁹. Tendentious repetition really amounts to an attempt at reform²⁸⁰. Open correction of earlier statements is rare, but obviously not in the hope of obliterating the precepts corrected, so much as to add another alternative, so that the public could make its choice²⁸¹.

The Indian genius for categorising finds full scope. Ordeals are divided by value and by caste²⁸². Different periods are set within which kinsmen may impugn a sale²⁸³. Nine types of 'adultery' are listed²⁸⁴. Yet, from earlier strata, there survive many examples of a failure to generalise, and a serial listing of incongruous elements. 'What is gifted or done by one intoxicated or one who is a lunatic or by one who had a different intention, that does not at all attain validity'²⁸⁵. 'Nor [should one summon as a witness] one engaged in a long journey, nor a merchant who travels into transmarine countries, nor a religious ascetic, nor one sick, nor one deformed, nor one man alone, nor a learned Brahmin, nor one who neglects religious customs, nor a eunuch, nor an actor . . . nor an adversary . . . nor a spy, nor a relation, nor one connected by the same womb . . .'²⁸⁶. Dispiriting enumerations without attempt to generalise are common²⁸⁷. As a result incorrect associations occur sometimes which would not have been tolerated otherwise. 'One should not plant anything on the road nor should one obstruct it by placing anything on it. A man who does not give precedence on the way to his *guru*, preceptor, the king and the like is liable to fine.'²⁸⁸ Yet the capacity to generalise was present: otherwise the following could not have been used: 'What is mortgaged or sold through deceit or what is gifted or accepted through deceit or wherever the judge sees fraud, all such transactions he should annul.'²⁸⁹

Unnecessary detail is an opposite fault, and untimely precision is not at all rare²⁹⁰. The rule that a widow shall be given 2,000 *paṇas* out of her husband's

²⁷⁹ Bṛh. II, 18–27 (types of judgment); Yājñ. I, 58–61 (forms of marriage) (?); Kāty. 35–46 (sources of rules). Nār., I, 157–162 (Nāradiya-Manu-saṃhitā 134, 139, 141) is an awkward performance: the first category of witness is unexplained and the rest are wrong.

²⁸⁰ Bṛh. XVIII, 4 (Renou, IJ, 6, 1962, 95–6); XI, 54–8; XXV, 86.

²⁸¹ Yājñ. I, 56; cf. Manu III, 13–19 (marriage); Bṛh. XXV, 79–81; cf. Manu IX, 219 (impartible property).

²⁸² Kāty. 418–22.

²⁸³ Kāty. 703.

²⁸⁴ Kāty. 829.

²⁸⁵ Kāty. 464.

²⁸⁶ Nār., I, 179–87. See also Nār. XII, 73–5; Manu VIII, 65 (a list, every item of which has a different, unexplained, reason behind it).

²⁸⁷ Kāty. 650–1; see also *ibid.*, 542–3, 550, 568, 647, 664, 734, 749, 846, 882–3; Manu X, 87; Yājñ. III, 36–9. For an exhaustive list see Nār., *Introd.* I, 52–4.

²⁸⁸ Kāty. 756. Ancient codes (Eshnunna, Hammurabi) group rules associated only by the factual context (e.g., boats): B. S. Jackson, 'Factbased classifications of law,' *J. Soc. Public Teachers of Law, N. S.*, 11/3 (1971), 149–53.

²⁸⁹ Kāty. 655. See also Bṛh. II, 5; Manu VIII, 288.

²⁹⁰ Cf. Bṛh. XXV, 69; Nār. HLS, II, 474. Derrett, *JRAS*, 1958/2, 17–25.

estate is a good example, and the large number of texts specifying fines precisely²⁹¹. The epics seem to borrow largely from the *smṛtis*, and are occasionally themselves cited by the commentators²⁹². They (the epics) have the leisure to avoid almost all the *smṛtis*' faults, which goes some way to support the view that Mahābhārata material resembling Manu was taken from our Manu-*smṛti* or an earlier stage of the materials quarried by its author²⁹³.

Much is made by historians out of contradictions within a *smṛti* (which we have noticed) and those between *smṛtis*. Of the innumerable examples available one illustration is needed to show the size of the intellectual problem before the medieval and later commentators and treatise-writers. The following five verses deal with the acquisition of property by possession.

'A man who enjoys (i.e. possesses) property without title even for many hundreds of years should be punished like a thief'²⁹⁴.

'Even in the absence of title, if a property has been in total possession by three ancestors, it cannot be recovered, having passed from one generation to another, for three generations'²⁹⁵.

'If possession of an estate has been held by three generations in due course, the fourth in descent shall retain it in his property—even without a written title'²⁹⁶.

'If a man's landed property has been enjoyed by another for twenty years—while a powerful king is reigning—his rights over that property cannot be established'²⁹⁷.

'If a man sees, without protesting, his landed property being enjoyed by another, he loses it after twenty years; chattels are lost in ten years'²⁹⁸.

The digests alone confirm what a huge contribution was made by *purāṇas* to our *śāstra*. In a simple style, hortatory and descriptive, they link rituals with cults, notably Vaiṣṇava cults; they pander to the desire of all castes to have a Veda open to all. Dates are hazardous in this area²⁹⁹. *Purāṇas* had evidently achieved fame and authority by about 1100. There are no running commentaries upon them. They were educationally self-sufficient. Did *śāstrīs* commit their interminable materials to heart? Enlarging communities certainly needed

²⁹¹ E.g. Yājñ. II, 223, 227. Cf. Plato, Laws, 948a.

²⁹² B. Bhattacharya, Studies in Dharmaśāstra (cit. sup), 3-7, 53-6. The Rāmāyaṇa is quoted also by Bhār. on Manu XII, 106. P. V. Ramanujaswami, ed., Dharmasaṅgraha (Tirupati, 1951) relies substantially on the epics. On the epics and the *śāstra* see Kane, HD, I², §. 32, esp. 380-402. J. Dahlmann, Das Mahābhārata als Epos und als Rechtsbuch (Berlin, 1895).

²⁹³ Kane, HD, I², 344-5.

²⁹⁴ Nār. IV, 87 (HLS, I, 124).

²⁹⁵ Nār. IV, 91 (HLS, I, 125).

²⁹⁶ Viṣṇu VII, 187 (HLS, I, 125).

²⁹⁷ Vyāsa (Aparārka, 612) (HLS, I, 128).

²⁹⁸ Yājñ. II, 24.

²⁹⁹ Kane, HD, V, 831-6. R. C. Hazra, Studies in the Upapurāṇas (Calcutta, 1958-63). The Matsya-purāṇa is of great age, possibly of the fourth century A. D. (Kane, V, 899-900).

what they had to supply. The appeal to divine revelation was overt and it suited the popular feeling that all custom, and all justice (not to speak of *dharma*) must go back to cosmic forces. And some ancient literature called purāṇas (how much of it survived?) was certainly accepted in very ancient times as source material for the *śāstra*³⁰⁰, and the pseudonymous compilers took advantage of this. Jurists utilised a mass of purāṇas: the Ādi, Āditya, Kālikā, Kurma, Garuḍa, Devī, Narasiṃha, Nāradya, Padma, Brahma, Brahmavaiivarta, Brahmāṇḍa, Bhaviṣya, Bhaviṣyat, Bhaviṣyottara, Mārkaṇḍeya, Matsya, Liṅga, Varāha, Vahni, Vāyu, Vārāha (was it different from the Varāha?), Viṣṇu, Viṣṇu-dharma, Viṣṇudharmottara, Śivadharmā, Śivadharmottara, Saura, and Skanda. It is remarkable that the commentators found in them essential ingredients for the statement of legal rules³⁰¹, and that, from a comparison of purāṇic contributions to the *vyavahāra* part of the *śāstra*, they seem to be responsible for conservative and defensive, rather than liberal tinges to the subject³⁰².

Tantras also served as potential sources of *dharma*³⁰³. A notorious example is also the last, the Mahānirvāṇa-tantra. Under the impression that any religious sect could claim the privilege of being governed by its own religious law, an addict of the Kaula, i. e. Śākta tantric religion, a reforming sect of Śaivas, wrote a conversation between Śiva and Pārvatī in which not only tantric rites but also a system of jurisprudence was set out, owing some inspiration to an early phase of Anglo-Indian law³⁰⁴! It even deceived Rammohun Roy. The rather later Śukranītisāra³⁰⁵ claimed only to be a manual for the practical administrator, and escaped detection as a modern work until very recently: it originated outside British India and did not incur the criticisms to which the tantra's advocates' enthusiasms exposed it in the British Indian courts and otherwise.

(II) The teacher extended beyond his class: (A) the simple commentary—

³⁰⁰ Yājñ. I, 3. Sarasvatī-vilāsa, 14. Kane, HD, I², §. 33; V. ch.xxii. R. C. Hazra, 'Purāṇas in the history of smṛti,' IC, 1 (1934-5), 587-614. B. Bhattacharya, Studies in Dharmaśāstra (cit. sup.), 17-23. On the Agastya-saṃhitā see ibid., 13-15.

³⁰¹ The Matsya-purāṇa is often cited in *vyavahāra* contexts, as shown at Dh. k. I/2, lxxx. The seven degrees of *sapinda* kinship are carefully explained in the Mārkaṇḍeya-purāṇa (see Dh. k. 1530). Important on suttee is the Brahma-purāṇa (Dh. k. 1118-9); and the Kālikā-purāṇa has vital information on adoption (Dh. k. 1376-7) and valuable material on ordeals. Jurists rely often on purāṇas: see Kane cited in n. 300 above.

³⁰² Derrett at Purāṇa 5/1 (1963), 11-30. Jurists' caution in regard to such texts is evidenced ibid., 30 n. 16. For a jurist's scepticism as to the genuineness of texts of Jātūkarna see Kane's telling quotation from the Hāralatā of Aniruddha (c. 1160) at HD, I, 276 n. 592.

³⁰³ V. N. Mandlik, Vyavahāra Mayūkha (1880), xli-xlii. The Bhaviṣya-purāṇa (ch.xi) recognises tantras in relation to the consecration of trees, etc. The Vīrami-trodaya, Paribhāṣā-prakāśa, 20-1 accepts tantras as sources of *dharma*.

³⁰⁴ Derrett, ZVR, 69/2 (1968), 138-81. Further references at the same, Critique of Modern Hindu Law (1970), 416.

³⁰⁵ Ed. Oppert (Madras, 1882), Jivānanda (Calcutta, 1892). For Gopal see above, n. 25 (also Kane's comment on the discovery).

Subject to surreptitious amendment by covert changes in wording, and to tendentious adjustment by quotation of ancient texts in new contexts, the pre-purāṇic and pre-tantric compositions were authoritative and co-equally binding upon orthodox Hindus, subject to valid customs to the contrary. Discussions of textual variants showed that the concept of a true or original Manu, etc., was established³⁰⁶. Some time before the seventh century the simple commentary had arrived. Words had become obsolete or ambiguous³⁰⁷. Ellipses needed to be filled. Flexibility had to be found in a text incapable of being repealed. Some smṛtis almost died at this period, and many must have disappeared silently. Manu and Yājñavalkya inspired a row of commentators. Nārada has one surviving commentator³⁰⁸. Commentators found it their duty to draw meaning from every part of their text, to explain what was repetitious³⁰⁹, and to fill out the meaning by adducing parallel passages. A student could refresh his mind, or even complete his training with a commentary which explained most of the words in a text which he possessed already (because he had learnt it by heart) but had never fully understood. The commentator adopted a modest tone, frankly admitting that any of several incompatible interpretations might be correct, and sometimes he said that further (unspecified) explanations were called for³¹⁰. A comparison of commentaries, if really independent of each other, reveals great differences in approach and understanding³¹¹. The original texts were compiled with such caution that they could not be dismissed the moment they encountered incredulity, or were handled by scholars of a region passing through a phase of contrary development. The smṛtis that survived the period of the earliest commentators proved their tensile strength. Yet the commentator never exceeded his text in prestige. He merely showed what the true authorities might have meant. A name such as Saṃgraha-kāra (the Author of the Collection) epitomises the modest, self-effacing loyalty to the basic sources which inspires this intellectual effort.

Works in the *A* category must once have been very numerous. Digests and specialist works contain condensed extracts which, masquerading as bare comments on the smṛtis, really belong to this class, but their surviving repre-

³⁰⁶ Bhār. on Manu X, 126. See above, n. 124.

³⁰⁷ Manu VIII, 325 and IX, 219 have examples. *daśabandham* in Manu VIII. 107 called for explanation, an archaic expression. At Manu VII. 147 the word *niḥśalāka* appeared clear to Bhāruci, but Medh., Govindarāja, and Nandana thought it meant 'where even grass does not grow,' and Kullūka, Nārāyaṇa, and Rāghavānanda thought it meant 'solitary.' L. Sternbach, *Gonda Fel. Vol.* (Leiden, 1972), 200-1.

³⁰⁸ Asahāya, see below, n. 312.

³⁰⁹ If a substantive purpose could be found for the words, repetition was not admitted: Bhār. on Manu VIII, 63.

³¹⁰ Bhār. on Manu IX, 287; X, 84, 126; XI, 163 ('some other solution must be found'!).

³¹¹ Nandana may be compared with other commentators printed by V. N. Mandlik in his *Manusamhitā* (Bombay, 1886). *Sarvajña-Nārāyaṇa* (Kane, HD, I², 347) constantly shows originality (but the ideas may long have antedated him).

sentation is poor. Asahāya wrote on Gautama, Manu, and Nārada in the 6th or 7th century³¹². Viśvarūpa's Bālakrīḍā (? 800–825)³¹³ on the Yājñavalkya-smṛti is short on *vyavahāra*, long on *ācāra* and *prāyaścitta*. He may have been identical with Sureśvara, a pupil of Śaṅkarācārya. Bhāruci (7th cent.) was probably a teacher in the line of predecessors of Rāmānuja³¹⁴. He wrote a *vivaraṇa* on the Manu-smṛti and also a commentary on Viṣṇu. Medhātithi (9th cent.), the most celebrated commentator on Manu, produced in his Manu-bhāṣya a huge repertory of opinion on the meaning of the smṛti and on some fundamental questions of *dharma* and law³¹⁵. Govindarāja's commentary on Manu (c. 1050–1125)³¹⁶ and Haradatta's commentaries on Āpastamba and Gautama (c. 1100–1300)³¹⁷ are not only roughly contemporary in time, they jointly prove the continuing usefulness of this style of publication within *śāstric* education. Kullūka-bhaṭṭa's Manvartha-muktāvali (c. 1150–1300)³¹⁸ is famous, ever since the over-dramatic eulogium passed on it by Sir William Jones, for its competent plagiarism of earlier commentators and its lucidity and certainty. Śūlapāṇi's commentary on Yājñavalkya (c. 1375–1460)³¹⁹ is disappointingly short, and is said to be an early effort. It seems, in sum, that the older commentaries continued to be used to train beginners, but that when this process was complete other, more flexible materials were sought.

—(B) the comparative scholar, servant of higher studies, and (C) the controversialist—

A few *śāstrīs* will always have known the opposing views of their predecessors, the outstanding opinions of their contemporaries, and the trends of the times, towards which any exposition of law is bound to take a stance, even if only tacitly. Two classes of jurist emerged between the twelfth century and the seventeenth. The most numerous seem to have taught a course of *śāstra*, covering the main areas of *ācāra*, *vyavahāra*, and *prāyaścitta*, with occasional excursions into minor areas. Compared with them the teacher of ritual was an inferior practitioner. Specialists in conveying a complete education, the former class would attempt to combine within a commentary on one smṛti the views of all the smṛtis, so that the harmony of all smṛtis would be achieved. Polymaths, original minds operating in many *śāstras* concurrently, are known to

³¹² Kane, HD, I², §. 59.

³¹³ Ibid., §. 61.

³¹⁴ Ibid., §. 62. The text, ed. and trans., Derrett, awaits publication (See Biblio.)

³¹⁵ Kane, HD, I², §. 64. Bengali trans. of Medh. by Bhūtanātha Saptatīrtha, 4 vols. (Calcutta, 1954). Derrett at Fest. O. Spies (Wiesbaden, 1967), 18–41.

³¹⁶ Kane, HD, I (1930), §. 76.

³¹⁷ Ibid., §. 86.

³¹⁸ Ibid., §. 88. The Śrāddha-sāgara belongs to Śūlapāṇi: D. C. Bhattacharya, IHQ, 27/2 (1951), 109–18. B. would place K. in 1250–1300, as the third son of Jagadguru Divākara-bhaṭṭa, contemporary of Udayanācārya.

³¹⁹ Kane, HD, I, §. 95. Bhattacharya (last n.) places Ś. between 1420 and 1465. S. C. Banerji, NIA 5 (1942), 31–5, 145–56, 169–75 (lit.). See n. 350 below.

have existed^{319a}. To this period, though no doubt to its earliest part, belong the verse compositions purporting to give the gist of many *smṛtis* (*Ṣaṭṭriṃśan-mata*, *Caturviṃśati-mata*)³²⁰. Upon these works, often quoted by jurists, no commentaries were written. The comprehensive commentary in prose was thus a more fragile and less attractive (though, obviously, less artistically demanding) alternative to the digest in verse, of which small examples recur in all later periods³²¹.

Appearing as a commentary written, physically, around the consecutive stanzas of the *smṛti*, or, in a few cases, the *sūtra*, the result was a harmony or synopsis, excluding superfluous materials, but not disguising the conflicts between those which demanded attention. Each paragraph was concluded with observations which the student was expected to absorb. Didactic presentations of discordant, co-authoritative sources, these works would be required by any aspiring teacher, and to repeat the gist of any one would be part of the exercises demanded of any candidate for a qualification in the *śāstra*.

Works of authors appropriate to class *B* must once have been numerous. *Vijñāneśvara's Mitākṣarā* lies here rather than in class *A*. It is to be dated 1120–1125³²². Its comprehensive resolution of intellectual and practical problems (especially in the fields of penance and inheritance due to widows and female and cognate heirs generally) made it one of the few great books of the *śāstra*. 'Aparārka,' who may or may not have known the *Mitākṣarā*, and must be dated within 1115–30, purports to have been compiled by (i.e. at the orders of) *Aparāditya-deva I*, of the *Śilāhāra* family of the *Koṅkaṇa*³²³, and is a large repertory of texts, including many *purāṇic* passages. It has an affinity with the *Kṛtyakalpataru*, which its author(s) may have used. Centuries afterwards arises another specimen of this type, *Nanda-panḍita's Vaijayantī* on *Viṣṇu*, a work with original ideas³²⁴, dated with the equivalent of Nov. 1623. After a long interval comes *Bālaṃbhaṭṭa's* commentary on the *Mitākṣarā* (1730–1800), which, while purporting to be a subcommentary, is a small digest.

A further class of the greater jurists were essentially controversialists, whose products were not written around *smṛtis*, nor purported to be exhaustive treatments. The authors were not encyclopedists, though they may have nursed

^{319a} *Epigraphia Carnatica* VII, Sk. 105 (A.D. 1193) (the case of *Vāmaśakti*): *D. Lorenzen*, *ABORI* 52 (1971), 97–139, at 126–7.

³²⁰ *Kane*, *HD*, I, §. 42, 53.

³²¹ E.g. *Śūlapāṇi's Dattaka-viveka* (seventeen lines), and the anonymous *Dāya-daśa-śloki*, on which see *Derrett*, *RLSI*, 259–60, 261, 270 and *ALB*, 33 (1969), 140–2. Also n. 143 above and 322 below.

³²² *Kane*, *HD*, I, §. 70; *K. V. R. Aiyangar*, ed. *Lakṣmīdhara*, *Kṛtyakalpataru*, *Vyavahāra-kāṇḍa*, 397 n., *Dāna-kāṇḍa*, *Introd.*, 31. *Derrett*, *JIH*, 30 (1952), 35–55; *Madras Law J.*, 1952, vol. 2, 9–14 (*Journal sect.*). *Vijñāneśvara's* pupil *Nārāyaṇa's Vyavahāra-śiromaṇi* (ed. *T. R. Chintamani*, *AOR*, 4, 1939–40, pt. 2; 5, 1940–1 (pp. iv, 56)) is a small digest in category D. *Vijñāneśvara's* own *Āśauca-daśaka* is at *Kane*, *HD*, IV, 832–3 (cf. *ibid.*, 273). *Mit. rejected*: *Rocher*, *JOIB* 1 (1952), 221.

³²³ *Kane*, *HD*, I, §. 79.

³²⁴ *Derrett*, *BSOAS*, 1965/3, 643–4.

ambitions in that direction, if life sufficed. Jīmūtavāhana was an example³²⁵. His remains the best treatise in class *C*, of which there are very many scattered minor examples. Jīmūtavāhana's long and elaborate thesis that succession is based on the principle of the supersensory benefit the heir can perform for the deceased is the longest of its kind: the *Dāyabhāga*. He was a Bengali (fl. 1090–1130) who aimed to produce a 'Dharma-ratna,' of which we possess only the *Vyavahāra-mātrkā* (which belongs essentially to class *E*) and the *Kālaviveka*. Nanda-paṇḍita's *Dattaka-mīmāṃsā* is a comparable work on adoption³²⁶. The *Dharma-dvaita-nirṇaya* of Śaṅkara-bhaṭṭa³²⁷, father of Nīlakaṇṭha (below) is a series of essays in this category. It is invidious to pick out specimens, but some that have been published or are referred to prominently, especially works of the eighteenth and nineteenth centuries, deserve passing mention as evidence of the industry and subtlety of the jurists. Special texts on the adoption of strangers as sons³²⁸, on the purpose and practice of suttee³²⁹, on the competing claims of certain remoter relations to succeed to an inheritance and the terms subject to which they may succeed³³⁰, and others, published^{330a} and unpublished, manifest the same spirit of research that lies behind the greater works, and links them, on the other hand, with the humble routine *vyavasthās* of which we have many specimens from Court pandits.

The common characteristic of these authors is their reliance on *mīmāṃsā* to explain away difficult texts, and settle controversies. What are now recognised as critical techniques hardly figured. It may be of interest to recognise the style of argumentation: the opposing view is stated first, with a sign that it is disapproved, or even without this. The reasons and citations behind that view are bracketed carefully with it. The denial and refutation follows, bearing its own reasons and citations. Expected objections to the argument or any article of it are stated and refuted as the exposition progresses. What would take up to an hour to expound as a lecture can be compressed onto a page. In view of the concise nature of the diction, and the highly technical character of the

³²⁵ Kane, HD, I, §. 78. M. Chakravarti, JASB, 11 (1915), 313–27. H. C. Chatterjee, OH, 6/1 (1958), 43–54 (a commentary on the *Dāyabhāga*). L. Rocher, JOIB, 3/2 (1953), 134–46 (the *Vyavahāra-mātrkā*).

³²⁶ Kane, HD, I, §. 105.

³²⁷ 1540–1600. Kane, HD, I, 747. A specimen of his work trans. Derrett, BSOAS, 20 (1957), 203–15.

³²⁸ *Asaṇḍāsagotra-putra-parigraha-parikṣā* (c. 1700) (Kane, HD, I, 511; III, 679, n. 1281).

³²⁹ *Anantarāma, Sahānumaraṇa-viveka* (Kane, HD, I, 662).

³³⁰ *Śvaśrū-snuṣā-dhana-saṃvāda*, ed. Derrett, ALB, 31–2 (1967–8), 538–53 (see also ALB 33, 1969, 135 n. 1); trans., the same, JGJRI, 24 (1968), 263–77. *Devarasuta-sapatnī-sutā-dhana-vivāda*, ed. Derrett, ALB, 33 (1969), 148–78.

^{330a} S. C. Banerji, ed. and trans., *Bhavadeva-bhaṭṭa, Sambandha-viveka* (on marriage), NIA, 6 (1943), 252–60. R. C. Hazra edited the same author's *Śava-sūta-kāśauca-prakarāṇa* (Calcutta, 1959); the gross blunder of all the manuscripts at p. 38 (see introd., p. xxi) illustrating perfectly the hazards of literary tradition in this field.

subject-matter, perfect manuscript copies do not survive, a fact which has lowered the standard of all but luxury printed editions.

—(*D*) the administrator-scholar, and (*E*) the digester of conflicting views.

Comparative work on the principal sources was done by the commentators. Specialists attempted to exhaust the potential of individual areas of law. Sooner or later jurists would divide the subject into sections and propound the law independently of their predecessors. The *śāstra* grew as sections divided and multiplied. This was so although individuals would differ as to where items belonged: one author would deal with suttee under Vows, and another under Penances—neither was wrong, the widow's act was a vow as far as she was concerned and operated as a vicarious penance for her husband. These scattered efforts would sooner or later be coordinated, digested.

The author of a digest engaged in the same task as his predecessors (indeed digests had begun before the greater commentaries were finished). The digester responded to an educated need, to teach the subject, not a text. But the 'digest' (*nibandha*) bifurcated into two forms. In the first (*D*) the author wrote his restatement of law as a collection of *smṛtis*, *sūtras*, purāṇic or similar quotations (with scissors and paste), with the minimum of elucidation—the primary sources told their own tale in their own ways on his pages. The second (*E*) category turned out to be more highly prized. Authors wrote their statements as lectures, quoting their authorities as they went along. The bulk of argumentation by the author thus equalled, or exceeded, the bulk of supporting citations.

Smṛtis, authentic and supposititious, ancient and modern, had swelled into an inconvenient bulk, and threatened to get out of hand. Kings gained reputations from enlarging the scope and efficiency of *dharma* within their borders. Moreover kings could afford to supply *śāstrīs* with books, amanuenses, and materials, so that copies of scholarly works could be disseminated throughout the kingdom and even presented to neighbouring rulers for their admiration. Without such patronage even the best-organized work could not easily reach the specialists who could best use it. Kings employed *śāstrīs* of renown to compile authoritative digests which would tend to suppress doubtful *smṛtis*, enhance the attention paid to leading authorities, and at the same time provide materials for the improvement of *śāstric* learning. Enlightened opinion might, or might not, be impressed as well as better informed by this enterprise. Important and petty sovereigns engaged in this inexpensive undertaking, thereby giving scholars unrivalled opportunities for airing their opinions. Pratāparudra's patronage (see below) gave his client Brahmins an opportunity for a display of theoretical expertise which in reality abused his hopes. The well-meant hope that all previous studies would be rendered obsolete³³¹ came to nothing, not merely because the bulky fruits of the royal patronage were not disseminated sufficiently well, but because, unlike Justinian who ordered Tribonian and his col-

³³¹ The passage from the *Sarasvatī-vilāsa* (Kane, HD, I, 411) handled by Derrett at *Mélanges Macqueron* (Biblio. below).

leagues appropriately, the *śāstrīs* had neither the authority nor the power to expunge *smṛti* authorities which were discordant with their view of dharma, and to known contradictions new uncertainties were added. It was still the responsibility of each judicial assessor or moral arbitrator to pronounce according to the best information available to him in the light of his own discretion and experience, and the *śāstrīs* of the palace could not shift this from his shoulders.

Relatively few works come within class *D*. Of Bhavadeva's works only fragments survive^{331a}. Govindarāja's *Smṛti-mañjarī* is a verse digest (11th cent.) of which the penance section is available in manuscript³³². Halāyudha's *nibandha* (11th cent.) was a prime authority, now lost^{332a}. Lakṣmīdhara, a minister of a northern Indian king, Govindacandra (c. 1104–54) wrote the *Vyavahāra-kāṇḍa* and other *kāṇḍas* of the enormous *Kṛtyakalpataru*³³³. A great repository of *smṛti* and *purāṇa* lore on all aspects except penance, the work was quarried by subsequent jurists, and nearly failed to survive. Ballālasena, king of Bengal, helped by his guru Aniruddha-bhaṭṭa (1175–1200) produced the *Dānasāgara* and other works rich in *purāṇic* material³³⁴. Varada-rāja's compact *Vyavahāra-nirṇaya* (c. 1220)³³⁵ is an important source of texts, illustrating the complexion of *śāstric* learning in South India. The *Caturvarga-cintāmaṇi* of Hemādri (c. 1340)³³⁶ would rival the *Kṛtyakalpataru* if it had contained a *vyavahāra* section. His is the only digest of texts (rich in all other aspects of *varṇāśramadharmā*) which approached the status of being a code. Ṭoḍarmal, finance minister of Akbar, caused one Nīlakaṇṭha to produce digests under the title *-saukhyas* (1572–89)³³⁷. There are portions of Mitra-miśra's *Vīramitrodaya* digest

^{331a} Kane, HD, I, §. 73, also 373. L. Rocher, AOR, 13 (1957), 19–41 (on the *Vyavahāra-tilaka*). See n. 330 a above.

³³² Kane, HD, I, §. 76.

^{332a} Ibid., §. 72 (296–7). M. Chakravarti, JASB, 1906, 176; 1915, 327–36. L. Rocher, JOIB, 3/4 (1954), 328–44; 4/1 (1954), 13–32.

³³³ Chakravarti JASB, 11 (1915), 357–61. Kane's treatment at HD, I, §. 77 is obsolete in view of B. Bhattacharya, NIA, 2 (1939–40), 208–10; the same, ISPP 7 (1966), 113–22, 451–4; and (subject to the remarks of B.) the introduction to the volumes of the *Kṛtyakalpataru* by their editor, K. V. R. Aiyangar.

³³⁴ Kane, HD, I, §. 83, cf. §. 82. *Dānasāgara*, ed. B. Bhattacharya (Calcutta, Bibl. Ind. Ser. no. 274, 1955–6). R. C. Hazra, OH, 8/2 (1960), 89–103 (on the *Dānasāgara*).

³³⁵ Ignored by Kane in HD, I (see 736), the author is handled well by K. V. R. Aiyangar in his edn. of the *Vyavahāra-nirṇaya* (Adyar, 1942).

³³⁶ Kane, HD, I, §. 87.

³³⁷ Ibid., §. 104, superseded by P. L. Vaidya's Introduction (and appendices) to his edn. of *The Ṭoḍarānanda, Sarga-saukhya and Avatāra-saukhya* (= I) (Ganga Or. Ser. 5: Bikaner, 1948). In contrast to the rather bombastic approach of Prātāpa-rudra's *paṇḍita-maṇḍala* (n. 331 above), and the paternalistic intention of Pṛthvīcandra (below, p. 55), Ṭoḍarmal's *paṇḍits* (Vaidya indicates how they worked, with rather poor quality assistants, to produce a digest of 80,000 śloka!) had a more modest intention, worth noting:

(below) which are virtually collections of *smṛtis* and *purāṇas* and are thus closer to class *D* than class *E*, but his work as a whole is not essentially a compilation. The *Vyavahāra-mālā*, a Sanskrit work with Malayālam commentary, belongs to this class, though compiled not earlier than the late eighteenth century³³⁸.

Numerous works emanate from writers within our class *E*. The works of the polymath Bhoja, King of Dhārā (1000–1055), contained much in the area of our *śāstra*, only a fraction of which survives^{338a}. Śrīdhara (1150–1200) astounds with his *Smṛtyarthasāra*³³⁹, transitional in its indecision whether it is a verse or a prose work. It covers a large range of *śāstra*, incidentally resolving doubts, but ignores *vyavahāra*. Devaṇṇa-(or Devanna-)³⁴⁰bhaṭṭa's *Smṛticandrikā*³⁴¹ is one of the greater works of the *śāstra*, covering the main areas and giving ample attention to *vyavahāra*. An original mind, with a power of abstraction, organisation, and mature research, he is an authority not surpassed in South India and respected everywhere. In spite of his bulk he eclipsed the Varadarājīyam (above). Śrīdatta's *Ācārādarśa* (1275–1310)³⁴², a work of the Mithilā school, is little known. Caṇḍeśvara, likewise from Mithilā, is very well known since his works (ending *-ratnākara*) remain standard digests there. He was a judge, and is one of the few jurists to leave biographical particulars, meagre though they are. He wrote at the command of king Bhaveśa of Mithilā³⁴³. Of Harinātha's *Smṛtisāra* (c. 1300–50)³⁴⁴ only a part is published, giving a unique summary of his predecessor's views on a topic in the law of inheritance. Mādhavācārya *alias* Vidyāraṇya (1330–85) was a minister of the founders of Vijayanagara, and must have compiled his famous commentary on the *Parāśara-smṛti*, the digest

*ādiṣṭe śrutibhiḥ ciraṃtana-muni-stomair muhuḥ śilite prācāṃ puṇya-pathe durukti-
satakair mliṣṭe janālasyataḥ |
mālīnyānyapanīya saṃgraha-miṣād enaṃ pariṣkurvato bhūyād eṣa pariśramo 'pi
jagad-ānandāya bhūmī-pateḥ ||*

'The righteous Way of Life of the ancients, proclaimed by the Vedas and practised for long by multitudes of sages through the ages, became indistinct through hundreds of incorrect utterances, due to the public's want of energy; the king [meaning Toḍarmal] caused it to be cleaned from its obscurities and re-presented under the guise of a Digest: may this toil be a joy to the World!' This passage from the introduction to the (unpublished) *Śuddhi-saukhya* (note the play on 'purity') (see Vaidya, *ubi cit.*, xxix) is interesting, also, by reason of the word *mliṣṭa* ('dirty,' 'indistinct,' 'barbarous') which alludes to the presence of the Mlecchas (Muslims). See n. 369 below.

³³⁸ Derrett, RLSI, 261–3, 271.

^{338a} Kane, HD, I, §. 64. The same, JOR 23 (1953–4), 94–127 (on dharma and astrology); ABORI, 36 (1955), 306–39 (texts on *tithi*, *vrata*, and *utsava* collected).

³³⁹ Kane, HD, I, §. 81.

³⁴⁰ M. Mayrhofer, Anz. d. phil.-hist. Kl., Oest. Akad. d. Wiss. 108 (1971), 81 n. 15.

³⁴¹ Kane, HD, I, §. 85.

³⁴² *Ibid.*, §. 89. Chakravarti, JASB, 11 (1915), 379.

³⁴³ Kane HD, I, §. 90. Chakravarti, *ubi cit.*, 382–4. B. Bhattacharya, NIA, 5/2 (1942), 36–8; the same, ISPP, 8 (1966–7), 203–9, 243–51; the same, JOR, 36 (1966–7), 3–28. U. Thakur, VIJ, 7/1–2 (1969), 56–68.

³⁴⁴ Kane, HD, I, §. 91. Dh.k. 1530–40.

called Parāśara-mādhavīyam, in response to the needs of the infant empire³⁴⁵. Viśveśvara-bhaṭṭa's Madana-pārijāta (1360–90)³⁴⁶ was patronised by Madana-pāla, king of Kāṣṭhā. His subcommentary on the Mitākṣarā, the Subodhinī, proves how even a Deccani work could achieve fame in Northern India. The Madanaratna-pradīpa of Madanasimha³⁴⁷, king of Gorakhpur, was produced by four learned Brahmins including one Viśvanātha. The work (1425–50) is of the same juridical level as the great production of Nilakaṇṭha (below); two *uddiyotas* have been printed³⁴⁸, and it figured indirectly in a remarkable decision of the Supreme Court in recent years³⁴⁹. Of greater fame is the corpus of works of the Bengali jurist Śūlapāṇi (their names end in *-viveka*) which broach juridical problems far wider than the ostensible subject-matter³⁵⁰. Śūlapāṇi is to be dated 1375–1460. Vardhamāna (1450–1500) is the primary author on criminal law^{350a}. Two more Mithilā jurists of note are Misaru-mīśra (c. 1450)³⁵¹, author of the Vivādacandra, who wrote under the orders of Lachimā-devī, wife of prince Candra-simha, and the much more famous Vācaspati-mīśra (1450–80)³⁵² who wrote a vast number of works in logic and law, amongst which the Vivāda-cintāmaṇi and Vyavahāra-cintāmaṇi are prime sources of *śāstric* knowledge. He was the *pariṣad* (i. e. referee in matters of dharma) of king Harinārāyaṇa. Pṛthvīcandra, king in Bundelkhand, produced the enormous Dharma-tattva-kalānidhi (c. 1470)³⁵³, of which only the Vyavahāra-prakāśa and a fragment of another *prakāśa* have appeared in print. The incipit of the Vyavahāra-prakāśa deserves notice, since it reveals both that a ruler could assume full responsibility for a legal treatise, and why:

³⁴⁵ Kane, HD, I, §. 92.

³⁴⁶ Ibid., §. 93. Viśveśvara was the true author of the Madanamahārṇava, a unique treatise on Karma-vipāka (the cure of diseases by expiating the sins which conduced to them) (ed. E. Krishnamacharya and M. R. Nambiyar, Baroda, 1953 (G. O. S. No. 117)).

³⁴⁷ Ibid., §. 94.

³⁴⁸ The Vyavahāra-vivekodyota by Kane (Bikaner, 1948); the Dāna-vivekodyota by K. Deshpande and D. G. Padhye (Hyderabad, 1964).

³⁴⁹ Guramma v. Mallappa, AIR 1964 S. C. 510 (Derrett, RLSI, 310, 415, Critique, 91 n. 6).

³⁵⁰ Kane, HD, I, §. 95. Chakravartī, JASB, 11 (1915), 336–43. S. C. Banerji, NIA 5/2 (1942), 31–5; *ibid.*, 5/7 (1942), 145–56, 169–76; *ibid.*, 6/8–9 (1943), 197–205 (on Jimūtavāhana, Śūlapāṇi, and Raghunandana). See n. 319 above.

^{350a} Kane, HD, III, 391 n. 621; I, 736–7. The Daṇḍa-viveka was ed. by K. K. Smṛtitīrtha (Gaekwad Or. Ser. 52: Baroda, 1931) and trans. (Dutch) by L. Rocher, 2 vol. (Thesis, Ghent: Schelle, 1951). L. Rocher, JOIB, 1/3 (1952), 214–24; 2/1 (1952), 71–85; 2/2 (1952), 139–47.

³⁵¹ Kane, HD, I, §. 97. Chakravartī, *ubi cit.*, 403–4.

³⁵² Kane, HD, I, §. 98. Chakravartī, *ubi cit.*, 394–400. L. Rocher, *Introd. to Vyavahāra-cintāmaṇi* (Ghent, 1956). G. Jha's trans. of the Vivāda-cintāmaṇi (Baroda, 1942) is an excellent introduction to *śāstric* learning in English.

³⁵³ Ignored in Kane, HD, I. Vyavahāra-prakāśa, pt. 1 (ed. J. H. Dave) (Bombay, Bhār. Vidya Ser., 1962). J. H. Dave, Bombay Law Reporter, 1953, Journal, 25.

*vidvadbhiḥ saha bhū-sūrair anudinam sa prādvivākaḥ svayaṃ lobha-krodha-vivarjī-
taḥ kalayate yaḥ paura-kāryaṃ kṛtī |
dharmādharma-vivecakaḥ kṣīti-bhṛtām san-mārga-dīkṣā-guruḥ Pṛthvīcandra-nareś-
varo vyavahṛtīm prastauti sat-pṛīṭaye ||*

‘Daily being a presiding judge himself along with learned Brahmins, free from greed and anger, he occupies himself effectively with the business of the city-dwellers: discriminating *dharma* from *adharma*, preceptor for the initiation of kings into the path of the good, King Pṛthvīcandra introduces, for the delight of the good, (the topic of) *vyavahāra*.’

The Nṛsiṃha-prasāda by one passing under the name Dalapati³⁵⁴ deals, rather briefly, with many aspects of *dharma*, including *vyavahāra*. His patron was Nizam Shah of Devagiri-Daulatābād (either Ahmad or Burhan of that family), and wrote between 1490 and 1512. Muslim rulers of an overwhelmingly Hindu population were sufficiently broadminded. The Sarasvatī-vilāsa, conceived on a grandiose scale by King Pratāparudra of the Gajapati dynasty of Orissa (c. 1500–25)³⁵⁵, was compiled by a committee under the supervision of Lolla Lakṣmīdhara³⁵⁶. Its Vyavahāra-kāṇḍa, whatever might be said of its pedantries, is a treasury of allusions to actual practice, and preserves quotations of works now lost. Govindānanda’s Kriyā-kaumudī (1500–40) deals with topics other than *vyavahāra*³⁵⁷. Raghunandana, Bengal’s most celebrated jurist, called Smārta-bhaṭṭācārya, wrote a series of works called Tattvas in which some aspects of *vyavahāra* figure. He belongs to 1520–70³⁵⁸. Kamalākara-bhaṭṭa (1610–40)³⁵⁹, grandson of Nārāyaṇa-bhaṭṭa³⁶⁰ the miracle-working son of the founder of the celebrated Mahārāṣṭrian Brahmin family which settled at Benares and produced many jurists, wrote, *inter alia*, the Nirṇaya-sindhu (1612), which partakes of the characteristics of class *C* as well as class *E*, the Vivāda-tāṇḍava,

³⁵⁴ Kane, HD, I, §. 99.

³⁵⁵ Ibid., §. 100. A remark at 412 is misleading: ‘The Sarasvatī-vilāsa, being a work composed under the express orders of a king for the benefit of his subjects, makes the nearest approach to the Austinian concept of law as a command addressed by political superiors to political inferiors and enforced by a sanction’ (!).

³⁵⁶ Ignored by Kane. See P. K. Gode, Stud. in Ind. Lit. Hist., I (Bombay, 1953), 423–4.

³⁵⁷ Kane, HD, I, §. 101. Chakravartī, JASB, 11 (1915), 355. R. C. Hazra, JOR, 18/2 (1951), 97–108. B. Bhattacharya, JOR, 29 (1959–60), 101–107; the same, ISPP, 8 (1966–7), 260–5, 303–30; 9 (1967–8), 1–9.

³⁵⁸ Kane, HD, I, §. 102. Chakravartī, *ubi cit.*, 351–7. R. C. Hazra, Bhār. Vidyā, 11/3–4 (1950), 178–82. B. Bhattacharya, Raghunandana’s Indebtedness to his Predecessors (Calcutta, 1955); the same, ‘Studies in Nibandhas,’ ISPP 9 (1967–8), 113–17; The Udvāha-tattva was published by H. N. Chatterjee (Cal. Skt. Coll. Res. Ser. 24, Calcutta, 1963) with introd. and apparatus. H. Chatterjee, Studies in Some Aspects of Hindu Saṃskāras in Ancient India (Calcutta, 1965) (based on Raghunandana). S. Chakravartī, Samāj-Sanskāra Raghunandana (Beng.) (Calcutta, 1964). B. Chakravorty, Calcutta Rev. 176 (1965), 177–82 (on R.’s date).

³⁵⁹ Kane, HD, I, §. 106. B. B. R. A. S. Catal. Skt. Mss., 744 (Kamalākara’s Sarva-śāstrārtha-nirṇaya). H. Chatterjee, ed., Vivāda-tāṇḍava, OH, 7/2 (1959); 8/2 (1960); 11/1 (1963); 13/1 (1965) (continuous pagination).

³⁶⁰ Kane, HD, I, §. 103.

and a treatise on the duties of Śūdras (a favourite topic of the latter days of the *śāstra*) called Śūdra-kamalākara.

Nilakanṭha-bhaṭṭa, most famous member of the same Mahārāṣṭrian family³⁶¹, wrote a series of works under the collective name Bhagavanta-bhāskara, called Mayūkhas, about 1610–40. Most would be placed in our class *D*. The Vyavahāra-mayūkha, for long of great authority in Western India, is a prime example of our class *E*. Many of the *prakāśas* of Mitra-miśra's Viramitrodaya (1610–40) are sophisticated disquisitions of law, arranged systematically as a digest³⁶². He is regarded as the last original mind to be applied to fundamental *vyavahāra* problems, e.g. inheritance, before European stimulus affected the balance of interest and the mode of exposition. His acuteness sometimes diminishes the authenticity of his practical conclusions. Mitra-miśra wrote under the patronage of Virasiṃha, ruler of Orcha 1605–27. Ananta-deva (c. 1650–75) wrote a series called Smṛti-kaustubha³⁶³, of which the Saṃskāra-kaustubha (including the Dattaka-dīdhiti) and the Rājadharmā-kaustubha are best known. His royal patron was Baz Bahadur Candra of Almora-Nainital. Keśava-paṇḍita's Daṇḍa-nīti (? 1681) is a contribution to criminal law owing its inspiration to the needs of the *rājas* of Satara^{363a}. Bālaṃbhaṭṭa³⁶⁴ wrote a commentary on the Mitākṣarā which turned out as a digest, and he attempted to publish it as the work of his mother. Colebrooke³⁶⁵ commissioned a Dharma-śāstra-saṃgraha from him, but it was not finished. Kāśinātha Upādhyāya wrote a Dharma-sindhu (1790–1) which achieved celebrity in Western India³⁶⁶. The verse and prose compilation called Vivādārṇava-setu³⁶⁷ was the work of a company of *śāstrīs* (1773) employed by Warren Hastings. Jagannātha Tarkapañcānana³⁶⁸ produced the Vivāda-bhaṅgārṇava in the last decade of the eighteenth century. Its bulk, complexity, and completeness show both what the jurist can marshal, given the space and adequate patronage, and the practicality of putting all such learning onto paper, at least in the chosen areas of contracts and inheritance.

³⁶¹ Kane, HD, I, §. 107. The same, introd., to his edn. of the Vyavahāra-mayūkha (Bombay Skt. Pkt. Ser. 80: Bombay, 1926).

³⁶² Kane, HD, I, §. 108.

³⁶³ Ibid., §. 109.

^{363a} Ed. V. S. Bendrey (Poona, B. I. S. M. ser. no. 59, 1943).

³⁶⁴ Kane, HD, I, §. 111. Also P. P. S. Sastri, Sarasvati Mahal Library, Cat. Skt. Mss (1934), 3626–7. Derrett, RLSI, 251, 270. S. L. Katre, JOIB, 16 (1967), 315–22 (an attribution to B.).

³⁶⁵ See last note.

³⁶⁶ Kane, HD, I, §. 112. A. Bourquin-L. de Milloué, Le Dharma Sindhu, I, Ann. Mus. Guimet 7 (1884), 150–274. See n. 30 above. Referred to by L. da Cunha Gonçalves (see Biblio.) with reference to Goa.

³⁶⁷ Derrett, RLSI, 239, 240, 244, 250, 271, 273 n.

³⁶⁸ Kane, HD, I, §. 113. Derrett, RLSI, 245–8. Passing mention must be made of Mayārāma-miśra-gauḍa, Vyavahāra-nirṇaya or Vyavahārāṅga-smṛti-sarvasva (–1798/9) written not under the British but Jayasiṃha (Kane, HD, I, 630–1).

The bulk of works in our class *E* should not lead to any inference that the need for other classes of composition had failed. Works by writers classifiable in our class *B* were produced in 1623 and about 1800, while a work in class *D* appeared in Kerala in the late eighteenth century. Works in class *C* appeared from the end of the eleventh century until the end of *śāstric* writing. Works even in class *A* could be written in the fourteenth century. Works in classes *C* and *E* were made possible by the availability of the digests in our class *D*, and of the techniques of *mīmāṃsā* and *nyāya*. A periodical stratification of the literature, such as would identify class-*E* works as the culminating phase, would be erroneous. Commentaries which one would attribute to class *A* can really be identified as sophisticated *précis*' of work finding expression in the efforts of writers in class *B* and, with much more freedom, in classes *C* and *E*.

From 1675 to about 1800 almost no notable work was produced. Kāśinātha's isolation in 1790-1 is remarkable. Jagannātha would never have thought of his digest without British stimulus. Kane writes³⁶⁹: 'They (the *śāstric* authors) preserved Hindu culture and literature in the midst of alien cultures and in spite of bigoted foreign dominion . . . Living as most of the later writers did in the midst of aggression and violently unsympathetic cultures and rulers and possessing no powerful central government that sympathised with their ideals, they were driven more and more to revolve within their narrow grooves and could not see far in order to regulate society in a free and buoyant spirit.' Passing over the unanthropological nature of this evaluation, we may ask why if (as is often alleged), foreign rule hampered the natural development of Hinduism towards 'modernity' and 'enlightenment,' no literature of note appeared while the Moghul empire was at its height, when, indeed, the greater part of India was free from intolerance and political chaos, whereas the bulk of all the literature appeared in Hindu kingdoms or during Hindu independence? The qualities of 'obscurantism' of which the liberal-minded complain when they approach traditional Hindu literature were fully present in all treatises produced under conditions free from the shortcomings to which Kane drew attention. The answer is simple. Great *śāstric* works depended, in practice, not so much on the initiative of their authors as on the liberal patronage of princes. The urge to write was not common, and needed to be well primed. The sale of

³⁶⁹ Kane, HD, I, 467. K. M. Panikkar, in his Foreword to P. L. Vaidya, ed., *Ṭoḍarānanda I* (1948), xv, says: 'The Hindu social structure was facing a grave crisis. The egalitarian conception of Islam and its prosyletising activity had created for Hinduism special problems which could not be overlooked. The reaction of Hindu lawgivers to this challenge was in general to make Hinduism more rigid and to re-interpret the rules in such a way as to resist the encroachments of Islam. It is perhaps this defensive attitude towards society that is responsible for the orthodoxy of views which is the characteristic of the Dharma Śāstra literature of this period.' This is guesswork, and not substantiated. What *is* evidenced, from *Ṭoḍarmal*'s *paṇḍits*' vast attention to the *avatāras*, including *Kalkī*, and their occasional references to *Mlecchas*, is awareness that the *Kali Age* was working out, seemingly, true to prophecy.

sāstric books was a sin.³⁷⁰ It would be difficult to indicate the importance of patronage more succinctly.

Before passing on to illustrate the commentators' techniques mention may be made of the notable second life *dharmaśāstra* obtained at the hands of logicians (to which we return), and incidental reference to the *Abhilaṣitārthacintāmaṇi*, or *Mānasollāsa*, by Someśvara III of the Western Cālukya dynasty (the well-known exponent of music). It is an encyclopedia written, like the *arthaśāstra* works which it exploits in the second *prakaraṇa*, in an objective spirit, without concessions to an overarching theory. It was written about 1052 and, being encyclopedic, had to have a short, rather general, section on legal administration, virtues, and religious rites and charity, and another on the *samskāras*.³⁷¹ Someśvara did not regard *dharmaśāstra* as a suitable topic for courtly debate and intellectual exercise: it is not clear whether it was his taste or prudence that (for him) excluded this and all other *sāstras* except poetry and logic.

(III) An illustration of commentators' techniques

A history of our *sāstra* can hardly dispense with an example of the material which the orthodox student must study. There are limitless possibilities for illustration. We may take as a suitable example Yājñ. I, 32, with five commentaries. The superiority of the earliest will be evident, as also the appearance (or, surely, re-appearance?) of new (or rather submerged?) information in the last. The question whether a *brahmacārī* might attend a *śrāddha* on invitation and partake of the offerings was a matter of doubt³⁷². The student was under taboos, and *śrāddhas* were melancholy occasions. To partake was an act depriving the guest himself of some of his occult power, but the more 'holy' the guest the more welcome, the more efficacious the *śrāddha*, for the deceased and, indirectly, for the hosts. Manu II, 189–90 permits a *brahmacārī*, provided he is a Brahmin, to accept such an invitation, on condition that he eats only such food as is consistent with his vows as a *brahmacārī*. This is a sophisticated resolution of the substance of the difficulties which must already have been experienced. Manu III, 186 includes (without comment) the student as a suitable invitee to a *śrāddha*³⁷³. Manu III, 151 could be understood to advise against inviting a student³⁷⁴, but this seems incorrect³⁷⁵. We now turn to Yājñ. I, 32: it will be

³⁷⁰ Hemādri, *Caturvarga-cintamaṇi*, *Prāyaścitta-kāṇḍa*, 224.

³⁷¹ *Mānasollāsa*, II, xx, 1244–99 (ed. Shama Sastry); III, 1245–1339 (ed. Shirigondekar), 1302–1521 (ed. Shama Sastry).

³⁷² Kane, HD, IV, 392 (virtually ignoring the topic) omits to show that Manu III, 151 runs contrary to the *sāstra* in other respects. K. did not respond to points of anthropological interest.

³⁷³ Nandana takes *brahmacārī* to mean one who observes certain ascetic practices.

³⁷⁴ *jaṭilam cānadhīyānam durbalam kītavam tathā |*
yājayanti ca ye pūgāms tāms ca śrāddhe na bhojayet ||

Every commentary on Manu so takes the word *jaṭilam*. Some astutely confine it, by reading *anadhīyānam* with it, to a *brahmacārī* who is not actually studying (Jha, *Manusmṛti*, Notes II, 1924, 221–2).

observed how the commentators relate the first and second halfverses to each other.

brahmacārye sthito naikam annam adyād anāpadi |
brāhmaṇaḥ kāmam aśnīyāc chrāddhe vratam apīdayan ||

‘One who adheres to studentship must not eat single food in a time free from distress. A Brahmin may, at his option, eat at a *śrāddha* without infringing his vow’.

Viśvarūpa: ‘This relates to a case where one who has no assets requires the means of subsistence. By using the word *sthita* (adheres) he indicates he would be a non-*brahmacārī* if he subsisted in some other manner. By saying “except under conditions of distress (*anāpadi*) he should not eat in one house”³⁷⁶ he (Yājñavalkya) has provided a facultative rule (*niyama*) which would permit even one who does have some assets to find subsistence by begging, as a counter-exception in a condition of distress (i. e. in a time of distress he *may* eat “single food”). *Brāhmaṇaḥ kāmam aśnīyāt* means when he has arrived to beg and has been invited by blameless hosts. Neither the kingly caste nor Vaiśyas may do this. *Vratam apīdayan* means not eating honey or meat³⁷⁷. Thus says Manu³⁷⁸, “At his option he may eat, when invited, the food of one man at a rite in honour of the gods, observing his vow, or in honour of ancestors; his vow is not spoiled.” And later on, by way of praising Brahmins³⁷⁹, he shows that the kingly caste and Vaiśyas have no right to such an invitation. Now a penance has been laid down for a student’s partaking of a *śrāddha* feast³⁸⁰: that must be related to one who has been invited in advance³⁸¹.

Aparārka³⁸²: ‘A *brahmacārī*, otherwise than in a time of distress, should not eat the food of a single person. A *brahmacārī*, if he is a Brahmin, when invited³⁸³, may eat the food of a single person in a time of distress. But if he is to eat at a *śrāddha* then he may eat provided he avoids honey, meat, etc., which would infringe his vow.’

³⁷⁵ Apparently unanimous *śāstric* opinion, contrary to the words, which by no means have this implication. Moreover, a survey of the literature on ‘who must not be invited’ to a *śrāddha* (e.g. Jha, op. cit., Notes, III, 1929, 225–8; Kane, HD, IV, 1953, 391–401), reveals that, not a *brahmacārī*, but a heretic keeping matted hair (cf. Vāyu-purāṇa, LXXVIII, 31) was to be excluded.

³⁷⁶ Viśvarūpa thus glosses ‘single food’.

³⁷⁷ Prohibited by Yājñ. I, 33 (32 in Viśvarūpa’s comm.).

³⁷⁸ Manu II, 189, but read by Viśvarūpa with *karmany upasthite* (not found elsewhere, Jha, ubi cit., Notes, I, 75) for Kullūka’s *atharṣivat*.

³⁷⁹ Unless it was a *stuti*, II, 190cd would be superfluous, which cannot be allowed.

³⁸⁰ Manu XI, 158; Viṣṇu LI, 43–44 (Vaijayanti, ibid., cites Yama); Vas. XXIII. 12. Viśvarūpa cites neither texts nor authors.

³⁸¹ Bhār. explains Manu XI, 158 as applying to a *brahmacārī* who partakes after an invitation he has himself requested: and cites Manu III, 234 which authorises a student who is a daughter’s son to be invited. No commentator on Manu takes Viśvarūpa’s point.

³⁸² Text (1903), I, 61.

³⁸³ Silent reference to Manu II, 189.

Vijñāneśvara³⁸⁴: ‘One who “adheres to studentship” must not eat “single food”³⁸⁵ except in time of distress, i. e. in the absence of disease, etc. However, a Brahmin having been invited to a *śrāddha* may eat “at his option.” “Without infringing his vow” means avoiding honey and meat. The word “Brahmin” here is intended to exclude Kṣatriyas and the rest from eating at a *śrāddha*. For there is a *smṛti*³⁸⁶ which says “the kingly caste and the Vaiśya only: for the two this ritual is not ordained.”’

Śūlapāṇi³⁸⁷: ““Single food” means begging from one person. “At his option” means according to his pleasure, except for honey, meat, etc. “At a *śrāddha*” implies a Brahmin only. The kingly caste and the Vaiśya are excluded. For Manu has said “the kingly caste and the Vaiśya only: for these two this ritual is not ordained.”’

Mitra-miśra³⁸⁸ has a fullness of his own, differing from Viśvarūpa. He explains ‘single’ as meaning ‘of one owner;’ ‘in a time free from distress’ means where other food can be had. The meaning is that one should not eat the same man’s food two days running. But this would not apply to a Brahmin student, provided he avoids honey, meat, etc. The words ‘at his option’ mean that even when he is invited he has the right to refuse, for there is a text in another *smṛti* which forbids a student to eat at a *śrāddha*³⁸⁹.

8. Qualities and potentialities of the literature

In the seventeenth century *smṛti* texts were taken up by specialists in *navya-nāya*, the New Logic, in order that they might investigate legal institutions. The resulting studies, in which the *smṛtis* are accepted as valid, but the institutions are defined in a new way, returned to *dharmaśāstra* schools and affected many later *śāstrīs*. The texts we have await systematic study³⁹⁰.

As an introduction to Indology the *smṛti* literature has its part to play. In comparative jurisprudence it has a strong claim, as yet not pursued by specialists for want of a sufficiently convenient access to the Sanskrit originals. Historians of law are at a disadvantage in that neither the *smṛtis*, nor digests or

³⁸⁴ Mitākṣarā on Yājñ. I, 32.

³⁸⁵ The editor glosses *ekānnam* as *eka-svāminam*, explaining that it means ‘obtained by begging from one person.’ Bālabhaṭṭa (ed. Gharpure, I, Bombay, 1914), 161.

³⁸⁶ Manu II, 190cd.

³⁸⁷ Text (1939), 5. S. C. Vidyārṇava’s trans. of Yājñ. (1918), 80, may also be consulted.

³⁸⁸ Text (Benares, 1924), 94; trans. Gharpure (1936), 124–5.

³⁸⁹ An allusion to Manu III, 151, and see n. 380 above.

³⁹⁰ *Svatva-vicāra*: text ed. Derrett, Pt. Charu Deva Shastri Fel. Vol. (Delhi, 1973), vol. I; trans. Derrett, BSOAS, 18/3 (1956), 486–98; *Svatva-rahasya*: Derrett, AOR 13 (1957), 42–8. H. C. Smṛtitīrtha, ‘*Svatvavāda-praveśaka*’ (Beng.), OH, 9/2 (1961)–10/2 (1962). Gadādhara-bhaṭṭāchārya, *Vivāha-vādārthaḥ*, ed. H. N. Chatterji, *Samskrta Sāhitya Pariṣat Patrikā* (Calcutta) (see also the same, Raghunandana, *Udvāha-tattva*, 145 n.); Derrett ed. text and trans., ALB, 1963, 171–199.

commentaries, undertake to give a full picture of law-in-action. The contribution to the *śāstra* of inscriptional evidence is as yet unexplored.

To this day a substantial flow of publication of little books on the ritual aspects of the *śāstra* continues³⁹¹, but this has no effect upon legal studies.

The effects of Anglo-Indian administration are diminishing with the gradual obsolescence of Anglo-Hindu law. The erroneous identification of certain works as peculiarly, and exclusively, recording the law in certain areas of India, and the invention of 'schools of Hindu law,' was an intellectual disservice to the literature, which operated broadly as an all-India medium of communication and debate³⁹². The sub-literature of Court pandits' *vyavasthās*, and *vyavasthās* provided for litigants has its own interest, but it was coloured strongly by the Anglo-Indian courts' predetermined fancies as to which texts should be relied upon and in which way. The disgust felt by many British observers of pandits' methods greatly discouraged research in Britain, which was confined to two men³⁹³ (with Horace Hayman Wilson as an able third). The life of one was cut short by an accident (Ellis), the other (Colebrooke) died a disappointed man: the indifference to indigenous Indian law of which he complained has hardly lifted; but the disappearance of Hindu law when the family laws of India are codified may do much to re-encourage scholarly investigation of a technical subject, for the first time removed from practical considerations^{393a}. The persistence in modern India of principles and prejudices, for which the *śāstra* gives abundant documentation, should add to its intrinsic value.

If the reader can detach himself from that which the anthropologist will find most useful, namely the detailed rules, he will find in India's response to the challenge of her size, her complexity, and her special requirement of an overarching system of righteousness a unique chapter in human experience. Now the status of the *śāstra* depends not on its being accepted by the prestige-holding classes of a disparate population, but rather on the discrimination, and aptitude for gainful comparison, possessed by future savants of all races and every tradition.

A history of any part of a literature, and especially one which was at every stage technical, cannot end without a frank comment on the state of secondary sources. Righteousness is an aspect of a civilization which, however technically handled by the native scholars of that civilization's great days, must make a claim upon the attention of anyone who, coming from a foreign clime and a

³⁹¹ Śivanārāyana Śāstri, *Nitya-karma-prayoga-mālā* (Bombay, 1964); *Tulsivivāha-vidhiḥ* (Bombay, 1955); *Caturthilāl, Upanayana-paddhati* (Bombay, 1957); *Vastu-sānti-prayoga* (Bombay, 1958); *Yajurvediyāhnikam* (Madras, 1959); *Śaṅkara-rāma Śāstri, ed., Yajurvediyopakarma-prayoga* (Madras, 1958).

³⁹² L. Rocher, 'Schools of Hindu Law,' *India Maior* (Jan Gonda Fel. Vol.) (Leiden, 1972), 167-76.

³⁹³ H. T. Colebrooke (1765-1836) and F. W. Ellis (d. 1819). On the latter see references at Derrett, *RLSI*, 259 nn. Also *Trans. Madras Lit. Soc. I*, 1-25.

^{393a} K. V. R. Aiyangar, *Preface to Kṛtyakalpataru, Vyavahāra-kāṇḍa* (1953), viii.

distant era, hopes to penetrate that civilization's quality and tone³⁹⁴. Before he gains confidence he must have acquainted himself with the original materials, and he cannot ignore detail (however wearisome) in the way that he could ignore the detail of the sciences of cooking, for example, and farriery (not to speak of India's luxuriant *gaja-śāstra*). A bibliography, such as is appended, must include all well-intentioned works of any magnitude, evidencing sustained attention by competent persons. The student will not have penetrated far into *dharmaśāstra* before he realizes that these have been very few, and that one towers so far above the rest as to make it essential to comprehend his methods, motives, and limitations. P. V. Kane's History of Dharmaśāstra was confined substantially, as he himself says, to *ācāra* and *vyavahāra*; yet it contains a great deal more, and at times wanders into fields in which Kane cannot have hoped to say anything like the final word. Yet the mutual disparagement in which he, S. C. Banerji, and R. C. Hazra indulge, and the grounds on which it is based, have a dispiriting effect. Kane's general criticism of 'Western scholars' is well founded. They were content, for reasons of their own (and this applied to Jolly, Meyer, and even Bühler, not to mention more fitful contributions), to make large generalisations and massive conjectures, which a better acquaintance with the enormously varied and scattered materials would have forbidden³⁹⁵. Kane was jealous of a fellow researcher, unless the latter confined himself to first-hand labour in discovering truth, and showed the devotion, patience, and organization which Kane himself displayed in a unique degree. Kane was also disgusted with the occasional disparagement of Indian texts, ideas, standards, and scholarship on the part of Europeans and Americans; but in his turn he reacted, in what he would call a 'subjective' manner, to claims that the West anticipated many developments that flowered in India. Since Kane was an encyclopedist it is possible to find the occasional gap in his work, but very difficult to fault him in completeness of documentation and sober assessment of the results. This has frustrated a desire to do original work on the part of Hindu scholars of his own day, a frustration leading to unedifying friction. Without the warning, and encouragement, that follows, however, European and American scholars as well as Indians, will be faced with the alternative of servile accommodation to Kane's results, and imitation of his approach to a subject he made uniquely his own (for no one will know all Kane knew), or abandoning the subject entirely. It is, therefore, essential to point out that, whereas no beginner can commence anywhere so appropriately as he can with Kane, the opportunity for him to make original contributions to the subject is not precluded by Kane's achievement, still less by that of his rivals. This is because Kane's approach was, as

³⁹⁴ As knowledge of the contemporary law of 'spousals' is necessary to appreciate works of Shakespeare and Webster, so without a knowledge of *smṛti* even *Kālidāsa* is obscure: V. Raghavan, *JBBRAS*, 29/2 (1954), 55-57. *Likhita's* hands were cut off for theft (*Mahābhārata* XII, 24, 2-27 (crit. edn.)), comprehensible in the light of *smṛtis* quoted by Jha, *HLS*, I, 446-62.

³⁹⁵ For examples of his censure see Kane, *HD*, I², 185-9, 343.

we have seen, devoid of anthropological or sociological awareness³⁹⁶; his approach to any Indian matter was essentially defensive³⁹⁷; and he imagined that the *vyavahāra* sources he handled were legal texts; and, worse still, he neglected to consider seriously the gap between profession and performance, which is not a shameful (as he suspected) but an interesting feature of the civilization, criticism of which offended him³⁹⁸. This leaves, to those patient enough to learn from his, and his rivals', references, a vast field of original discovery and comparative investigation which can, on the one hand (as Kane would have wished) eschew wild conjectures, and on the other enable the Sanskrit sources to speak in a voice which has been their own, but has been silent too long.

³⁹⁶ The comment made by Kane, at HD, I², 413 on Hemādri's (alleged) concept of priorities typifies the naivety lying behind massive learning. On his selectivity see R. C. Hazra, OH, 17/2 (1969), 74.

³⁹⁷ Observe the comment at Kane, HD, I², 232 (persecution of the Jews!).

³⁹⁸ Kane, HD, III, 60.

ABBREVIATIONS

AB	Aitareya-brāhmaṇa
ABORI	Annals of the Bhandarkar Oriental Research Institute (Poona)
AIR	All India Reporter (Nagpur)
AOR	Annals of Oriental Research (Madras)
Āp.	Āpastamba-dharma-sūtra
Baudh.	Baudhāyana-dharma-sūtra
BDCRI	Bulletin of the Deccan College Research Institute (Poona)
Bhār.	Bhārucci's Manu-śāstra-vivaraṇa*
Bṛh.	Bṛhaspati-smṛti
BSOAS	Bulletin of the School of Oriental and African Studies (London)
Dh.k.	Dharma-kośa, Vyavahāra-kāṇḍa (3 vols. continuous pagination)
DS.	S. C. Banerji, Dharma Sūtras
Gaut.	Gautama-sūtra
HD	P. V. Kane, History of Dharmaśāstra
HLS	G. Jha, Hindu Law in its Sources
IC	Indian Culture
IHQ	Indian Historical Quarterly
IJJ	Indo-Iranian Journal
ISPP	Indian Studies, Past and Present (Calcutta)
JA	Journal asiatique (Paris)
JAOS	Journal of the American Oriental Society
JAS	Journal of the (Calcutta) Asiatic Society
JASB	Journal of the Asiatic Society of Bengal
JBBRAS	Journal of the Bombay Branch of the Royal Asiatic Society
JESHO	Journal of the Economic and Social History of the Orient
JGJRI	Journal of the Ganganath Jha Research Institute (Patna)
JIH	Journal of Indian History (Trivandrum)
JOIB	Journal of the Oriental Institute (Baroda)
JOR	Journal of Oriental Research (Madras)
JRAS	Journal of the Royal Asiatic Society (London)
Kāty.	Kātyāyana-smṛti
Ker.	Kerala
LQR	Law Quarterly Review
Mad.	Madras
Medh.	Medhātithi (-bhāṣya)
Nār.	Nārada-smṛti
NIA	New Indian Antiquary (Calcutta)
OH	Our Heritage (Calcutta)
PLD	All-Pakistan Legal Decisions
RLSI	Derrett, Religion, Law and the State in India

* The text is awaiting publication by the Sūdasiē Institut, Heidelberg; the Ms (devanāgarī) is available at the School of Oriental & African Studies (London). Another copy of the original (at Trivandrum) is at the Bhāratiya Vidyā Bhavan (Bombay).

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ŚB.	Śatapatha-brāhmaṇa
SBE	Sacred Books of the East (Oxford)
TS	Taittirīya-saṃhitā
Vas.	Vasiṣṭha-dharma-sūtra
VIJ	Viśveśvarānand Indological Journal
WZKSO	Wiener Zeitschrift für die Kunde Süd- und Ostasiens
Yājñ.	Yājñavalkya-smṛti
ZDMG	Zeitschrift der Deutschen Morgenländischen Gesellschaft
ZVR	Zeitschrift für vergleichende Rechtswissenschaft

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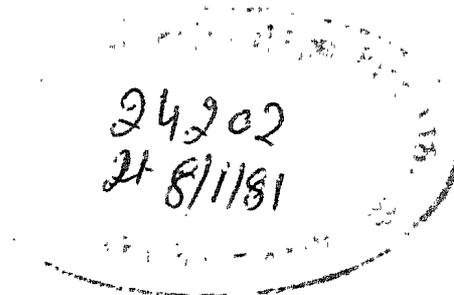
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by

Robert Lingat



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THE PROBLEM

IN THE old Vedic schools the study of domestic ritual was completed very early on by the rules of a discipline primarily of religious inspiration, which were intended to define *dharma*, or the conduct of the individual according to his age and station in life. Though fairly scanty in the *dharma-sūtras*, precepts of a juridical character took a more and more important place in the *dharma-śāstras*. At the same time, they were expressed in a more and more certain and scientific form. The immense literature of the commentaries and digests finally presents a sum-total of all those works whose authority was confirmed by time. Study of the sacred tradition is prolonged by it right up to our own days, but at the same time it is limited, for only texts in which that tradition is embodied may be utilised.

Yet the rules of a juridical character which one finds in the *dharma-śāstras* continue, as in the times of Gautama or Āpastamba, to be incorporated with rules of a purely religious and ritual inspiration. It matters little that they are enunciated à propos of the duties of the householder or those of the king, that they appear in the *ācāra* section or the *vyavahāra* section. Their object is to certify the *virtue* of the act in question. When Yājñavalkya for example provides (II.24) that he who sees his land occupied by another for twenty years, without making any objection to this, is subject to a loss in respect of that land, etc., that rule, for all its completely juridical tone, is of virtually the same nature as that which enjoins upon a *dvija* the duty of not marrying a woman of a *varṇa* higher than his own (I.57). In either case the precepts put into the mouth of Yājñavalkya express or rather determine the requirements necessary to maintain the cosmic and moral order. It is the duty of men to profit from this if they want salvation. Thus the king, or his delegated judge, knows that he will commit a sin if, when a suit for repossession of land is before him, he does not apply the rule laid down, and likewise a Vaiśya knows that he will commit a sin if he marries a Kṣatriya woman. The two sins would not have the same degree of gravity, but of necessity both would involve a sanction in this world or in the next if they are not effaced by an appropriate penance. These are not simple recommendations which wisdom would tender, or rules of equity that ought to be obeyed. The rule of *dharma* retains its peculiar quality even when it involves juridical consequences. Its authority

resides essentially in the faith of the Hindu in a divine regulation of the world, the law of which is expressed by that rule.

Hence we are led to wonder in what measure the rules of law which we meet in the *dharma-sāstras*—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. But what is their exact significance? Are they direct sources of law, i.e. have they the 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 are amongst the sources of law in Europe—that is, have they managed to exert an influence upon the development of social institutions as an historical or explanatory cause of law rather than a true *source*?

From the day that the British took into their hands the administration of justice in India, they were confronted by the problem of the value suitable to attach in practice to the *sāstras*' precepts. This problem has remained open to controversy ever since. In 1772, Warren Hastings laid the foundations of the jurisdiction of the courts which the East India Company should institute by virtue of the Diwani grant obtained a few years earlier from the Emperor at Delhi. He provided that in certain matters, such as those concerning succession, marriage, caste and religious institutions, the Hindus and Muslims would be ruled by their respective laws. Likewise, after the Indian Empire had been joined to the Crown of the United Kingdom, in her Proclamation of the 1st November 1858, Queen Victoria solemnly renewed the promise made to her subjects to respect their laws and customs.¹ But, so far as the Hindu element of the population was concerned, where were these laws and customs to be found? The Regulation of 1772 provided that in the cases in which the Hindu law must be applied the British judge must be assisted by a native Law Officer, whose opinion he must seek before making his decision. This system owed something to methods known to the Muslim courts, and it was not abolished until 1864. Its result was to give the judges the impression that the *smṛti*-literature had the status of legislation. The Law Officers were not professional jurists in the western sense (India had none, so far as we know), but men educated in the *sāstras*, one might say "doctors in *dharmaśāstra*". They always cited as authorities for their opinions texts taken from the *dharma-sāstras* or from works relying upon the latter. In truth the judges were not slow to perceive that the texts often had only a slight connection

¹ We disclaim alike the right and desire to impose our convictions on any of our subjects. . . We will that generally in framing and administering the law due regard be paid to the ancient rights, usages and customs of India.'

with the point of law in issue. There were times when they seemed to be cited only as a matter of form, or to illustrate the paṇḍit's own learning. There were times when they appeared to contradict the opinion professed. Harmony between the opinions themselves was not always maintained, and the paṇḍits were not always consistent with themselves. Thanks to translations, the British judges gained well before 1864 some personal acquaintance with the alleged written law which their paṇḍits relied upon, and they ceased to follow their opinions blindly. This critical spirit, however, went only so far as to cast doubt on the interpretation of the texts. It never reached their juridical quality. The result was that the legal force attributed to precepts of the *śāstra* came to be confirmed. Once a text had been produced as the basis for a rule of law, the British judge had only to attempt to find its sense and implications and to apply it with all the consequences it seemed to involve.

Now it was not long before realisation began to dawn that the paṇḍit, in conformity with national usage, most frequently gave opinions which conformed to his compatriots' (or some of his compatriots') conception of what would be just; and that the vanity or the corruption with which he tended to be accused by no means always explained the useless ostentation of texts with which he amused himself or the text-torturing in which he indulged. It was early discovered also that precepts of the *smṛtis* were not always obeyed with rigour, that they were not all understood in the same sense, and that at times even custom contradicted them flatly and prevailed in practice without discernible objection. Further, a Regulation was passed in the Bombay Presidency in 1799 which required the courts to ascertain in each case whether there did not exist a customary rule which might furnish a solution to the dispute and, if there was, to apply it to the exclusion of all provisions emanating from the written texts (Bombay Regulation IV of 1799). But though it was recognised that custom took precedence over the law of the *śāstras*, the difficulty of its proof when the existence of a custom had to be established, and the infinite diversity of the customary rules forced the judges, more often than not, to fall back on the precepts of the *smṛtis* under the influence of their paṇḍits, or rather to the interpretation of those precepts which had been established locally. Resistance to improper application of the written law was accentuated in regions or circles where the judges were better informed about actual customs. Hindu law defied attempts to grasp it.

In the last quarter of the nineteenth century a lively reaction occurred against the use which the courts were making of the "Brahminical codes" and their substitutes. It tended even to deny their practical value. Some suggested that they be replaced by a new legislation made entirely by British authority. Others proposed that custom alone should be the

guide, since in their view custom was the only real law which India had ever known.²

The most impetuous champion of these reforming ideas was James H. Nelson, a District Judge in the Madras Presidency. His three works, *A View of the Hindu Law. . .*, *A Prospectus of the Scientific Study of the Hindu Law*, and *Indian Usage and Judge-made Law in Madras*, published respectively in 1877, 1881, and 1887, resounded somewhat loudly. They are fighting works, almost pamphlets.^{2a} Because of his practical responsibility Nelson had personal acquaintance with the difficulties of which he speaks, and he was perfectly *au fait* with the problem. In spite of his exaggeration his critique could not fail to arouse attention and was bound to lead to a better understanding of the Hindu law.

Nelson takes up the cudgels against the case-law handed down by the High Court at Madras, which he attacks as being biased in favour of the Sanskrit texts and which he accuses of an excessive reluctance to apply the customary law although a recent statute (The Madras Civil Courts Act, 1873, sec. 16) had recognised its legal force. He cites several principles solemnly laid down under that system which led to decisions as unjust as they were contrary to established customs. But his criticism had a more general bearing. He was inspired by views advanced by Burnell,³ and his critique amounted to a denial of the juridical value of the *smṛtis* and digests. In Nelson's view those works

²The same problem arose before the courts of the French possessions in India, the French government having undertaken to administer justice to Hindus 'according to the laws, usages, and customs of their castes'. But it seems that the court at Pondicherry, guided by earlier practice, was quick to recognise the fundamental importance of custom. See Léon Sorg, *Introduction à l'étude du droit hindou* (Pondicherry, 1895).

^{2a}Derrett at C.H. Philips, ed., *Historians of India, Pakistan and Ceylon* (London, 1961), ch. 26.

³Burnell, to whom Nelson dedicated his first work, wrote in the preface to his translation of the *Dāyavibhāga* portion of the *Parāśara-Mādhavīya*, which he published in 1868, the following, which Nelson quotes at p. 133 of his *View*: 'The digests however were never intended to be actual codes of law; they were written in a language understood by a very few, and because of the Vedic quotations in them, they must have remained almost exclusively in the hands of the Brahmans. Again they refer for the most part to the Brahmans only, and utterly ignore the numerous un-Aryan peoples scattered about India, and which form the greater part of the population of the South, whose usages (whatever they may call themselves) can in no wise be referred to the Dharmaśāstra. There is not a particle of evidence to show that these works were ever even used by the Judges of ancient India as authoritative guides; they were, it is certain, considered as merely speculative treatises, and bore the same relation to the actual practice of the courts, as in Europe treatises on jurisprudence to the law which is actually administered.' Burnell's views here, and in his edition of a part of the *Varadarājīyam* (1872), were not free from exaggeration, and were expressed in an over-dramatic style. That the *śāstras* (interpreted in a very wide sense) were actually consulted in legal contexts is proved by the important inscription from South India published in *Ann. Rep. S.I. Epigraphy*, 1936-7, pp. 92-3 (A.D. 1584). See appendix

never were taken to be sources of law! It was a great blunder to place them in the same category as the *Institutes* of Justinian or the Napoleonic Code. Their reputation was in any event a recent one, and was due in no small measure to the enthusiasms of European Sanskritists. Prior to the publication undertaken by Sir William Jones, he argued, a Madras pandit would have been astonished to hear the Code of Manu referred to as a source of law. *Smṛtis* were purely literary and theoretical works. They had no contact with reality. They were the fruit of speculations altogether out of touch with practice and propounded ideal rules for which not a single Hindu cared in the business of life, if we except a few very restricted circles of Brahmins. They were of no weight at all so far as concerned the crowds of inferior castes and the peoples of Dravidian race. Their authority was practically nil even for the Āryans and those who pretended to be Āryans. If the experience of the author was of any value, a native of South India, whatever his class, would be highly embarrassed to say according to which of the *smṛtis* or which of the digests he claimed to be judged. In fact the *dharma-śāstras* had nothing to do with law at all. Hindu law was entirely customary. Far from simplifying the British judges' task, recourse to Sanskrit texts which were inaccessible except by way of translations had created greater difficulties. In order to extricate themselves, the judges had often been led to abandon this alleged written law in order to substitute for it their own sense of equity. This method has given rise only to arbitrary and incoherent decisions. An artificial law resulted from it, a veritable monster engendered by "Sanskritists without law and lawyers without Sanskrit". In his view this monster should be executed and buried without delay, and then a commission should be got together to gather and to arrange in a simple form the practices and primitive customs which were common to all the castes or the majority of them.

The works of Nelson have the merit of putting the problem clearly. The remedy he suggests seems rather naive, but his critique is in general well founded. It is marred only by his exaggerated tone and by his prejudices against what he calls the "Sanskrit Books", prejudices which were not justified.

Jurists naturally replied to him.⁴ But the most pertinent reply, because it takes the problem as a whole, is that made by the celebrated Indologist, Auguste Barth (to whom Nelson dedicated his second book) in his reviews in the *Revue critique* for the years 1878, 1882, and 1888.⁵

⁴Mr. Justice Innes made a detailed reply in 1882. Sarvadhikari discussed some of Nelson's opinions in his Tagore Law Lectures for 1880, 'On the Hindu Law of Inheritance'. J.D. Mayne, in his turn, drew attention to the weaknesses of Nelson's argument in the preface to the third edition (1888) of his *Philosophy of Hindu Law and Usage*.
⁵Barth, *Revue critique*, III, 3, IV, 47-52.
 Comparative Public Law (CCPL) Shimla, HPNLU, Shimla. Only for private circulation.
 Works (see above, p. 51, n. 52), II, 39-40; III, 296-304 and 400.

Barth criticises Nelson with some severity for arguments which leave no stone unturned in an attempt to lower the authority of the Code of Manu, the *Yājñavalkya-smṛti* and the *Mitākṣarā*. But he is not far from him in thinking that the *smṛtis* are basically literature and nothing more. "The treatises", says he, "are almost all of them apocryphal. They have a character which is primarily didactic and often purely literary. They never had the force of positive ordinances, and the doctrine itself which they propound, half religious and half juridical, undoubtedly shares the fate of holy and ideal books. They agree only moderately with the way of the world and are more respected than obeyed."⁶ So he does not accord them the status of legislation. Yet he adds, "If it would be an error to place the *sāstras* on the same level as the Law of the Twelve Tables or the *Code Civil*, it would be no less an error to attempt to judge them by the same standard. We must take them for what they are, a written tradition, and that at epochs and under influences sundered by many diversities, not compiled by legislators but by scholars unrelated, for the most part, to public authority."⁷ Apart from certain doctrines relating to social pretensions rather than to civil law properly so called, or wherever that tradition is outside reality, those scholars did not work otherwise than in good faith and were never inspired simply by personal fantasies."⁸

Barth admits, then, that *dharmaśāstra* authors were not pure theoreticians or simple poets, but that they tried at least in some domains to make a practical work, taking their inspiration from custom in order to enable their conception of wisdom to prevail. Likewise, in opposition to Nelson, he recognises that the *smṛtis* have exercised an undeniable influence over Indian society and that their precepts in certain contexts have acquired a legal force. He may be going a little too far when he says, "We do not hesitate to concede that in civil questions, in what concerns the constitution of families, the management of property, contracts, partition, succession, all questions of which the codes treat in a practical fashion and conformably to conditions obtaining amongst the majority of the inhabitants, we can really speak of a 'Hindu law' as having been effectively recognised from the Himalayas to Cape Comorin". It is true that he adds, "Only, we must not claim more for this law than it claims for itself, and never lose sight of the qualification it constantly exhibits, that its validity stops where a contrary custom prevails".⁹

⁶*Ibid.*, III, 299-300.

⁷A gratuitous assumption. Except for indications, in certain cases, which are in any event hypothetical, about their countries of origin, we know nothing about the personalities of the authors of the *dharmaśāstras*.

⁸*Works*, III, 405.

⁹*Ibid.*, III, 302.

Without any other definition of its nature, Barth recognises that the *dharma-śāstras* have enjoyed a certain authority and that authority has not been without effect. "Mr. Nelson", he says, "rightly attaches great importance to the fact attested by judicious and well-informed observers that at a recent period as much as in the time of Megasthenes, the inhabitants of the various regions of India did not refer to any written law in order to regulate their differences.¹⁰ But when he concludes from this that before William Jones's publication one would have astonished a paṇḍit of Madras by citing the Code of Manu to him as a book of authority in matters of law, his conclusion is certainly erroneous. The paṇḍit would not have spoken of the code as an Englishman would speak of an Act of Parliament, but he would certainly have recognised in it one of the numerous expressions of the eternal *dharma*."¹¹

He concludes, "The history of the juridical literature of India, whether native or European, imperfect, uncertain, full of *lacunae* as it is, like everything applying to the past of that singular country, is not really the formless chaos nor the tissue of contradictions that it appears to be to the rather overheated imagination of Mr. Nelson. What is true is this: Britain, in undertaking to respect as far as possible this multiple tradition, and at the same time, to apply it with the aid of institutions and methods without which justice cannot be imagined in the West, has assumed a task which was difficult from the first, and its complications have become gradually more obvious as we have learnt better to gauge the present as well as the past conditions obtaining in that land."¹²

The eminent Sanskritist here put his finger on the true cause of the discomfort experienced by the British judges. The principal lesson to be drawn from this long controversy amounts to this, that the Hindu concept of law marries ill with our methods of administering justice. Our judicial system demands an imperative rule, emanating from an organ having legislative power, or appertaining (in the case of the common law) to a source the authority of which is equal to that of legislation until it is validly repealed. Now there never was in India, prior to the British period, a power able to pass legislation, in our sense of that word, at least in matters of private law. However, law did not reside entirely in custom. Certainly the *dharma-śāstras* were not Codes in the European sense of that word. But their precepts did not thereby lack a certain authority in the eyes of all Hindus, specially because of their origin but also, and particularly in the judge's eyes, because they were the only ones which were the fruit of a profound study and, as a result, offered some framework of juridical reasoning. The written law

¹⁰Cf. Derrett, *J.A.O.S.* 88 (1968), 776ff.

¹¹*Comparative Public Law and Hindu Philosophy (Select Readings)*

¹²*Ibid.*, III, 408.

of the *śāstras* and the customary laws of the different groups of humanity thus existed side by side, equally respected though often in notable disagreement with each other. The former acted upon the latter and restricted its mobility; but the latter also acted upon the former through the medium of interpretation. The result was an extremely variable and diverse law, the application of which required the judge to use a power of *assessment* quite incompatible with our conception of the judicial function. What was needed was a judge who had the power to apply as the case demanded the law of the holy *ṛṣis* or the custom of ancestors, a judge who could decide with sovereign independence and total liberty so far as the choice of law was concerned, in short an arbitrator rather than a judge. And Barth was wise enough to detect that that was how it was.¹³

To understand the notion which the Hindus had of law prior to the intervention of western concepts, it is important to try to define the authority which they attributed to the *dharma-śāstras*. The precepts to be found in those works could stumble against several sorts of obstacles: particularly that of custom, and that of the governmental policies. We must, then, look into the relations that obtained between custom and the written law of the *śāstras*, on the one hand, and, on the other, the role incumbent on the king in the application of that written law according to traditional notions. In either case the preliminary labour done by interpretation pioneered the road and prepared the passage from *dharma* to law.

¹³ This law ... is addressed rather to arbitrators than to judges and contains at least as many recommendations as it does precepts.' *Ibid.*, IV, 50.

CONCLUSION

WESTERN JURIDICAL systems are based on the concept of legality. Whether strictly speaking a written law or the common law, the law is understood to express the will of all. Even in cases where it has done no more than declare the customary law or case law in the form of codes, its imperative force resides entirely in the popular will or constitutionally established authority which has sanctioned it, and not in the power of the usage or custom which lies behind, and has in a sense given birth to, that law. What is just, within the meaning of those systems, is that which is *legal*, i.e. that which conforms to law. What is unjust, and thus irregular and reprehensible, is that which is illegal, i.e. contrary to law, i.e. to an actual provision of a law. Law-in-action, which effectively governs relations between people, is deduced directly from the law. Courts cannot pass sentences or hand down judgments which are just unless they are also, in that sense, legal. True enough, the statute or positive law is not the only source of court-law. Case-law, legal doctrine, even jurisprudence, which fix or attempt to fix the meaning and importance of statutory provisions, all play creative roles to various degrees, and there are numerous contexts, particularly in India, in which law is discovered from custom. But primacy belongs always to the positive law and in particular to statute. The other sources, even when by no means inconsiderable, are only subsidiary to it.

This system is the product of a long evolution in the western world, of which many parts of the "Third World" have inherited much, in both form and substance, alongside their indigenous systems. It is a system which fits an egalitarian and individualistic society. The rule of law is established at the very level of the relations which it purports to govern. It starts with individuals, and it is a manifestation of their own picture of the social order.¹ If we wanted to find a near counterpart to this conception in the traditional system of India we should probably find it in the regulations and "statutes" of corporate bodies and others such as we have mentioned which, established by the interested parties

¹On the circumstances which led in Europe to the appearance in the fourteenth century of this individualistic conception of law see M. Villey, *Cours d'histoire de la philosophie du droit*, fasc. 2, 'La formation de la pensée juridique moderne' (Paris, 1963). It is impossible to fail to observe how close to Indian tradition was the doctrine, until then the classical doctrine, to which that conception is opposed.

themselves or declaring their customs, fixed everyone's rights and obligations. No doubt there was positive law there, but it was not legislation in the proper sense of that word.

The classical legal system of India substitutes the notion of *authority* for that of *legality*.² The precepts of *smṛti* are an authority because in them was seen the expression of a law in the sense in which that word is used in the natural sciences, a law which rules human activity. Everyone knows that no one can escape from that law. As a result, one must try his utmost to conform to it. But it has no constraining power by itself. It puts itself forward, it shows the way which one should follow, but it does not impose that way.³ Society is thus organised on the model of itself, with which it is presented, as if it had actually achieved it.

This conception would have ended in a complete divorce between reality and law, had not the law revealed by the Sages been profoundly based in the traditions and aspirations of the Hindu world. It is careful to explain that wherever it cannot conquer custom remains queen. But custom's triumph by no means diminishes the authority of the law. It can only fetter the application of the latter, perhaps only for a time. No rule is really legitimate and finally sanctified until it conforms to that law.

Further, this conception would have involved or justified a strict conservatism, incompatible even with the survival of legal realities. But that law contained within itself a variety of solutions permitting interpretation to diversify its effects according to plans and periods, even going so far as to limit and actually paralyse its application. But this is also the reason why we can hardly get a grip upon the law-in-action, for interpretation could not, any more than the law itself, go beyond proposing itself: it could not be imposed.

The king might well have the right to impose his own decision, and if it conforms to the law, as he is in duty bound to make it do, it could be worthy of amounting in some sense to case-law. But to the extent that it is interpretative—and its interest would have begun and ended there—it cannot have more value (it indeed has less value) than the

²*Autorité, auctoritas*. The latter was the power which, added to the act made it perfect. Cf *auctoritas patrum* (the 'authority' of fathers) and, in ancient times, *auctoritas tutoris* (the 'authority' of the guardian, as fictitious parent). A. Ernout and A. Meillet, *Dictionnaire étymologique*, s.v. *augeo* and its derivatives, especially *augur*, 'he who gives omens, assuring the development of an enterprise'.

³Dharma is a code of conduct supported by the general conscience of the people. It is not subjective in the sense that the conscience of the individual imposes it, nor external in the sense that the law enforces it. Dharma does not force men into virtue, but trains them for it. It is not a fixed code of mechanical rules, but a living spirit which grows and moves in response to the development of society.' (S. Radhakrishnan, *The Heart of Hinduism*)

opinion of a qualified interpreter. In reality the office of king is more complex than the office of judge, because of the duties peculiar to the ruler. Even though his judgments are really law-in-action, they remain singular and unrelated, staccato, without any future.

The text of the law floats alone, incessantly worked upon, discussed, orientated in diverse ways: all we can say of it is that it preserves all its authority. It would be presumptuous and vain to attempt to draw from it any picture of the law actually in force at any given period. This would only be to add one more interpretation to those which have reached us from the hands of men better placed than we are to evaluate the juridical solutions which suited each in his own day.

Such a system may well be imperfect in the eyes of a western jurist. But it presented unquestionable advantages over our system for India, a country with a population of such diversity. A system founded upon legality, even assuming it could have found a climate fit to hatch it, would have involved a veritable legislative chaos. Even if not, it could only have been maintained by a tyranny which ignored popular reactions completely. Profiting from maximum flexibility, the Hindu system sustained the unity of the Indian world, thanks to the undisputed authority of the law. That unity was unrealisable at a lower level, but was realised on the higher level in an ideal participation amongst all Hindus. That ideal received the dynamic imparted to it by faith, by Hinduism itself, with the result that custom and the written law were inextricably woven together to give rise to law.

Some scholars feel that it was the need to affirm and to maintain that faith, when menaced by Islam, which explains how the work of interpretation went on without a break under the rule of the Sultans of Delhi and the Mogul Emperors. Indeed it is a remarkable fact that, far from stopping or even bridling the composition of digests or treatises, the Muslim conquests seem on the contrary to have produced a renewal of interest in this class of literature. However, it would be going too far to attribute this renewal simply to the reactions of the orthodox faithful. Even at the height of Muslim power independent Hindu states always existed with an almost complete internal autonomy, as vassals of the Emperor. Looking at works which originated in these states, one can only wonder at their extraordinary diffusion throughout the whole country, especially when we think of works like the *Vīramitrodāya* of Mitra-miśra or the *Bhagavanta-bhāskara* of Nīlakaṇṭha, written in each case under the patronage of quite subordinate princelings. On the other hand many digests, and not the least important of them, were written in regions directly subject to Muslim rule! It is possible that the curiosity or spirit of tolerance of a ruler like Akbar will explain how he could prompt Tōḍar Mal to compose a digest. But it is difficult to imagine

that he saw nothing in it beyond a literature inspired by the religious zeal of his minister. In reality the flowering of treatises and digests during the Muslim period seems to have been due to the need for a renewal of that literature, or rather for a new effort on the part of interpretation to adapt the law to the changes that must have come about in Hindu opinion and manners as a result of the Muslim conquest.

According to K.L. Sarkār,⁴ if the author of the *Mitākṣarā* adopted a fully secular concept of proprietary right,⁵ a possible motive was to facilitate the application of Hindu succession law by Muslim officials. Apart from the fact that Vijñāneśvara lived in a region and at a period when Muslim rule was a very dimly apprehended possibility, this suggestion is very debatable in itself. But the idea, taken abstractly, may not be entirely lacking in relevance. The political ideas expressed by Caṇḍeśvara in the *Rājanīti-ratnākara* could consist with impressions produced in the author by the extension of the power of the Sultanate of Delhi. Nīlakaṇṭha's ideas on the ruler's property in the soil are thought to reflect the new situation created by the appearance of a non-Hindu ruler.^{5a} When Muslim rule was consolidated the prolonged coexistence on the soil of India of two communities each having its way of life must obviously have led to movements of ideas in the bosom of each, actions and reactions which must have affected their respective customs, if only marginally. If it was the mission of Muslim rulers to maintain the presence of Islam, those Hindus who were versed in the *śāstras* must for their part have been under obligation to propagate their teaching, not in a spirit of rivalry or opposition which doubtless would not have been tolerated, but in order to inform the Hindu population of what, in their view, were strict duties incumbent upon it, with which no compromise could be permitted.

Though the Muslim conquests aroused and maintained this renewal of interpretation, marked by many works of different tendencies, the very concept of law remained unchanged. The system which the invaders imported was fundamentally similar to that of the Hindus, so that the Hindu would find it quite natural that it should be applied to Muslims, while the latter could raise no theoretical objection to the application of India's classical law to the Hindus. In either case the authority of the law rested not on the will of those who were governed by it, but on divine revelation, on the one hand *The Koran* and the *Sunna*, and on the other hand the Vedas and *smṛti*. The Islamic law was applied only to the believ-

⁴*The Mīmāṃsā Rules of Interpretation*, 13.

⁵This view, endorsed by A.S. Naṭarāja Ayyar, is an exaggeration, for Vijñāneśvara had no such intention in general, and in the passages under consideration he was anticipated by Medhātithi. See Derrett, *Religion . . .*, 141 n. 1 and see also Medhātithi on *Manu*.

^{5a}[trs.]

ers, while the law of the *śāstras* was not applicable in its plenitude except to Hindus. In either system interpretation has the same importance, and custom holds a significant (if not the same) rôle, even though in principle it could not contradict a revealed text. Finally, in either system the decisions of the courts are not a source of law, and juridical rules are established by what we would call juridical doctrine.⁶

The general principles are the same and the two systems look as if they were made in order to coexist. But still the Hindu system lacked, over a greater and greater area of territory, an essential element required in order that it might function properly—the king. In the Muslim system as in the Hindu the king has no power of legislation. But this restriction applied only in the sphere reserved for Koranic law. Apart from the fact that this left him a wide margin, it did not concern the institutions of conquered countries, which, in his eyes, had only the status of customs. If Muslim rulers, for reasons of policy analogous to those that inspired some rules of the *śāstras*, generally respected the customs of their Hindu subjects, they were certainly not bound to protect them in the same way as a Hindu king, and they were indifferent to the religious significance of their practices. The only means which the Indian population retained whereby it might be reminded of its duties was the Brahmin who, despoiled of his privileges, had lost the preeminent place he had occupied in the state.

But the void left by the removal of the Hindu king had consequences of the gravest nature in the administration of justice. In both systems, the mission to keep peace between subjects is the primary function of the sovereign, and the Sultans, like the Emperors, usually tried zealously to fulfil this duty. In fact, at least under the reigns of the great Emperors, the administration seems to have attained a high degree of perfection for the period. The judicial authority, represented by the Kādi, always enjoyed in Islam a great independence vis-à-vis the administration and the sovereign himself. But, and here we come to the Hindu system's first failing, criminal justice which belonged to the sovereign's temporal authority according to the *śāstras* themselves, passed under the control of Islam. The Hindus were submitted in criminal matters to the same régime as the Muslims, like all subjects of the state; and if exception was made in their favour in respect of crimes which only Muslims could commit, the breaches made by Hindus, conversely, against Good Custom ceased to be enquired into and punished in the highest quarter. On the other hand the Sultans, like the Emperors, generally admitted that the

⁶On the life of Hindus under Muslim rule see M. B. Ahmad, *The Administration of Justice in Medieval India* (Aligarh, 1941); Jadunāth Sarkār, *Mughal Administration* (4th edn., Calcutta, 1952); Ishtiaq Husain Qureshi, *The Administration of the Sultanate of Delhi* (4th edn., Karachi, 1958).

Hindus should remain subject to their laws and customs in matters of private law, such as family law, inheritance, partition, adoption, and the like.

But the court of the Kādi, instituted to give justice as between believers, could only judge according to the Islamic law. Following a practice employed in Iran by the Abassids, Sultan Iltutmish decided in the thirteenth century that, for matters between Hindus (unable to settle their differences amicably by arbitration), the Kādi should be assisted by a paṇḍit, to whom he should refer himself in questions of Hindu law, just as he was assisted by a mufti for questions of Islamic law. But although the Kādi, who was a professional judge, was versed in Islamic law like the mufti, by whose advice (by the way) he was not absolutely bound, he had no knowledge whatever of Hindu law and had no choice but to rely on the opinion of the paṇḍit. The system thus entailed serious inconvenience. However it was not universal, and some regions, like Bengal, seem never to have employed it. Especially in the Mogul period, there were occasions when, if the dispute was between Hindu notables, it was determined by the Emperor's own arbitration. But more often the differences were submitted by the parties themselves to a Brahmin's decision, or were referred to local jurisdictions. Early on, as internal politics suggested, the Muslim authorities left local bodies a large measure of autonomy, not different from that which they enjoyed under the Hindu rulers. In judicial matters, the control of the central authorities was only exercised gently, especially because litigants felt some embarrassment in appealing before a Kādi's court. As a result the bodies which the *śāstras* call *kula*, *śreṇi*, etc. took on a great importance, even though their jurisdiction was reduced to what we may call civil matters and to penal questions of minor importance. Village assemblies or caste tribunals, under the name *panchayat*, became the ordinary courts for Hindus, gradually usurping the attributes of the state courts and passing judgments from which there was no appeal. Whether it was arbitration by a Brahmin, the decision of a caste tribunal, or that of a *panchayat*, the law applied was that of the local community, a law based above all on tradition and precedent, attached more or less laxly to one or other of the schools of interpretation. What occurred was a sort of localisation, if not sclerosis, of law, an arrested development which was henceforth embedded in custom. The Hindu law was no longer that ocean of texts, incessantly conned over and brewed over by the interpreters. It was fragmented into a series of islands placed under the government, direct or indirect, of a particular classical treatise or association of

¹Cf U.C. Sarkār, *Epochs in Hindu Legal History* (Hoshiarpur, 1958), ch. 11 : 'The history of village panchayats with special reference to the administration of Hindu law during the Muslim period', 236-67.

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treatises. Against this legalisation, i.e. conversion into law, of the juridical doctrine of the interpreter-jurists, which was so contrary to the whole spirit of the Hindu law, the last of the interpreters protested with commendable vigour.

Muslim rule injured the functioning of the classical system, but it did not directly attack or subvert it. Thus the system emerged again, or tended to emerge, as soon as historical circumstances permitted.⁸

By contrast, the British conquest (for, *de facio*, conquest it was), entailed direct attacks upon the Hindu system. In 1772, however, Warren Hastings had not the remotest intention of touching such fundamental questions; he thought only of securing a better administration of justice. At that time in his famous *Plan*, he laid the foundations for the civil courts of the Dīwānī of Bengal, Bihar, and Orissa, which had been granted to the East India company by the Emperor of Delhi. Hindus and Muslims remained as in the past under their respective laws. Only the judicial mechanism was changed, for thenceforward the judgment would be passed by an English judge instead of by a Kādi. But although this change was inoffensive to all appearances, it contained in itself, so far as Hindu law was concerned, a threat to traditional concepts which later developments and improvements introduced into this system could only aggravate. Whether the English judge followed the opinion of the paṇḍit in default of detailed knowledge of his own, or whether he had better information about the juridical literature (e.g. from translations) and had access to the texts, he could only make his judgment conform to what he thought was the law. He was a foreigner in India. He was an organ superimposed upon the living sources of law and exterior to them. His principal concern was to search out the legal solution. In other words in his court *legality* became substituted for *authority*, a concept which did not and could not have any meaning for him; and in any case he had no means of making it work, of giving it voice. His only possible course was to determine the law as he found it. No doubt this conception, with which we have become quite familiar, had its advantages. After the successive reforms to which judicial administration was subjected, viz. the creation of the High Courts and the institution of a system of appeals leading up to the Privy Council in London, the public subject to it received a surety of certainty and objectivity which at present they could not better. But these advantages could only be obtained at the price of the ruin of the traditional system.

Whilst, in the classical system, the judgment had no other object or effect but to put an end to a dispute brought before the judge, it now began to constitute a precedent upon which the rule of *stare decisis*

⁸ Cf. the renaissance of Hindu justice (Sanskrit readings) Maratha country under Shivaji. V.T. Gupte. *The judicial system of the Marathas* (Poona, 1953). Only for private circulation

conferred the status of a source of law. Thus law-in-action, which had not existed except potentially in the *śāstras* and treatises, henceforward became extracted and fixed in the case-law of these new courts. It is beyond our present scope to evaluate that judge-made law in itself. Very different estimates of its value have appeared.⁹ The English judge, grappling with multiple difficulties, could only confer authority on the diversity of customs which he found before him and refer, where possible, to rules given in a treatise which passed as an authority in the region where he functioned. He could complete the gaps—or his own ignorance—of the Hindu law with notions borrowed from the only law with which he was (in a measure) conversant, namely English law, as he was in any case authorised to do.¹⁰ What interest us here are the effects which the introduction of the English judicial system was bound to have upon the classical system, whatever might be correctness or appropriateness of the decisions which emerged from the courts.

The judgment of a Hindu judge left the authority of the law intact, always available thereafter for new interpretations. However, the English judge called upon to define law, fixed interpretation once and for all. The judgment (even if that of a Full Bench), which was basically only one of the ways in which the law could be understood, became at length its sole valid expression. The commentaries and the digests were treated as if they were the customals of the continent of Europe, each of which used to apply, before codification began, to a particular territory; at times they were allowed to exclude each other, and at other times it was as if they complemented each other, although all of them were originally nothing more than diverse forms of interpretation. The latter skill at once dried up. Further development of law could take place only through the cases. In the classical system the rule of the sacred law became the rule of law-in-action only when it was hallowed by custom, but custom as such had no power to legitimate the rule. Opposed to that law, custom was external to the court-law and likewise to the judicial decision, which, as a result, could maintain its susceptibility to change. The British courts also agreed that custom prevailed over the written law, but, once proved—and admittedly proof was much more difficult than had been the case previously—it remained a *legal* rule. It was imposed (in suitable

⁹Derrett, *Religion* . . . , ch. 9.

¹⁰In 1781, Impey, completing the formula approved by Warren Hastings, decided that in the absence of a legal rule the judge should decide according to justice, equity and good conscience, which would be equivalent to leaving the judgment to the discretion of the judge, but the latter naturally was led to refer to the principles of the system nearest to him, namely the common law. For the formula, 'justice equity, and good conscience' see Derrett in J.N.D. Anderson, ed., *Changing Law in Developing Countries* (London, 1963), ch. 7. For the important role of Impey see B.N. Pāṇḍey, *The Introduction of English Law into India* (London, 1967). [trs.]

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cases) upon the future, so that the written law ceased to exert any influence upon it. Thus the reform instituted solely to ameliorate judicial administration ended in subverting the traditional system. Intending to reduce the judge to the status of an interpreter of scriptural law, Warren Hastings and his successors turned him into a creator of court-law.

Legislation next appeared on the scene, introducing a new element even more fatal to Hindu concepts. The British took this path only very gradually. The first legislative measures were passed in the interests of morality and seem as a whole like police measures: the abolition of *suttee* in 1829, the abolition of slavery in 1843; the abolition in 1850 of loss of rights due to exclusion from caste and change of religion; the validation of the remarriage of widows in 1856. However the British were not slow to discover that the judicial system which they had imported could not function well unless an end was put to the uncertainty in which the judge was often placed as to the law to be applied. The recourse to codification was suggested early on. Already Warren Hastings himself had recognised the need for "a well-digested code of laws compiled agreeably to the laws and tenets of the Mahomedans and Gentoos".¹¹ Sir William Jones and Colebrooke placed great faith in the digests which they had caused to be produced and which, they imagined, would fix the Hindu law. But this was to misconceive the power of the interpreter, and they soon discovered that they had only added several more works to that imposing literature without having in any way diminished its authority. It was necessary to wait until the Charter Act of 1833 which, having set up a single legislature for all India, enabled one to envisage the utilisation of a parliamentary legislative power. However the British hesitated for a long time to intervene in the sphere of the personal laws, thinking that "the Hindoo law and the Mahomedan law derive their authority respectively from the Hindoo and Mahomedan religion. It follows that as a British legislature cannot make Mahomedan or Hindoo religion so neither can it make Mahomedan or Hindoo law."¹² It was only after the government of India was taken over by the Crown in 1858 that, impelled by the Legislative Council, the movement for codification came into play. The first codes to be issued—and long since revised—were the Code of Civil Procedure (1859), the Penal Code (1860), and the Code of Criminal Procedure (1861), dealing with matters relating to the sovereign authority and involving, from our present point of view, no innovation.

The first texts touching the private law were called forth by the need to regularise legal relations which the indigenous practice had not pro-

¹¹Sir G.C. Rankin, *Background to Indian Law* (Cambridge, 1946), 137.

¹²*Report of the Second Law Commission*, 13 December 1855, quoted in Sir G.C. Rankin, *Background to Indian Law*, 158.

vided for, such as the Succession Act of 1865, applicable to foreign communities settled in India whose personal law was uncertain because of the want of a *lex loci*, a territorial law. Statutes of 1866 and 1869 belonged to the same class: the first was the Native Converts Marriage Dissolution Act, the scope of which is sufficiently indicated by its title, and the second was the Indian Divorce Act, which was intended specifically for Christians. The Hindu Wills Act of 1870 only settled and arranged matters collateral to the practice of making testaments which antedated the British. The Contract Act of 1872 was inspired above all by the needs of commerce. The personal law of the Hindus was, as yet, scarcely touched. But the notion that a statute law, positive law, could be substituted for the authority of the *śāstras* had made its way into men's minds. Especially after the First World War, more and more statutes interfered with a sphere previously exempted, and undertook important reforms especially in the fields of marriage and succession. Sometimes ahead of public sentiment, this new legislation could not have managed to become effectual unless it had had the support of the Hindu public. In that reservation we find something of an echo of the traditional system.

With the inauguration of a purely Indian legislature, the Union Parliament which held itself qualified to express the will of the Hindu people, a definitive change in the nature of statute law ensued. From being a personal law, with the variability and flexibility which that purported to ensure, it has become since 1955/6 a territorial law, applying with few and relatively unimportant exceptions to all Hindus, whatever their castes and places of origin. It thus responds to that need for uniformity which all new nations feel if they are to become states in the full sense of that word. It remains to be seen if this new set of laws, emanating from an élite, will gain the fullest response from a society which still lives within traditional frameworks, or whether it will live on outside society, in the same way as the law of the *śāstras* did but on a different level, where the unity resolves itself into aspirations which are no longer religious but political.¹³

We must turn, now, to Further India, and particularly towards the Hinduised states of the former Indo-China, if we wish to watch a continuous development of the classical Hindu system which relied for its renewal upon no resources but its own. True, the ambience was new. It was that of Hīnayāna Buddhism, the *theravāda*, of which the Mons or people of Pegu were the zealous propagandists in South East Asia. In the lands of Sanskrit culture, Cambodia and Champā, it seems that the Hindu system was followed in its original purity, even though it had to undergo some modifications as a result of the difference of environment. But,

¹³ Derratt, *Critique of Modern Hindu Law* (Bombay, Tripathi, 1970). Only for private circulation

so far as we can discover from epigraphy, the official doctrine conformed to Hindu orthodoxy.¹⁴

The appearance at the Pagan epoch in Burma of a literature composed locally in Pāli by Mon monks on the model of the *dharma-sāstras* in Sanskrit marks, on the other hand, the first stage of an evolution which went on until it was exhausted.¹⁵ The *dhammasattha*, of which the Code of Wāgarū gives us an idea, in spite of the late date of the version which has come down to us, has managed to hazard the introduction or perhaps rather the conservation of the Hindu system in environments practically cut off from India and entirely won for the Buddhist faith. That their authors were inspired by Indian *sāstras* is beyond doubt, for it is evidenced by their classification of contentious matters into 18 types, corresponding to the 18 titles of litigation in the *smṛtis*. But, if they were content to "de-Brahminise" their model and to adapt its rules to the manners and customs of the public for whom they wrote, manners and customs very different from those of Indian society which appears through the *dharma-sāstras*, they only ended by making customals or handbooks of law. To give to them the authority which the *dharma-sāstras* enjoyed, they would have had to attach the rules to a supernatural source like the Veda. The difficulty arose from the fact that the Buddhist religion, the religion of "renouncers", did not contain any revelation on the social order. The canonical legend of Mahāsammata, the world's first king, chosen by his people to put an end to discord,¹⁶ alone offered elements of a solution. It must have been tempting to attribute the precepts of the *dhammasatthas* to Mahāsammata, who turned out to be a Bodhisattva. But Mahāsammata had to remain above all the model of the just king and could only be the interpreter of the law. Thus our authors, seizing upon the legend, completed it conveniently. They gave Mahāsammata a counsellor, the hermit Manu, who plays in his court the role which the *prādvivāka* does in the *dharma-sāstras*. They imagined that that Sage was raised into the celestial regions and reached the *cakkavāla*, the wall which surrounds the world and which bears, carved in letters high as a bull, the law which rules it. It is this very text of the law which, rehearsed from memory by the hermit Manu, is set down in the *dhammasatthas*.

The fable seems to us naive enough. Yet, after all, it is not more so

¹⁴Lingat, 'L'influence juridique de l'Inde au Champā et au Cambodge d'après l'épigraphie', *J.A.*, 1949, 273-290.

¹⁵What follows is a brief résumé of my article, 'La conception du droit dans l'Indochine hinayāniste', *B.E.F.E.O.*, 1951, 165-87. See also S.P. Khetarpal, 'Debt of Burmese jurists to Hindu law', *Jaipur Law J.*, 8 (1968), 6-25. [trs.]

¹⁶*Dīgha Nikāya*, XXVII. Agañña Suttanta (Rhys Davids, *Dialogues of the Buddha* III, 77-94). On this legend and its relations with Indian traditions see L. Dumont, 'Kingship in ancient India', *Contributions to Indian Sociology*, 6 (The Hague) (1962), 61-4. J.W. Spellman, *Political Theory of Ancient India* (Oxford, 1964), 22.

than that which places the precepts of the *dharma-śāstras* in the mouths of mythical personages. It evidences at least as great an ingenuity as theirs, for it achieves an exact transposition of the Hindu system to Buddhist environments. It is clear that the hermit Manu has no more than the name in common with the Manu of the *smṛiti*, even though some *dhammasatthas* make out of him a son of Brahmā, reincarnated in the person of a hermit. But it is also evident that the name was not chosen at random. For the Buddhists, the law of Manu is really the law of the phenomenal world, that which governs laymen. It is thenceforward cut from its religious roots, independent of the law which the Buddha came to teach to the world. It reveals to men the conditions of social welfare, while the law of the Buddha reveals to them the conditions of salvation. Despite this dichotomy, which has remained one of the characteristic traits of Hīnayānist society, the law of the *dhammasatthas*, like the law of the *śāstras*, transcends the world which it rules. It also is bound to the cosmic order and is therefore free from the will of men, who will live in peace only so long as they obey its precepts. A king like Mahāsammata himself could introduce no changes into it, and his role is confined to insuring that it is respected.

Of course the authors of the *dhammasatthas*, like those of the *dharma-śāstras*, took a substantial number of the rules which they attributed to Manu from the facts of contemporary custom. But thereby they certified its authority. Likewise thereby they condemned or deprived of all power of expansion those usages which they did not retain, thus pursuing, though in a different spirit, the work of moral reform which the *dharmaśāstra* writers undertook in Indian society. In environments which were still corroded and bound down by their customs, they also introduced a kind of ideal image of their society in which, through frameworks borrowed from Indian learning, their legal life could be defined and organised.

The Burmans were for a long time tributary to the Mons in the domain of law as in the remainder of the cultural sphere. Thus the *dhammasatthas* appeared to them as the *dharma-śāstras* did to the Hindus, as the expression of a law which was universal so far as concerned the Buddhist universe, and from which it was natural that they should profit. But little by little the Mon or Pāli *dhammasatthas* were melted, absorbed in a prolix production, written most frequently in the vernacular, in which local traditions held a greater and greater place, and where borrowings from the Buddhist scriptures became more and more numerous. In this new guise the *dhammasatthas* lost their original nature. All repeat and embellish the story of the marvellous discovery of the text of the law, and base their precepts on the revelation of the hermit Manu. This literature is abundant. As in India, the genre has proliferated. There

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is a list enumerating a hundred *dhammasatthas* composed in Burma, and forty of them still exist. Like the *dharmasāstras*, their chronological succession is uncertain: they copy each other, and also complete and differ from each other. It is from the totality of them that the rule of law must be extracted. However, in contrast to the Indian position, the commentaries are mixed with the texts and do not appear as independent works until the modern period, when the form of doctrinal treatises emerges. A "digest" has however been compiled at the request of the British. But up to our own time the *dhammasatthas* have remained the only written law on all questions relating to the personal law of Burmese Buddhists, even though a project of codification has recently been mooted. The Burman kings, like the British authorities, took care not to legislate in the sphere of the law of Manu and confined themselves to their role as judges. As in the Hindu system, the precepts of the *dhammasatthas*, while certainly being authoritative, are not imperative in the manner of the rules of our codes. They give way before a regularly proved custom. After the British conquest, the rule of *stare decisis* has undermined traditional concepts in attributing to the judicial decision the status of a legal rule, but this injury has not had the significance which it had in India.

The Indian conception was adapted by the Mon and Buddhist peoples and lived on thereafter only upon its own resources. But in Siam it found its limits. The collection of ancient laws of the Ayuthia period has come down to us framed in a *dhammasattha* which provides it at once with a preface and a table of contents. This *dhammasattha*, originally written in Pāli, purports to be of Mon origin. It seems to have been known to the Thai peoples settled in the Ménam basin before the foundation of the Ayuthia kingdom (1350), and it is possible that within its surviving version many works of the same type have been fused. However that may be, it is in many respects very close to the Code of Wāgarū. We find there king Mahāsammata and his minister Manu (called Manosāra), and the text is given by rehearsal on Manu's part from what he read on the wall which surrounds the world. But it marks an important piece of progress in juridical technique by means of the new divisions and distinctions which it introduces. For example, contentious matters, instead of being reduced to the classical 18 titles of law, are classified under 39 rubrics, 10 being rules of procedure and 29 rules of substantive law.¹⁷ But the most important novelty is the appearance, beside these fundamental rules (*mūla-attha*), of a new source of law, constituted by the "ramifications of litigation" (*sākha-attha*), i.e. rules derived from the first. The fundamental rules are those which the hermit Manu

¹⁷This subdivision of litigation corresponds to the distinction made in certain Sanskrit treatises between the *mārkā* and the *vivāda-padas*.
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(or Manosāra) read on the *cakkavāla* and are found set out in the *dhammasattha*. They are the expression of the eternal law which should inspire Mahāsammata and future kings when giving justice to their subjects. As for the derivative rules, these resulted, in course of time, from the application by Mahāsammata and his successors of the principles laid down in the *dhammasattha*. They could not be actually enumerated, although the fundamental rules are necessarily limited in number.

Thus the Siamese *dhammasattha* recognised in advance that there may be a legal value in decisions passed by kings in conformity with its precepts. A procedure is expressly provided for the transformation of a royal decision into a rule of law. They must be stripped of the features which gave rise to them, and reduced in abstract terms to the concise form of the precepts of the law. They could then be added to the text of the *dhammasattha* itself under the relevant rubric. It seems that such a procedure was actually followed during the Ayuthia period at every change in the reign, when it was entrusted to members of the High Court of Justice, composed principally of Brahmins versed in the science of law. The last corpus of the old Siamese laws that has come down to us presents, therefore, a partially finished codification, in which the derivative rules of law, forming as many articles, are classified under the various rubrics of the *dhammasattha*, after a brief account of the fundamental rules.

The passage from *dharma* to court-law is found to have been perfectly realised. The Siamese code, in its *dhammasattha* frame, expressed a positive law which was applicable immediately. The royal will, in its capacity as interpreter of the law, developed from the simple order which it was into a true legislation, even though, at least in theory, the king had no legislative power properly speaking. The law he laid down had authority only when it conformed to the *dhammasattha* precepts, but that authority was now furnished with coercive power which belonged to none but the king. The fusion between the two constituent elements of court-law was completed.

Truly speaking, this evolution of the Hindu system towards a system having a legislative aspect was already suggested by the *dharma-sāstras* themselves, insistently warning the king that a judgment is not just unless it is given in conformity with the precepts of the *sāstras*. Certainly in the course of the Muslim period, judicial precedents, in so far as they expressed custom, played an important role in the local courts (which does not mean to say that they were always recorded).¹⁸ As for the ancient period, only the Buddhist literature alludes to collections of judgments intended to facilitate the work of the judiciary. In the *Tuṇḍila-jātaka* (VI.2.3) and the *Tesakuna-jātaka* (XVIII.1) the Bodhi-
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Guṇe, *op. cit.*, 68; U.C. Sarkar, *op. cit.*, 251.

sattva compiles a collection of his judgments after the death of the king of Benares and exhorts the subjects of the kingdom to consult it in the disposal of their disputes. But one must note that these judgments were not given by the king as an application of a preexisting law, but by the Bodhisattva himself, guided by his innate sense of justice. The society depicted is a society without written law, living solely under its customs, in fact far removed in this respect from the picture of Indian society which the *smṛtis* give us. The stories which appear in the *Mahā-Ummaga-jātaka* (XXII.9) of sentences passed by the future Buddha throw light on the usefulness which one might expect of such compilations in a real society, assuming that the *jātakas* (the ages of which are not known) alluded to historical facts.

Mahosatha whilst still a child astonishes the world by his ability to solve difficult cases. The king of Mithilā, before inviting him to visit, submits to him a certain number of tests, from which he extricates himself adroitly. If we leave aside the edifying character which their authors attached above all to these stories, we find that their principal function is to highlight the ingenuity of the Bodhisattva when faced with complicated cases, in establishing the true facts, testing the veracity of the parties, and confounding the culprit by unexpected tricks. In other words, they aim to teach judges not how to apply the law, but the art, often difficult enough, of discerning the true from the false and of obtaining an exact knowledge of the facts of the case. In this way they assist and illustrate the teaching of the *smṛtis* which exhort the king not to judge lightly (*Yāj.*, II.19), and to pay careful attention to the presumptions of fact (*M.*, VIII.44), not to speak of indirect methods which may be utilised in criminal matters. But these are only the necessary qualities of perspicacity which they seek to develop in the judge, qualities needful if one is to try the case well. When at length the facts are established it remains to find out under which rule of the *sāstras* they will fall. Then another intelligence is needed, that of the interpreter.¹⁹ There is every reason to think that, if the Hindus had ever effectively compiled collections of "judgments", it would have been the originality and subtlety of the means employed to justify the decision which would have guided their choice, and not the correctness of the juridical argumentation.

As a matter of fact the stories in the *Jātaka* have given rise to a literary genre which is extremely widespread throughout Southeast Asia and particularly in Burma, that of the law tale.²⁰ In Burma, collections of

¹⁹This division of judicial work between the magistrate-inquisitor and the magistrate who is the judge is clearly marked in the ancient Siamese procedure, of which it is one of the most original characteristics. Lingat, 'La preuve dans l'ancien droit siamois', *Recueils de la Société Jean Bodin*, XVIII. *La Preuve* (Brussels, 1964), 397-418. Only for private circulation

²⁰Maung Htin Aung, *Burmese Law Tales* (London, 1962).

judgments (*pyat-hton*) attributed to various Bodhisattvas (the names of Mahosatha, Vidhura, Mahātuṇḍila occur) or to legendary personages, have been published to a great number (one lists puts them at 35). They are evidently fictitious judgments in which the writers display their imagination and their ingenuity. But there are some serious works amongst these collections. They are inspired by the Buddhist faith and effort is made to use the Pāli scriptures to complete the law of Manu or to show its conformity with the law of Buddha. This literature developed parallel to that of the *dhammasatthas* and certainly exerted some influence on the later ones of that class. But these works were not a source of law and can by no means be considered as if they were collections of precedents. They are simply intended to teach the art of sound judgment to the king, whence the name of *rāja-sattha* is given to them. They express the science of kingship *par excellence*, that which teaches the king to pass equitable judgments. Further, the *rāja-satthas* not only complete the *dhammasatthas*; they also reinforce their authority by appealing to Buddhist sources. With the coming of Buddhism, the king is no longer the mere protector of his subjects. He is also and above all the protector of the religion and the defender of morality. Let him become, in turn, interpreter of the precepts of the *dhammasattha*, and his judgments will have the double sanctity of the secular law and the religious law, and will serve as a model to the kings of the future. The *Manu Kyé*, a compilation of Burmese *dhammasatthas* of the middle of the eighteenth century, enjoins upon judges, as from the mouth of Manu, to follow "the decisions of the ancient kings, embryos of Buddha, and those which have been passed in our days in conformity with the precepts of the *dhammasattha*".²¹ Thus, if the *rāja-sattha* continues to remain distinct from the *dhammasattha*, the Buddhist conception of the royal function has led writers to formulae which contain the germ of the legislative system of modern times whilst maintaining the essentials of the Hindu system.

²¹D. Richardson, *The Damathat or the Laws of Menoo* (Rangoon, 1874), 151.

INDIA.

LECTURE I. WHAT CAN INDIA TEACH US?

When I received from the Board of Historical Studies at Cambridge the invitation to deliver a course of lectures, specially intended for the candidates for the Indian Civil Service, I hesitated for some time, feeling extremely doubtful whether in a few public discourses I could say anything that would be of real use to them in passing their examinations. To enable young men to pass their examinations seems now to have become the chief, if not the only object of the universities; and to no class of students is it of greater importance to pass their examinations, and to pass them well, than to the candidates for the Indian Civil Service.

But although I was afraid that attendance on a few public lectures, such as I could give, would hardly benefit a candidate who was not already fully prepared to pass through the fiery ordeal of the three London examinations, I could not on the other hand shut my eyes completely to the fact that, after all, universities were not meant entirely, or even chiefly, as stepping-stones to an examination, but that there is something else which universities can teach and ought to teach—nay, which I feel quite sure they were originally meant to teach—something that may not have a marketable value before a Board of Examiners, but which has a permanent value for the whole of our life, and that is a real interest in our work, and, more than that, a love of our work, and, more than that, a true joy and happiness in our work. If a university can teach that, if it can engraft that one small living germ in the minds of the young men who come here to study and to prepare themselves for the battle of life, and, for what is still more difficult to encounter, the daily dull drudgery of life, then, I feel convinced, a university has done more, and conferred a more lasting benefit on its pupils than by helping

them to pass the most difficult examinations, and to take the highest place among Senior Wranglers or First-Class men.

Unfortunately, that kind of work which is now required for passing one examination after another, that process of cramming and crowding which has of late been brought to the highest pitch of perfection, has often the very opposite effect, and instead of exciting an appetite for work, it is apt to produce an indifference, if not a kind of intellectual nausea, that may last for life.

And nowhere is this so much to be feared as in the case of candidates for the Indian Civil Service. After they have passed their first examination for admission to the Indian Civil Service, and given proof that they have received the benefits of a liberal education, and acquired that general information in classics, history, and mathematics, which is provided at our public schools, and forms no doubt the best and surest foundation for all more special and professional studies in later life, they suddenly find themselves torn away from their old studies and their old friends, and compelled to take up new subjects which to many of them seem strange, outlandish, if not repulsive. Strange alphabets, strange languages, strange names, strange literatures and laws have to be faced, “to be got up” as it is called, not from choice, but from dire necessity. The whole course of study during two years is determined for them, the subjects fixed, the books prescribed, the examinations regulated, and there is no time to look either right or left, if a candidate wishes to make sure of taking each successive fence in good style, and without an accident.

I know quite well that this cannot be helped. I am not speaking against the system of examinations in general, if only they are intelligently conducted; nay, as an old examiner myself, I feel bound to say that the amount of knowledge produced ready-made at these examinations is to my mind perfectly astounding. But while the answers are there on paper, strings of dates, lists of royal names and battles, irregular verbs, statistical figures and whatever else you like, how seldom do we find that the heart of the candidates is in the work which they have to do. The results produced are certainly most ample and voluminous, but they rarely contain a spark of

original thought, or even a clever mistake. It is work done from necessity, or, let us be just, from a sense of duty, but it is seldom, or hardly ever, a labor of love.

Now why should that be? Why should a study of Greek or Latin—of the poetry, the philosophy, the laws and the art of Greece and Italy—seem congenial to us, why should it excite even a certain enthusiasm, and command general respect, while a study of Sanskrit, and of the ancient poetry, the philosophy, the laws, and the art of India is looked upon, in the best case, as curious, but is considered by most people as useless, tedious, if not absurd?

And, strange to say, this feeling exists in England more than in any other country. In France, Germany, and Italy, even in Denmark, Sweden, and Russia, there is a vague charm connected with the name of India. One of the most beautiful poems in the German language is the *Weisheit der Brahmanen*, the “Wisdom of the Brahmans,” by Rückert, to my mind more rich in thought and more perfect in form than even Goethe’s *West-östlicher Divan*. A scholar who studies Sanskrit in Germany is supposed to be initiated in the deep and dark mysteries of ancient wisdom, and a man who has travelled in India, even if he has only discovered Calcutta, or Bombay, or Madras, is listened to like another Marco Polo. In England a student of Sanskrit is generally considered a bore, and an old Indian civil servant, if he begins to describe the marvels of Elephanta or the Towers of Silence, runs the risk of producing a count-out.

There are indeed a few Oriental scholars whose works are read, and who have acquired a certain celebrity in England, because they were really men of uncommon genius, and would have ranked among the great glories of the country, but for the misfortune that their energies were devoted to Indian literature—I mean Sir William Jones, “one of the most enlightened of the sons of men,” as Dr. Johnson called him, and Thomas Colebrooke. But the names of others who have done good work in their day also, men such as Ballantyne, Buchanan, Carey, Crawford, Davis, Elliot, Ellis, Houghton, Leyden, Mackenzie, Marsden, Muir, Prinsep, Rennell, Turnour, Upham, Wallich, Warren, Wilkins, Wilson, and many others, are hardly known

beyond the small circle of Oriental scholars; and their works are looked for in vain in libraries which profess to represent with a certain completeness the principal branches of scholarship and science in England.

How many times, when I advised young men, candidates for the Indian Civil Service, to devote themselves before all things to a study of Sanskrit, have I been told, “What is the use of our studying Sanskrit? There are translations of Sakuntalâ, Manu, and the Hitopadesa, and what else is there in that literature that is worth reading? Kâlidâsa may be very pretty, and the Laws of Manu are very curious, and the fables of the Hitopadesa are very quaint; but you would not compare Sanskrit literature with Greek, or recommend us to waste our time in copying and editing Sanskrit texts which either teach us nothing that we do not know already, or teach us something which we do not care to know?”

This seems to me a most unhappy misconception, and it will be the chief object of my lectures to try to remove it, or at all events to modify it, as much as possible. I shall not attempt to prove that Sanskrit literature is as good as Greek literature. Why should we always compare? A study of Greek literature has its own purpose, and a study of Sanskrit literature has its own purpose; but what I feel convinced of, and hope to convince you of, is that Sanskrit literature, if studied only in a right spirit, is full of human interests, full of lessons which even Greek could never teach us, a subject worthy to occupy the leisure, and more than the leisure, of every Indian civil servant; and certainly the best means of making any young man who has to spend five-and-twenty years of his life in India, feel at home among the Indians, as a fellow-worker among fellow-workers, and not as an alien among aliens. There will be abundance of useful and most interesting work for him to do, if only he cares to do it, work such as he would look for in vain, whether in Italy or in Greece, or even among the pyramids of Egypt or the palaces of Babylon.

You will now understand why I have chosen as the title of my lectures, “What can India teach us?” True, there are many things which India has to learn from us; but there are other things, and, in one sense, very important things, which we too may learn from India.

If I were to look over the whole world to find out the country most richly endowed with all the wealth, power, and beauty that nature can bestow—in some parts a very paradise on earth—I should point to India. If I were asked under what sky the human mind has most fully developed some of its choicest gifts, has most deeply pondered on the greatest problems of life, and has found solutions of some of them which well deserve the attention even of those who have studied Plato and Kant—I should point to India. And if I were to ask myself from what literature we, here in Europe, we who have been nurtured almost exclusively on the thoughts of Greeks and Romans, and of one Semitic race, the Jewish, may draw that corrective which is most wanted in order to make our inner life more perfect, more comprehensive, more universal, in fact more truly human, a life, not for this life only, but a transfigured and eternal life—again I should point to India.

I know you will be surprised to hear me say this. I know that more particularly those who have spent many years of active life in Calcutta, or Bombay, or Madras, will be horror-struck at the idea that the humanity they meet with there, whether in the bazaars or in the courts of justice, or in so-called native society, should be able to teach *us* any lessons.

Let me therefore explain at once to my friends who may have lived in India for years, as civil servants, or officers, or missionaries, or merchants, and who ought to know a great deal more of that country than one who has never set foot on the soil of *Âryâvarta*, that we are speaking of two very different Indias. I am thinking chiefly of India such as it was a thousand, two thousand, it may be three thousand years ago; they think of the India of to-day. And again, when thinking of the India of to-day, they remember chiefly the India of Calcutta, Bombay, or Madras, the India of the towns. I look to the India of the village communities, the true India of the Indians.

What I wish to show to you, I mean more especially the candidates for the Indian Civil Service, is that this India of a thousand, or two thousand, or three thousand years ago, as the India of to-day also, if only you know where to look for it, is full of problems, the solution of which concerns all of us, even us in this Europe of the nineteenth century.

If you have acquired any special tastes here in England, you will find plenty to satisfy them in India; and whoever has learned to take an interest in any of the great problems that occupy the best thinkers and workers at home, need certainly not be afraid of India proving to him an intellectual exile.

If you care for geology, there is work for you from the Himalayas to Ceylon.

If you are fond of botany, there is a flora rich enough for many Hookers.

If you are a zoologist, think of Haeckel, who is just now rushing through Indian forests and dredging in Indian seas, and to whom his stay in India is like the realization of the brightest dream of his life.

If you are interested in ethnology, why India is like a living ethnological museum.

If you are fond of archæology, if you have ever assisted at the opening of a barrow in England, and know the delight of finding a fibula, or a knife, or a flint in a heap of rubbish, read only General Cunningham's "Annual Reports of the Archæological Survey of India," and you will be impatient for the time when you can take your spade and bring to light the ancient Vihâras or colleges built by the Buddhist monarchs of India.

If ever you amused yourselves with collecting coins, why the soil of India teems with coins, Persian, Carian, Thracian, Parthian, Greek, Macedonian, Scythian, Roman,^[1] and Mohammedan. When Warren Hastings was Governor-General, an earthen pot was found on the bank of a river in the province of Benares, containing one hundred and seventy-two gold darics.^[2] Warren Hastings considered himself as making the most munificent present to his masters that he might ever have it in his power to send them, by presenting those ancient coins to the Court of Directors. The story is that they were sent to the melting-pot. At all events they had disappeared when Warren Hastings returned to England. It rests with you to prevent the revival of such vandalism.

In one of the last numbers of the *Asiatic Journal of Bengal* you may read of the discovery of a treasure as rich in gold almost as some of the tombs opened by Dr. Schliemann at Mykenæ, nay, I should add, perhaps, not quite

unconnected with some of the treasures found at Mykenæ; yet hardly any one has taken notice of it in England!^[3]

The study of Mythology has assumed an entirely new character, chiefly owing to the light that has been thrown on it by the ancient Vedic Mythology of India. But though the foundation of a true Science of Mythology has been laid, all the detail has still to be worked out, and could be worked out nowhere better than in India.

Even the study of fables owes its new life to India, from whence the various migrations of fables have been traced at various times and through various channels from East to West.^[4] Buddhism is now known to have been the principal source of our legends and parables. But here, too, many problems still wait for their solution. Think, for instance, of the allusion to the fable of the donkey in the lion's skin, which occurs in Plato's *Cratylus*.^[5] Was that borrowed from the East? Or take the fable of the weasel changed by Aphroditê into a woman who, when she saw a mouse, could not refrain from making a spring at it. This, too, is very like a Sanskrit fable; but how then could it have been brought into Greece early enough to appear in one of the comedies of Strattis, about 400 B.C.?^[6] Here, too, there is still plenty of work to do.

We may go back even farther into antiquity, and still find strange coincidences between the legends of India and the legends of the West, without as yet being able to say how they travelled, whether from East to West, or from West to East. That at the time of Solomon there was a channel of communication open between India and Syria and Palestine is established beyond doubt, I believe, by certain Sanskrit words which occur in the Bible as names of articles of export from Ophir, articles such as ivory, apes, peacocks, and sandalwood, which, taken together, could not have been exported from any country but India.^[7] Nor is there any reason to suppose that the commercial intercourse between India, the Persian Gulf, the Red Sea and the Mediterranean was ever completely interrupted, even at the time when the Book of Kings is supposed to have been written.

Now you remember the judgment of Solomon, which has always been admired as a proof of great legal wisdom among the Jews.^[8] I must confess

that, not having a legal mind, I never could suppress a certain shudder^[9] when reading the decision of Solomon: “Divide the living child in two, and give half to the one, and half to the other.”

Let me now tell you the same story as it is told by the Buddhists, whose sacred Canon is full of such legends and parables. In the Kanjur, which is the Tibetan translation of the Buddhist Tripitaka, we likewise read of two women who claimed each to be the mother of the same child. The king, after listening to their quarrels for a long time, gave it up as hopeless to settle who was the real mother. Upon this Visâkhâ stepped forward and said: “What is the use of examining and cross-examining these women? Let them take the boy and settle it among themselves.” Thereupon both women fell on the child, and when the fight became violent the child was hurt and began to cry. Then one of them let him go, because she could not bear to hear the child cry.

That settled the question. The king gave the child to the true mother, and had the other beaten with a rod.

This seems to me, if not the more primitive, yet the more natural form of the story—showing a deeper knowledge of human nature and more wisdom than even the wisdom of Solomon.^[10]

Many of you may have studied not only languages, but also the Science of Language, and is there any country in which some of the most important problems of that science, say only the growth and decay of dialects, or the possible mixture of languages, with regard not only to words, but to grammatical elements also, can be studied to greater advantage than among the Aryan, the Dravidian, and the Munda inhabitants of India, when brought in contact with their various invaders and conquerors, the Greeks, the Yue-tchi, the Arabs, the Persians, the Moguls, and lastly the English?

Again, if you are a student of Jurisprudence, there is a history of law to be explored in India, very different from what is known of the history of law in Greece, in Rome, and in Germany, yet both by its contrasts and by its similarities full of suggestions to the student of Comparative Jurisprudence. New materials are being discovered every year, as, for instance, the so-called Dharma or Samayâkârîka Sûtras, which have supplied the materials

for the later metrical law-books, such as the famous Laws of Manu. What was once called “The Code of Laws of Manu,” and confidently referred to 1200, or at least 500 B.C., is now hesitatingly referred to perhaps the fourth century A.D., and called neither a Code, nor a Code of Laws, least of all, the Code of Laws of Manu.

If you have learned to appreciate the value of recent researches into the antecedents of all law, namely the foundation and growth of the simplest political communities—and nowhere could you have had better opportunities for it than here at Cambridge—you will find a field of observation opened before you in the still-existing village estates in India that will amply repay careful research.

And take that which, after all, whether we confess or deny it, we care for more in this life than for anything else—nay, which is often far more cared for by those who deny than by those who confess—take that which supports, pervades, and directs all our acts and thoughts and hopes—without which there can be neither village-community nor empire, neither custom nor law, neither right nor wrong—take that which, next to language, has most firmly fixed the specific and permanent barrier between man and beast—which alone has made life possible and bearable, and which, as it is the deepest, though often-hidden spring of individual life, is also the foundation of all national life—the history of all histories, and yet the mystery of all mysteries—take religion, and where can you study its true origin,^[11] its natural growth, and its inevitable decay better than in India, the home of Brahmanism, the birthplace of Buddhism, and the refuge of Zoroastrianism, even now the mother of new superstitions—and why not, in the future, the regenerate child of the purest faith, if only purified from the dust of nineteen centuries?

You will find yourselves everywhere in India between an immense past and an immense future, with opportunities such as the old world could but seldom, if ever, offer you. Take any of the burning questions of the day—popular education, higher education, parliamentary representation, codification of laws, finance, emigration, poor-law; and whether you have anything to teach and to try, or anything to observe and to learn, India will

supply you with a laboratory such as exists nowhere else. That very Sanskrit, the study of which may at first seem so tedious to you and so useless, if only you will carry it on, as you may carry it on here at Cambridge better than anywhere else, will open before you large layers of literature, as yet almost unknown and unexplored, and allow you an insight into strata of thought deeper than any you have known before, and rich in lessons that appeal to the deepest sympathies of the human heart.

Depend upon it, if only you can make leisure, you will find plenty of work in India for your leisure hours.

India is not, as you may imagine, a distant, strange, or, at the very utmost, a curious country. India for the future belongs to Europe, it has its place in the Indo-European world, it has its place in our own history, and in what is the very life of history, the history of the human mind.

You know how some of the best talent and the noblest genius of our age has been devoted to the study of the development of the outward or material world, the growth of the earth, the first appearance of living cells, their combination and differentiation, leading up to the beginning of organic life, and its steady progress from the lowest to the highest stages. Is there not an inward and intellectual world also which has to be studied in its historical development, from the first appearance of predicative and demonstrative roots, their combination and differentiation, leading up to the beginning of rational thought in its steady progress from the lowest to the highest stages? And in that study of the history of the human mind, in that study of ourselves, of our true selves, India occupies a place second to no other country. Whatever sphere of the human mind you may select for your special study, whether it be language, or religion, or mythology, or philosophy, whether it be laws or customs, primitive art or primitive science, everywhere, you have to go to India, whether you like it or not, because some of the most valuable and most instructive materials in the history of man are treasured up in India, and in India only.

And while thus trying to explain to those whose lot will soon be cast in India the true position which that wonderful country holds or ought to hold in universal history, I may perhaps be able at the same time to appeal to the

sympathies of other members of this University, by showing them how imperfect our knowledge of universal history, our insight into the development of the human intellect, must always remain, if we narrow our horizon to the history of Greeks and Romans, Saxons and Celts, with a dim background of Palestine, Egypt, and Babylon,^[12] and leave out of sight our nearest intellectual relatives, the Aryans of India, the framers of the most wonderful language, the Sanskrit, the fellow-workers in the construction of our fundamental concepts, the fathers of the most natural of natural religions, the makers of the most transparent of mythologies, the inventors of the most subtle philosophy, and the givers of the most elaborate laws.

There are many things which we think essential in a liberal education, whole chapters of history which we teach in our schools and universities, that cannot for one moment compare with the chapter relating to India, if only properly understood and freely interpreted.

In our time, when the study of history threatens to become almost an impossibility—such is the mass of details which historians collect in archives and pour out before us in monographs—it seems to me more than ever the duty of the true historian to find out the real proportion of things, to arrange his materials according to the strictest rules of artistic perspective, and to keep completely out of sight all that may be rightly ignored by us in our own passage across the historical stage of the world. It is this power of discovering what is really important that distinguishes the true historian from the mere chronicler, in whose eyes everything is important, particularly if he has discovered it himself. I think it was Frederick the Great who, when sighing for a true historian of his reign, complained bitterly that those who wrote the history of Prussia never forgot to describe the buttons on his uniform. And it is probably of such historical works that Carlyle was thinking when he said that he had waded through them all, but that nothing should ever induce him to hand even their names and titles down to posterity. And yet how much is there even in Carlyle's histories that might safely be consigned to oblivion!

Why do we want to know history? Why does history form a recognized part of our liberal education? Simply because all of us, and every one of us,

ought to know how we have come to be what we are, so that each generation need not start again from the same point and toil over the same ground, but, profiting by the experience of those who came before, may advance toward higher points and nobler aims. As a child when growing up might ask his father or grandfather *who* had built the house they lived in, or who had cleared the field that yielded them their food, we ask the historian whence we came, and how we came into possession of what we call our own. History may tell us afterward many useful and amusing things, gossip, such as a child might like to hear from his mother or grandmother; but what history has to teach us before all and everything, is our own antecedents, our own ancestors, our own descent.

Now our principal intellectual ancestors are, no doubt, the *Jews*, the *Greeks*, the *Romans*, and the *Saxons*, and we, here in Europe, should not call a man educated or enlightened who was ignorant of the debt which he owes to his intellectual ancestors in Palestine, Greece, Rome, and Germany. The whole past history of the world would be darkness to him, and not knowing what those who came before him had done for him, he would probably care little to do anything for those who are to come after him. Life would be to him a chain of sand, while it ought to be a kind of electric chain that makes our hearts tremble and vibrate with the most ancient thoughts of the past, as well as with the most distant hopes of the future.

Let us begin with our religion. No one can understand even the historical possibility of the Christian religion without knowing something of the Jewish race, which must be studied chiefly in the pages of the Old Testament. And in order to appreciate the true relation of the Jews to the rest of the ancient world, and to understand what ideas were peculiarly their own, and what ideas they shared in common with the other members of the Semitic stock, or what moral and religious impulses they received from their historical contact with other nations of antiquity, it is absolutely necessary that we should pay some attention to the history of Babylon, Nineveh, Phœnicia, and Persia. These may seem distant countries and forgotten people, and many might feel inclined to say, "Let the dead bury their dead; what are those mummies to us?" Still, such is the marvellous

continuity of history, that I could easily show you many things which we, even we who are here assembled, owe to Babylon, to Nineveh, to Egypt, Phœnicia, and Persia.

Every one who carries a watch owes to the Babylonians the division of the hour into sixty minutes. It may be a very bad division, yet such as it is, it has come to us from the Greeks and Romans, and it came to them from Babylon. The sexagesimal division is peculiarly Babylonian. Hipparchos, 150 B.C., adopted it from Babylon, Ptolemy, 150 A.D., gave it wider currency, and the French, when they decimated everything else, respected the dial-plates of our watches, and left them with their sixty Babylonian minutes.

Every one who writes a letter owes his alphabet to the Romans and Greeks; the Greeks owed their alphabet to the Phœnicians, and the Phœnicians learned it in Egypt. It may be a very imperfect alphabet—as all the students of phonetics will tell you—yet, such as it is and has been, we owe it to the old Phœnicians and Egyptians, and in every letter we trace, there lies imbedded the mummy of an ancient Egyptian hieroglyphic.

What do we owe to the Persians? It does not seem to be much, for they were not a very inventive race, and what they knew they had chiefly learned from their neighbors, the Babylonians and Assyrians. Still, we owe them something. First of all, we owe them a large debt of gratitude for having allowed themselves to be beaten by the Greeks; for think what the world would have been if the Persians had beaten the Greeks at Marathon, and had enslaved—that means, annihilated—the genius of ancient Greece. However, this may be called rather an involuntary contribution to the progress of humanity, and I mention it only in order to show how narrowly, not only Greeks and Romans, but Saxons and Anglo-Saxons too, escaped becoming Parsis or Fire-worshippers.

But I can mention at least one voluntary gift which came to us from Persia, and that is the relation of silver to gold in our bi-metallic currency. That relation was, no doubt, first determined in Babylonia, but it assumed its practical and historical importance in the Persian empire, and spread

from there to the Greek colonies in Asia, and thence to Europe, where it has maintained itself with slight variation to the present day.

A *talent*^[13] was divided into sixty *minæ*, a mina into sixty *shekels*. Here we have again the Babylonian sexagesimal system, a system which owes its origin and popularity, I believe, to the fact that *sixty* has the greatest number of divisors. Shekel was translated into Greek by *Stater*, and an Athenian gold stater, like the Persian gold stater, down to the times of Croesus, Darius, and Alexander, was the sixtieth part of a mina of gold, not very far therefore from our sovereign. The proportion of silver to gold was fixed as thirteen or thirteen and a third to one; and if the weight of a silver shekel was made as thirteen to ten, such a coin would correspond very nearly to our florin.^[14] Half a silver shekel was a *drachma*, and this was therefore the true ancestor of our shilling.

Again you may say that any attempt at fixing the relative value of silver and gold is, and always has been, a great mistake. Still it shows how closely the world is held together, and how, for good or for evil, we are what we are, not so much by ourselves as by the toil and moil of those who came before us, our true intellectual ancestors, whatever the blood may have been composed of that ran through their veins, or the bones which formed the rafters of their skulls.

And if it is true, with regard to religion, that no one could understand it and appreciate its full purport without knowing its origin and growth, that is, without knowing something of what the cuneiform inscriptions of Mesopotamia, the hieroglyphic and hieratic texts of Egypt, and the historical monuments of Phœnicia and Persia can alone reveal to us, it is equally true with regard to all the other elements that constitute the whole of our intellectual life. If we are Jewish or Semitic in our religion, we are *Greek* in our philosophy, *Roman* in our politics, and *Saxon* in our morality; and it follows that a knowledge of the history of the Greeks, Romans, and Saxons, or of the flow of civilization from Greece to Italy, and through Germany to these isles, forms an essential element in what is called a liberal, that is, an historical and rational education.

But then it might be said, Let this be enough. Let us know by all means all that deserves to be known about our real spiritual ancestors in the great historical kingdoms of the world; let us be grateful for all we have inherited from Egyptians, Babylonians, Phœnicians, Jews, Greeks, Romans, and Saxons. But why bring in India? Why add a new burden to what every man has to bear already, before he can call himself fairly educated? What have we inherited from the dark dwellers on the Indus and the Ganges, that we should have to add their royal names and dates and deeds to the archives of our already overburdened memory?

There is some justice in this complaint. The ancient inhabitants of India are not our intellectual ancestors in the same direct way as Jews, Greeks, Romans, and Saxons are; but they represent, nevertheless, a collateral branch of that family to which we belong by language, that is, by thought, and their historical records extend in some respects so far beyond all other records and have been preserved to us in such perfect and such legible documents, that we can learn from them lessons which we can learn nowhere else, and supply missing links in our intellectual ancestry far more important than that missing link (which we can well afford to miss), the link between Ape and Man.

I am not speaking as yet of the literature of India as it is, but of something far more ancient, the language of India, or Sanskrit. No one supposes any longer that Sanskrit was the common source of Greek, Latin, and Anglo-Saxon. This used to be said, but it has long been shown that Sanskrit is only a collateral branch of the same stem from which spring Greek, Latin, and Anglo-Saxon; and not only these, but all the Teutonic, all the Celtic, all the Slavonic languages, nay, the languages of Persia and Armenia also.

What, then, is it that gives to Sanskrit its claim on our attention, and its supreme importance in the eyes of the historian?

First of all, its antiquity—for we know Sanskrit at an earlier period than Greek. But what is far more important than its merely chronological antiquity is the antique state of preservation in which that Aryan language has been handed down to us. The world had known Latin and Greek for

centuries, and it was felt, no doubt, that there was some kind of similarity between the two. But how was that similarity to be explained? Sometimes Latin was supposed to give the key to the formation of a Greek word, sometimes Greek seemed to betray the secret of the origin of a Latin word. Afterward, when the ancient Teutonic languages, such as Gothic and Anglo-Saxon, and the ancient Celtic and Slavonic languages too, came to be studied, no one could help seeing a certain family likeness among them all. But how such a likeness between these languages came to be, and how, what is far more difficult to explain, such striking differences too between these languages came to be, remained a mystery, and gave rise to the most gratuitous theories, most of them, as you know, devoid of all scientific foundation. As soon, however, as Sanskrit stepped into the midst of these languages, there came light and warmth and mutual recognition. They all ceased to be strangers, and each fell of its own accord into its right place. Sanskrit was the eldest sister of them all, and could tell of many things which the other members of the family had quite forgotten. Still, the other languages too had each their own tale to tell; and it is out of all their tales together that a chapter in the human mind has been put together which, in some respects, is more important to us than any of the other chapters, the Jewish, the Greek, the Latin, or the Saxon.

The process by which that ancient chapter of history was recovered is very simple. Take the words which occur in the same form and with the same meaning in all the seven branches of the Aryan family, and you have in them the most genuine and trustworthy records in which to read the thoughts of our true ancestors, before they had become Hindus, or Persians, or Greeks, or Romans, or Celts, or Teutons, or Slaves. Of course, some of these ancient charters may have been lost in one or other of these seven branches of the Aryan family, but even then, if they are found in six, or five, or four, or three, or even two only of its original branches, the probability remains, unless we can prove a later historical contact between these languages, that these words existed before the great *Aryan Separation*. If we find *agni*, meaning fire, in Sanskrit, and *ignis*, meaning fire, in Latin, we may safely conclude that *fire* was known to the undivided Aryans, even if

no trace of the same name of fire occurred anywhere else. And why? Because there is no indication that Latin remained longer united with Sanskrit than any of the other Aryan languages, or that Latin could have borrowed such a word from Sanskrit, after these two languages had once become distinct. We have, however, the Lithuanian *ugnis*, and the Scottish *ingle*, to show that the Slavonic and possibly the Teutonic languages also, knew the same word for fire, though they replaced it in time by other words. Words, like all other things, will die, and why they should live on in one soil and wither away and perish in another, is not always easy to say. What has become of *ignis*, for instance, in all the Romance languages? It has withered away and perished, probably because, after losing its final unaccentuated syllable, it became awkward to pronounce; and another word, *focus*, which in Latin meant fireplace, hearth, altar, has taken its place.

Suppose we wanted to know whether the ancient Aryans before their separation knew the mouse: we should only have to consult the principal Aryan dictionaries, and we should find in Sanskrit *mûsh*, in Greek $\mu\tilde{\upsilon}\varsigma$, in Latin *mus*, in Old Slavonic *mŷse*, in Old High German *mûs*, enabling us to say that, at a time so distant from us that we feel inclined to measure it by Indian rather than by our own chronology, the mouse was known, that is, was named, was conceived and recognized as a species of its own, not to be confounded with any other vermin.

And if we were to ask whether the enemy of the mouse, the *cat*, was known at the same distant time, we should feel justified in saying decidedly, No. The cat is called in Sanskrit *mârgâra* and *vidâla*. In Greek and Latin the words usually given as names of the cat, $\gamma\alpha\lambda\acute{\epsilon}\eta$ and $\alpha\tilde{\iota}\lambda\omicron\upsilon\rho\omicron\varsigma$, *mustella* and *feles*, did not originally signify the tame cat, but the weasel or marten. The name for the real cat in Greek was $\kappa\acute{\alpha}\tau\tau\alpha$, in Latin *catus*, and these words have supplied the names for cat in all the Teutonic, Slavonic, and Celtic languages. The animal itself, so far as we know at present, came to Europe from Egypt, where it had been worshipped for centuries and tamed; and as this arrival probably dates from the fourth century A.D., we can well

understand that no common name for it could have existed when the Aryan nations separated.^[15]

In this way a more or less complete picture of the state of civilization, previous to the Aryan Separation, can be and has been reconstructed, like a mosaic put together with the fragments of ancient stones; and I doubt whether, in tracing the history of the human mind, we shall ever reach to a lower stratum than that which is revealed to us by the converging rays of the different Aryan languages.

Nor is that all; for even that Proto-Aryan language, as it has been reconstructed from the ruins scattered about in India, Greece, Italy, and Germany, is clearly the result of a long, long process of thought. One shrinks from chronological limitations when looking into such distant periods of life. But if we find Sanskrit as a perfect literary language, totally different from Greek and Latin, 1500 B.C., where can those streams of Sanskrit, Greek, and Latin meet, as we trace them back to their common source? And then, when we have followed these mighty national streams back to their common meeting-point, even then that common language looks like a rock washed down and smoothed for ages by the ebb and flow of thought. We find in that language such a compound, for instance, as *asmi*, I am, Greek *ἔσμι*. What would other languages give for such a pure concept as *I am*? They may say, *I stand*, or *I live*, or *I grow*, or *I turn*, but it is given to few languages only to be able to say *I am*. To us nothing seems more natural than the auxiliary verb *I am*; but, in reality, no work of art has required greater efforts than this little word *I am*. And all those efforts lie beneath the level of the common Proto-Aryan speech. Many different ways were open, were tried, too, in order to arrive at such a compound as *asmi*, and such a concept as *I am*. But all were given up, and this one alone remained, and was preserved forever in all the languages and all the dialects of the Aryan family. In *as-mi*, *as* is the root, and in the compound *as-mi*, the predicative root *as*, to be, is predicated of *mi*, I. But no language could ever produce at once so empty, or, if you like, so general a root as *as*, to be. *As* meant originally *to breathe*, and from it we have *asu*, breath, spirit, life, also *âs* the mouth, Latin *ôs*, *ôris*. By constant wear and tear this root *as*, to

breathe, had first to lose all signs of its original material character, before it could convey that purely abstract meaning of existence, without any qualification, which has rendered to the higher operations of thought the same service which the nought, likewise the invention of Indian genius, has to render in arithmetic. Who will say how long the friction lasted which changed *as*, to breathe, into *as*, to be? And even a root *as*, to breathe, was an Aryan root, not Semitic, not Turanian. It possessed an historical individuality—it was the work of our forefathers, and represents a thread which unites us in our thoughts and words with those who first thought for us, with those who first spoke for us, and whose thoughts and words men are still thinking and speaking, though divided from them by thousands, it may be by hundreds of thousands of years.

This is what I call *history* in the true sense of the word, something really worth knowing, far more so than the scandals of courts, or the butcheries of nations, which fill so many pages of our Manuals of History. And all this work is only beginning, and whoever likes to labor in these the most ancient of historical archives will find plenty of discoveries to make—and yet people ask, What is the use of learning Sanskrit?

We get accustomed to everything, and cease to wonder at what would have startled our fathers and upset all their stratified notions, like a sudden earthquake. Every child now learns at school that English is an Aryan or Indo-European language, that it belongs to the Teutonic branch, and that this branch, together with the Italic, Greek, Celtic, Slavonic, Iranian, and Indic branches, all spring from the same stock, and form together the great Aryan or Indo-European family of speech.

But this, though it is taught now in our elementary schools, was really, but fifty years ago, like the opening of a new horizon of the world of the intellect, and the extension of a feeling of closest fraternity that made us feel at home where before we had been strangers, and changed millions of so-called barbarians into our own kith and kin. To speak the same language constitutes a closer union than to have drunk the same milk; and Sanskrit, the ancient language of India, is substantially the same language as Greek, Latin, and Anglo-Saxon. This is a lesson which we should never have

learned but from a study of Indian language and literature, and if India had taught us nothing else, it would have taught us more than almost any other language ever did.

It is quite amusing, though instructive also, to read what was written by scholars and philosophers when this new light first dawned on the world. They would not have it, they would not believe that there could be any community of origin between the people of Athens and Rome, and the so-called Niggers of India. The classical scholar scouted the idea, and I myself still remember the time, when I was a student at Leipzig, and began to study Sanskrit, with what contempt any remarks on Sanskrit or comparative grammar were treated by my teachers, men such as Gottfried Hermann, Haupt, Westermann, Stallbaum, and others. No one ever was for a time so completely laughed down as Professor Bopp, when he first published his *Comparative Grammar of Sanskrit, Zend, Greek, Latin, and Gothic*. All hands were against him; and if in comparing Greek and Latin with Sanskrit, Gothic, Celtic, Slavonic, or Persian, he happened to have placed one single accent wrong, the shouts of those who knew nothing but Greek and Latin, and probably looked in their Greek dictionaries to be quite sure of their accents, would never end. Dugald Stewart, rather than admit a relationship between Hindus and Scots, would rather believe that the whole Sanskrit language and the whole of Sanskrit literature—mind, a literature extending over three thousand years and larger than the ancient literature of either Greece or Rome—was a forgery of those wily priests, the Brahmans. I remember too how, when I was at school at Leipzig (and a very good school it was, with such masters as Nobbe, Forbiger, Funkhaenel, and Palm—an old school too, which could boast of Leibnitz among its former pupils) I remember, I say, one of our masters (Dr. Klee) telling us one afternoon, when it was too hot to do any serious work, that there was a language spoken in India, which was much the same as Greek and Latin, nay, as German and Russian. At first we thought it was a joke, but when one saw the parallel columns of numerals, pronouns, and verbs in Sanskrit, Greek, and Latin written on the blackboard, one felt in the presence of facts, before which one had to bow. All one's ideas of Adam and Eve, and the Paradise,

and the tower of Babel, and Shem, Ham, and Japhet, with Homer and Æneas and Virgil too, seemed to be whirling round and round, till at last one picked up the fragments and tried to build up a new world, and to live with a new historical consciousness.

Here you will see why I consider a certain knowledge of India an essential portion of a liberal or an historical education. The concept of the European man has been changed and widely extended by our acquaintance with India, and we know now that we are something different from what we thought we were. Suppose the Americans, owing to some cataclysmal events, had forgotten their English origin, and after two or three thousand years found themselves in possession of a language and of ideas which they could trace back historically to a certain date, but which, at that date, seemed, as it were, fallen from the sky, without any explanation of their origin and previous growth, what would they say if suddenly the existence of an English language and literature were revealed to them, such as they existed in the eighteenth century—explaining all that seemed before almost miraculous, and solving almost every question that could be asked? Well, this is much the same as what the discovery of Sanskrit has done for us. It has added a new period to our historical consciousness, and revived the recollections of our childhood, which seemed to have vanished forever.

Whatever else we may have been, it is quite clear now that, many thousands of years ago, we were something that had not yet developed into an Englishman, or a Saxon, or a Greek, or a Hindu either, yet contained in itself the germs of all these characters. A strange being, you may say. Yes, but for all that a very real being, and an ancestor too of whom we must learn to be proud, far more than of any such modern ancestors, as Normans, Saxons, Celts, and all the rest.

And this is not all yet that a study of Sanskrit and the other Aryan languages has done for us. It has not only widened our views of man, and taught us to embrace millions of strangers and barbarians as members of one family, but it has imparted to the whole ancient history of man a reality which it never possessed before.

We speak and write a great deal about antiquities, and if we can lay hold of a Greek statue or an Egyptian Sphinx or a Babylonian Bull, our heart rejoices, and we build museums grander than any royal palaces to receive the treasures of the past. This is quite right. But are you aware that every one of us possesses what may be called the richest and most wonderful Museum of Antiquities, older than any statues, sphinxes, or bulls? And where? Why, in our own language. When I use such words as *father* or *mother*, *heart* or *tear*, *one*, *two*, *three*, *here* and *there*, I am handling coins or counters that were current before there was one single Greek statue, one single Babylonian Bull, one single Egyptian Sphinx. Yes, each of us carries about with him the richest and most wonderful Museum of Antiquities; and if he only knows how to treat those treasures, how to rub and polish them till they become translucent again, how to arrange them and read them, they will tell him marvels more marvellous than all hieroglyphics and cuneiform inscriptions put together. The stories they have told us are beginning to be old stories now. Many of you have heard them before. But do not let them cease to be marvels, like so many things which cease to be marvels because they happen every day. And do not think that there is nothing left for you to do. There are more marvels still to be discovered in language than have ever been revealed to us; nay, there is no word, however common, if only you know how to take it to pieces, like a cunningly contrived work of art, fitted together thousands of years ago by the most cunning of artists, the human mind, that will not make you listen and marvel more than any chapter of the Arabian Nights.

But I must not allow myself to be carried away from my proper subject. All I wish to impress on you by way of introduction is that the results of the Science of Language, which, without the aid of Sanskrit, would never have been obtained, form an essential element of what we call a liberal, that is an historical education—an education which will enable a man to do what the French call *s'orienter*, that is, “to find his East,” “his true East,” and thus to determine his real place in the world; to know, in fact, the port whence man started, the course he has followed, and the port toward which he has to steer.

We all come from the East—all that we value most has come to us from the East, and in going to the East, not only those who have received a special Oriental training, but everybody who has enjoyed the advantages of a liberal, that is, of a truly historical education, ought to feel that he is going to his “old home,” full of memories, if only he can read them. Instead of feeling your hearts sink within you, when next year you approach the shores of India, I wish that every one of you could feel what Sir William Jones felt, when, just one hundred years ago, he came to the end of his long voyage from England, and saw the shores of India rising on the horizon. At that time, young men going to the wonderland of India were not ashamed of dreaming dreams and seeing visions; and this was the dream dreamed and the vision seen by Sir William Jones, then simple Mr. Jones:

“When I was at sea last August (that is in August, 1783), on my last voyage to this country (India) I had long and ardently desired to visit, I found one evening, on inspecting the observations of the day, that *India* lay before us, *Persia* on our left, while a breeze from *Arabia* blew nearly on our stern. A situation so pleasing in itself and to me so new, could not fail to awaken a train of reflections in a mind which had early been accustomed to contemplate with delight the eventful histories and agreeable fictions of this Eastern world. It gave me inexpressible pleasure to find myself in the midst of so noble an amphitheatre, almost encircled by the vast regions of Asia, which has ever been esteemed the nurse of sciences, the inventress of delightful and useful arts, the scene of glorious actions, fertile in the productions of human genius, and infinitely diversified in the forms of religion and government, in the laws, manners, customs, and languages, as well as in the features and complexions of men. I could not help remarking how important and extensive a field was yet unexplored, and how many solid advantages unimproved.”

India wants more such dreamers as that young Mr. Jones, standing alone on the deck of his vessel and watching the sun diving into the sea—with the memories of England behind and the hopes of India before him, feeling the presence of Persia and its ancient monarchs, and breathing the breezes of Arabia and its glowing poetry. Such dreamers know how to make their dreams come true, and how to change their visions into realities.

And as it was a hundred years ago, so it is now; or at least, so it may be now. There are many bright dreams to be dreamed about India, and many bright deeds to be done in India, if only you will do them. Though many great and glorious conquests have been made in the history and literature of

the East, since the days when Sir William Jones^[16] landed at Calcutta, depend upon it, no young Alexander here need despair because there are no kingdoms left for him to conquer on the ancient shores of the Indus and the Ganges.

THE RELIGION OF INDIA
THE SOCIOLOGY OF HINDUISM AND BUDHISM
(1916)
BY MAX WEBER
TRANSLATED BY HANS H. GERTH AND DON MARTINDALE

INDIA AND HINDUISM

1. *The General Place of Hinduism*

INDIA, in contrast to China, has been, and remains, a land of villages and of the most inviolable organization by birth. But at the same time it was a land of trade, foreign, particularly with the Occident, as well as domestic. Trade and credit usury appeared in India from ancient Babylonian times. In the northwest Indian commerce was under constant perceptible Hellenic influence. At an early period the Jews settled in the South. Zarathustrians from Persia immigrated to the Northwest, constituting a stratum wholly devoted to wholesale trade. Into this situation came the influence of Islam and the rationalistic enlightenment of the great mogul Akbar. Under the great moguls, and also repeatedly before them, all or almost all of India for generations was formed into one political unit. Such periods of unity were interrupted, however, by long periods of disintegration with the country divided into numerous, constantly warring political dominions.

Princely methods of warfare, politics, and finance were rationalized, made subject to literary and, in the case of politics, even quite Machiavellian theorizing. Knightly combat and the disciplined army equipped by the prince appeared. While, as is occasionally maintained, use of artillery did not develop here for the first time, it appeared early. State creditors, tax farming, state contracting, trade and communication monopolies, etc., developed in the fashion characteristic of occidental patrimonial logic. For centuries urban development in India paralleled that of the Occident at many points. The contemporary rational number system, the technical basis of all "calculability", is of Indian origin. The "positional" number system has existed for an undetermined time. The zero was invented and used sometime after the fifth or sixth century A.D. Arithmetic and algebra are considered to have been independently developed in India. For negative magnitudes the term "debts" (Ksaya) was used. In contrast to the Chinese, the Indians cultivated rational science (including mathematics and grammar). They developed numerous philosophic schools and religious sects of almost all possible sociological types. For the most part the schools and

sects developed out of the basic need for rational consistency which was expressed in the most varied spheres of life. For long periods tolerance toward religious and philosophic doctrines was almost absolute; at least it was infinitely greater than anywhere in the Occident until most recent times.

Indian justice developed numerous forms which could have served capitalistic purposes as easily and well as corresponding institutions in our own medieval law. The autonomy of the merchant stratum in law-making was at least equivalent to that of our own medieval merchants. Indian handicrafts and occupational specialization were highly developed. From the standpoint of possible capitalistic development, the acquisitiveness of Indians of all strata left little to be desired and nowhere is to be found so little anti-chrematism and such high evaluation of wealth. Yet modern capitalism did not develop indigenously before or during the English rule. It was taken over as a finished artifact without autonomous beginnings. Here we shall inquire as to the manner in which Indian religion, as one factor among many, may have prevented capitalistic development (in the occidental sense).

The national form of Indian religion is Hinduism. The term “Hindu” was first used under the foreign domination of the Mohammedans to mean unconverted native Indians. Only in recent literature have the Indians themselves begun to designate their religious affiliation as Hinduism. It is the official designation of the English census for the religious complex also described in Germany as “Brahmanism.” The term “Brahmanism” refers to the fact that a definite type of priest, the Brahman was the leader of the religion. It is known that the Brahmans constituted a caste and that, in general, the institution of the castes— a system of particularly rigid and exclusive hereditary estates— played and continue to play a role in the social life of India. Also, the names of the four main castes of classical Indian learning as represented in the *Laws of Manu* are known: Brahmans (priest); Kshatriyas (knights); Vaishyas (free commoners); Shudras (serfs).

The general public is quite unfamiliar with the details of the castes with the possible exception of vague ideas about the transmigration of souls. These ideas are not false; they merely require clarification in terms of the abundant sources and literature.

Under the heading “religion” the tables of the *Census of India* for 1911 list, in round numbers, 217½ million people as "Hindus," i.e., 69.39 per cent of the population. Among the imported faiths there are: Mussulmen (66-2/3 million or 21.26 per cent); Christians, Jews, Zoroastrians, and “Animists” (10.29 million or 3.28 per cent). The following non-Hindu religions are listed as native to India: Sikhs (around three million or 0.86 per cent); Jains (1.2 million or 0.40 per cent); Buddhists (10.7 million or 3.42 per cent). However, all but a third of a million of the Buddhists reside in Burma (which since early times was almost nine-tenths Buddhistic); the remainder live in the bordering territories of Tibet (hence not on classically Indian but Mongolian territory), partly in outlying Indian territories, partly in central Asia.

To be sure, the census figures by decades cannot be compared without reservations. The percentage of Hindus since 1881 decreased from 74.32 per cent to 69.39 per cent; Islam rose from 19.74 per cent to 21.22 per cent; Christians, from 0.73 per cent to 1.24 per cent; and, finally, Animists, from 2.59 per cent to 3.28 per cent. This last figure, and also part of the percentage shifts, rests not only upon the considerable numbers of children of the uncultured animistic tribes but to a large extent upon differences in census enumeration. A further small part of the proportional decrease of Hindus is to be accounted for by the extension of the census to Burma, which resulted in a considerable increase in counted Buddhists. For the rest, the relative decline of the Hindu is partially to be attributed to differential birth and mortality rates. The relatively low social status and correspondingly low standard of living of the Hindu masses has, to some extent, religious causes. Child marriage, female infanticide, the prohibition of the remarriage of widows, led to the reduction in the number of children and the high mortality of women of the upper castes; nutritional difficulties due to food taboos during bad harvest have been important among the lower strata.

Another small part of the decrease of Hindus is to be ascribed to single conversions to Islamism and Christianity, the converts being mainly from the lower castes for the betterment of their social situation. Formal conversions to Hinduism do not officially exist; according to the theory of Hinduism, they are impossible. This leads us forthwith to a consideration of important peculiarities of Hinduism.

A “sect” in the sociological sense of the word is an exclusive association of religious virtuosos or of especially qualified religious persons, recruited through individual admission after establishment of qualification. By contrast a “church,” as a universalistic establishment for the salvation of the masses raises the claim, like the “state,” that everyone, at least each child of a member, must belong by birth. It demands sacramental acts and, possibly, proof of acquaintance with its holy learning as a precondition of its membership rights, but establishes as a duty the observance of the sacraments and the discharge of those obligations which are a condition of active membership rights. The consequence of this is that when the church reaches its full development and has power, it coerces opponents to conform according to the principle *coge intrare*. The individual is normally “born” into the church, single conversions and admissions occurring only until the time the church has attained its principal goal—the unification of all men in the universal church. (Hinduism has some of the properties of a church conjoined to sect-like exclusiveness.)

One belongs to a strictly birth-religion, like Hinduism, merely by being born to Hindu parents. However, Hinduism is “exclusive” in the sense that in no other way can the individual enter its community, at least the circle of those considered fully qualified religiously. Hinduism does not wish to encompass mankind. No matter what his belief or way of life, anyone not born Hindu remains an outsider, a barbarian to whom the sacred values of Hinduism are in principle denied.

Like most generalizations about Hinduism this is true only with qualifications. Quite apart from the sporadic relaxation of the exclusiveness of the upper castes, as reported by the Census, there were important processes in some of the lower castes. Some of these castes not only recruit excommunicated former members of other castes but occasionally do so quite indiscriminately. For example, the impure caste of the Bhangi of Bombay Province is partially made up of outcastes from higher castes. However, the Bhangi of the “United Provinces” were recruited by admitting voluntary applicants, and hence were often identified, as Blunt does in the Census Report of 1911, with the Tshandala, the lowest unclean caste of the ancient law books. Several other castes, in principle, allow individuals to affiliate.

A great number of outcastes belong to the Vaishnabs, a sect-caste which to this day offers a haven to rebels against Brahmanical rule. Furthermore, imperfectly Hinduized tribes and tribal castes burdened with residues of tribal descent often receive individual affiliates. Most lenient are the very low-ranking pariah tribes of mat and basket-weavers.

In general, the more completely Hinduized in the classical pattern, the more exclusive the caste. And genuine old Hindu castes hold that individual affiliation with a caste is impossible. Hence Ketkar goes too far in constructing the facts above into the generalization that Hinduism “leaves it” to the various castes whether or not to accept strangers and that no caste can lay down the law for another. Formally, each caste formulates its own principles, but in a typical Hindu caste the affiliating individual would forego all sub ties. In fact, rules, prerequisites, and forms of individual recruitment are nonexistent. Where individual affiliation takes place it is indicative of an absence rather than the existence of rules. In the systematic Hinduization of a region, at least according to ancient theory, the Hinduized barbarians could at best join the lowliest unclean caste of the Tshandala.’

The Census Report of 1901 states that tribes outside the caste system enjoy greater esteem than do the lower castes of impure village artisans precisely because they are not “conquered” subjects. If they were to affiliate with castes they would be received by the pure castes. This is obviously similar to the relative social estimation of Indians and Negroes in the United States. The higher esteem of the Indians is in the last analysis due to the fact that “they didn't submit to slavery.” Therefore the American gentleman permits intermarriage and commensalism with Indians but never with Negroes. In areas where the caste system has not been shattered, a non-Hindu, a European, for instance, can find only members of impure castes for domestic service; the domestic servant of the ritually pure Hindu castes without exception belongs to and must belong to pure castes.

Thus, with some qualifications the principle holds that anyone not born a Hindu remains an outsider. And although, as has been indicated, there are “open-door castes” they are unclean. Ecclesiastical institutions of universal grace employ excommunication for certain sacrilegious offences, but only to the extent that the banned person foregoes churchly means of grace while remaining subject to ecclesiastical jurisdiction and sanction.

Hinduism, however, is exclusive—like a sect. For certain religious offences a person is forever excluded from the community. A Brahman caste, for instance, cancelled the readmission of members after their forced conversion to Islamism. It did this despite their absolution by penance and purification when it became known that the applicants had been compelled to eat beef.

This case is comparable to that of the heroic sects of early Christendom, including the Montanists, who (because of Matthew, 10, 33), in contrast to the corporate church organization, deemed absolutely irreparable the participation of Christians in emperor worship. It was, for this very reason, that the Romans had made emperor worship compulsory during the time of the Diocletian persecutions.

Insofar as individual recruitment was possible, at least the expelled Brahmans might have found a haven among one of the unclean castes of beef-eaters. But a man who has knowingly killed a cow could not possibly be accepted as a fellow-Hindu. To put it more precisely: the castes suspected, with good reason, of cooperating in cattle poisoning practices (especially the currier castes) are an abomination for every Hindu, even though these castes are officially correct.

2. Diffusion Patterns of Hinduism

HINDU propaganda in the grand manner occurred in the past. It is still of considerable importance. In the course of about eight hundred years the present Hindu system has spread from a small region in Northern India to an area comprising over 200 million people. This missionary propagation was accomplished in opposition to “animistic” folk belief and in conflict with highly developed salvation religions. The system is still expanding from census to census.

Ordinarily, the propagation of Hinduism occurs in approximately the following way. The ruling stratum of an “animistic” tribal territory begins to imitate specific Hindu customs in something like the following order: abstention from meat, particularly beef; the absolute refusal to butcher cows; total abstinence from intoxicating drinks. To these certain other

specific purification practices of good Hindu castes may be added. The ruling stratum gives up marriage practices that may deviate from Hindu custom and organizes itself into exogamous sibs, forbidding the marriage of their daughters to men of socially inferior strata. The Brahmans, by the way, are often very tolerant with regard to marital customs. During the Hinduization of many a small region, for instance, existing matrilineal lines were left in peace. The same tolerance is shown for alcohol and food other than beef. In this respect individual members of genteel castes such as the Vishnuites and the Shivaists often differ more markedly than do the castes. The assumption of additional Hindu customs follows rapidly: restrictions are placed upon contact and table community; widows are forced into celibacy; daughters are given into marriage before puberty without being asked; the dead are cremated rather than buried; ancestral death sacrifices (sraddha) are arranged; and native deities are rebaptized with the names of Hindu gods and goddesses. Finally, tribal priests are eliminated and some Brahman is requested to provide and take charge of ritual concerns and thereby also to convince himself and provide testimony to the fact that they—the rulers of the tribe were of ancient, only temporarily forgotten, knightly (Kshatriya) blood. Or, under favorable circumstances, the tribal priests borrow the Brahman's way of life, acquire some knowledge of the Vedas, and maintain that they are themselves Brahmans of some special Veda school and members of an ancient well-known Brahman sib (gotra) going back to such and such sage (Rishi). Presumably it had only been forgotten that they had immigrated from an ancient Hindu region centuries ago. Now they seek to establish relations with recognized Indian Brahmans.

It is not always easy to find true Brahmans ready to accept such spurious propositions, and neither in the past nor nowadays would a high-caste Brahman accept them. However, numerous Brahman subcastes were and are still to be found. Some of recognized Brahman-quality are considered socially degraded because they serve lower castes, perhaps meat-eaters and wine drinkers. They were and are ready to accept such propositions. Pedigree, and the required origin-myth, possibly reaching back to epic or pre-epic times, are borrowed or simply invented, documented, and witnessed, permitting the claim to the rank of Rajput (royal relationship, the present-day term for Kshatriya).

Fleet proved the frequent falsification of princely pedigrees in Southern India as early as the ninth century. Surviving irregularities in conduct are then eliminated, and a scanty Vedic education is required of the knights and of the stratum to be considered twice-born free men (Vaishyas). Assimilation is completed with the ceremony of girdling and binding themselves with holy ties. The ritual rights and duties of the various occupations are regulated in Hindu manner.

This accomplished, the ruling stratum seeks social intercourse on equal footing with equivalent strata in ancient Hindu territory. When possible they seek to attain intermarriage and commensalism with its Rajput sibs, acceptance of food cooked in water from Brahmans, admission of their own Brahmans to old Brahmanical schools and cloisters. But this is extremely difficult and as a rule does not initially succeed. A true, or today presumably true, Brahman or Rajput will listen sympathetically and with good humor to the origin legend of such an upstart Rajput stratum, if, for example, an interested European relates it. No true Brahman or Rajput would dream of treating the new fellows as his peers.

Alas, time and wealth make a difference. Large doweries to Rajputs who marry their daughters, and other means of exerting social pressure, are employed and there comes a time—today often relatively quickly—when the manner of origin is forgotten and social acceptance is completed. A certain residue of rank degradation usually remains the lasting burden of the parvenu. This extensive propaganda was paralleled by an intensive propaganda which followed similar principles wherever Hinduism held sway.

As a social phenomenon “guest peoples” existed everywhere within the Hindu community. They are to be found to this day. Contemporary remnants still evident among us are the gypsies, a typical ancient Indian guest people which, in contrast to others, has wandered outside of India. In earlier times similar phenomena occurred on a far larger scale in India. There, as elsewhere, the guest people does not primarily appear as an absolutely homeless wandering people. More frequently the guest peoples are of tribes which still possess village settlements of their own, but dispose of the product of their household or tribal industry interlocally; or of tribes where the members may periodically lease their

services interlocally as harvesters, day laborers, repair men, hired helpers; or, finally, of tribes which may traditionally monopolize interlocal trade in a special product.

The increase in population of wood and mountain barbarian tribes on one hand, and the increasing demand for labor in the developing culture areas on the other created, with increasing wealth, numerous lower or unclean services. When the local resident population declined to take them over, these occupations fell into the hands of alien workers of foreign origin who were permanently lodged in urban areas but retained their tribal affiliations. Guest industry became highly developed in a form resembling that of specialized communities. Certain highly skilled trades are found in the hands of men native to the region, but such men were viewed as outsiders by village peoples. They did not live in the village but on the outskirts—in German, on the *Wurth*; they shared no part in the rights of the villagers, but rather formed into interlocal organizations of their own which answered for them and had jurisdiction over them. In the village they had only guest rights, partially under religious, partially under princely guarantee. Such phenomena are also found outside of India.

Frequently, the representatives of a guest industry are excluded from intermarriage and commensalism, and therefore are held to be ritually “impure.” When such ritual barriers against a guest people exist, we shall, for our present purposes, use the expression pariah people. As far as the Hindus are concerned, the term would be quite incorrect. The Pulyian or Parayan (pariah) caste of Southern India by no means represents the lowest stratum or a stratum of outcastes, as Abbe Raynal believes. A caste of ancient weavers (and today also farmhands), first mentioned in inscriptions of the eleventh century, they did not rank high socially and had to live outside the village, but they had, and have, fixed caste privileges. The leather-workers (Chamar) and streetsweepers ranked lower. And lower still are castes like the Doms and others who mainly represent the dregs of the castes.

We use the term pariah here in the usual European sense, much in the way the term Kadi is used in Kadi-justice. The term pariah people in this special sense should not be taken to refer to any tribe of workers considered by a local community “strange,” “barbaric,” or “magically impure” unless they are at the same time wholly or predominantly a guest people.

The purest form of this type is found when the people in question have totally lost their residential anchorage and hence are completely occupied economically in meeting demands of other settled peoples—the gypsies, for instance, or, in another manner, the Jews of the Middle Ages.

The power of such circumstances is alone great enough to force a long series of transitional adjustments toward full integration into the social order. First, there were and are numerous degrees of segregation. While impure guest workers have been excluded since ancient times from the village association, they are not thereby made outlaws. The village owes them a definite compensation for their services and reserves for them a monopoly in their respective vocations. Moreover, their regulated ritualistic rights and duties by their very gradations denote a positively defined legal position. Even when Brahmans and members of other high castes may have to avoid contact with them or even their very presence, the positive religious rules of Hinduism are decisive for the nature of these relations. Above all, a violation of these norms by the impure guest worker results not only in the measures taken by the Brahmans or village community, but also, under certain circumstances, by his own community. Besides, it is a source of magical disadvantage in this world, and reduction of salvation chances in the next.

One must ascribe membership in the Hindu community to those impure guest workers and pariah peoples who adhere to such norms and regulations despite their essentially underprivileged status position. Indubitably, they have been considered members for centuries, inasmuch as they do not represent barbarian tribes but impure castes in Hindu classification.

Quite different is the case of those tribes, whose guest position is defined by traditional rules, applying to those trafficking with alien: overseas traders. Such tribes have neither positive nor negative religious rank, but are considered to be simply impure barbarians. They recognize no religious duties of a Hindu sort. Such tribes are as little Hindu as the Christians and Mussulmen.

There are, however, various transitional stages on the way to Hinduization. As Blunt observes in the Census report, a considerable section of the people listed in the census as

“Animists” consider themselves Hindus. However, some of the people listed in the Census as impure castes are under certain circumstances inclined to reject all relation to Hinduism, particularly to the Brahmans. In fighting for the significance of their national culture today, the representatives of Hinduism seek to define Hinduism as broadly as possible. They claim as a Hindu anyone who passes one of the possible tests of Hinduism defined by census authority, hence also a Jain, Sikh, or Animist. In extending their definition of Hinduism, the Hindus are met halfway by the tendency toward Hinduization among these outsiders.

This tendency among guest tribes living among Hindus takes roughly the following form: its guest workers readily begin to claim and accept certain services from those Brahmans who regularly serve impure castes, e.g., the casting of the horoscope for marriage dates and similar family activities, while continuing to call upon their own priests for other services. If such guest workers take up trades of Hindu castes, usually impure, they must conform to prescriptions applied elsewhere to that trade in order to avoid too sharp resistance. The more they approach the pure type of a pariah people—i.e., the more they lose their stability in a closed tribal territory, or the less important this becomes—the more their social situation depends upon the norms their Hindu environment establishes, the more likely they are to adjust their ritualistic conduct to it, and the more they borrow typical Hindu customs and find themselves in the end essentially in the position of a (usually impure) Hindu caste.

The sole caste designation by pariah peoples monopolizing ancient crafts or trades is the old tribal name. Sometimes when the tribe forms an additional endogamous caste division of an old Hindu caste the tribal name is continued beside the caste ‘name. This tribal name is then the last residue of their origin.

Most varied transitional states of Hinduization, i.e., the transformation of tribes into castes, are to be found. Sometimes assimilation takes a mixed form, partially extensive, partially intensive propaganda; sometimes subdivisions of a tribe are received as a guest people by several castes, while the remaining subdivisions continue to exist without losing their form of tribal organization. The Ahir represent a mixed Hinduized tribe originally of shepherds and herdsmen. In Bombay Province even today (1911) some castes have subcastes

of Ahirs in addition to their usual ones. Thus the Brahmans in Khandesh have the Sonars, the Lohars, and the Koli. There, as elsewhere, the Ahir carpenters, goldsmiths, and blacksmiths do not intermarry with the professionally identical non-Ahir castes, whereas Ahir carpenters and Ahir blacksmiths, though of different castes, often do intermarry. Moreover, Ahirs who remained herdsmen often are totemically organized like a tribe, and not by sibs like a caste. Usually the propaganda advances in the form of a slow-moving recruitment of whole associations into the Hindu community. In principle, at least, it cannot be otherwise, since individuals can never affiliate directly with that community except as members of another association, a caste; and since affiliation always takes place in terms of the fiction that the respective association had been a caste of yore, somewhat similar to a Catholic dogma which is never newly enacted like a modern law, but is rather “found” and “defined” as having always been valid. It is in this way that the hereditary character of Hindu religion is revealed.

What were, and are, the motives working for the reception? The Brahmans, serving as intermediaries, primarily have material interest in opportunities for expanding income, ranging from service fees for the casting of horoscopes to prebends and the gifts due to house and sacrificial priests. Rich gifts of cattle, money, jewelry, and, above all, land and land rent (pepper-rent) were the compensations for Brahmans who provided the necessary “proofs” of genteel descent for the Hinduized ruling stratum of an area undergoing assimilation.

And what were the motives of the group desiring assimilation? The “tribes” which would be transformed into “castes,” particularly their ruling stratum; assume an enslaving yoke of rituals hardly duplicated elsewhere in the world. They surrendered pleasures—for instance, alcohol, which is relinquished in general only with great reluctance. What, then, was the reason?

Legitimation by a recognized religion has always been decisive for an alliance between politically and socially dominant classes and the priesthood. Integration into the Hindu community provided such religious legitimation for the ruling stratum. It not only endowed the ruling stratum of the barbarians with recognized rank in the cultural world of Hinduism, but, through their transformation into castes, secured their superiority over the subject classes with an efficiency unsurpassed by any other religion. In the distant past, the

services of the Brahmans were not, as a rule, sought primarily and exclusively by nobles; nor were the nobles always the only stratum seeking Hinduization, as assumed above in accordance with nineteenth-century conditions. On occasion the nobles were probably direct opponents of the Brahmans.

In ancient times it was the kings, rather, who took the lead in the struggle for Hinduization. Their services were enlisted to assist the prince in the formal organization, in the Hindu manner; of his patrimonial bureaucratic rule and status structure and to consecrate the prince as a legitimate Raja or Maharaja in the sense of the Hindu Dharmashastras, Brahmanas, and Puranas. Telling documents of land-grants issued sometimes' simultaneously to dozens, even hundreds of obviously immigrant Brahmans, are found dispersed throughout India.

Similar to the legitimation interest of the ruling groups are the interests lying back of the voluntary acceptance of Hindu rites by pariah peoples who, by this means, only acquire the humiliating situation of an impure caste. Yet, from the standpoint of Hinduism, they are impure anyway, and obliged by restrictions to keep their place. Hence it is advantageous to secure a monopoly over their work opportunities by recognizing them as a legitimate "caste," however underprivileged, rather than an alien people. Also by borrowing organizations peculiar to Hinduism (e.g., the caste *panchayat*) the assumption of caste status can be given practical significance.

These caste organizations, like quasi-trade unions, facilitate the legitimate defense of both internal and external interests of the lower castes. To be sure, substitutes might well be found for these organizations. Perhaps, too, in the past, religious hopes were frequently an important factor in the Hinduization of such pariah peoples, for, as we shall see, Hinduism holds out hopes to the socially oppressed strata. The peculiarities of the religious promise which Hinduism offers to underprivileged classes "help explain their relatively minor resistance in view of what one would expect of the abysmal distance: Hinduism establishes between social strata.

Certainly there are, and were, rebellions against the Hindu order rising from the impure castes. There are today a number of communities which expressly deny all Brahmanical authority. If, in any external respects, such communities behave as castes, official Hindu and the former British census authorities are inclined to treat them as castes, in spite of the dubious status of the communities or their will in the matter. Rebellions by lower castes undoubtedly occurred, The question is: Why were there not more of them, and, more important, why did the great, historically significant, religious revolutions against the Hindu order stem from altogether different, relatively privileged strata and retain their roots in these?

The approximately correct view may be formulated provision, ally: the internalization of the Hindu order by underprivileged strata, guest and pariah tribes, represents the adjustment of socially weak strata to the given caste order—the legitimation of their social and economic situation. However, the struggle for or against acceptance of Hinduism for entire territories generally was led by the rulers or ruling strata. In any case, the strongest motive for the assimilation of Hinduism was undoubtedly the desire for legitimation.

We have observed the momentum of the caste system in its diffusion through the assimilation of tribes. Once established, the assimilative power of Hinduism is so great that it tends even: to integrate social forms considered beyond it its religious borders.

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EDITED BY
JONARDON GANERI

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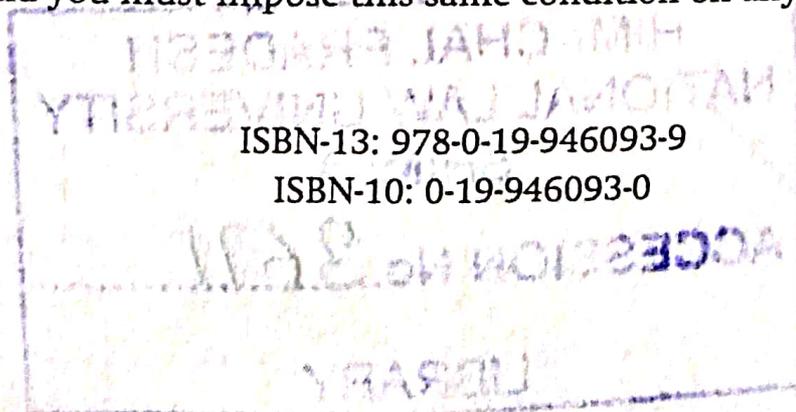
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1

Perception and Language



CHRONOLOGICAL NOTE. The *Nyāyasūtras*—‘aphorisms of the *Nyāya* system’—were compiled between 100 BC and AD 200. Nāgārjuna effectively established the Mādhyamika school of Buddhism in the latter half of the second century AD. It is difficult to determine the exact chronological relation between Nāgārjuna and the final compilation of the *Nyāyasūtras*. While certain *sūtras* seem to be pre-Nāgārjuna, others were probably compiled after Nāgārjuna. For a discussion of this chronological problem, see G. Tucci, ‘Introduction’.

Vātsyāyana wrote a commentary on the *Nyāyasūtras* called *Nyāyabhāṣya*. His date is also a matter of conjecture. E. Frauwallner and G. Oberhammer place him between AD 400 and 500. They argue that Vṛṣagaṇa (c. AD 350), the great Sāṃkhya philosopher and the author of the lost *Ṣaṣṭhitantra*, was the teacher of Vindhyavāsin who must be senior to Vātsyāyana. But if one considers Vātsyāyana’s style one will be in favour of a much earlier date than AD 500. Vātsyāyana must be earlier than Diñnāga because Diñnāga criticized Vātsyāyana. I place him between AD 300 and 400 as a working hypothesis.

Vasubandhu preceded Diñnāga. Sthiramati was a student of Vasubandhu and wrote a commentary on his teacher’s *Vijñaptimātratāsiddhi*. Bharṭṛhari, the great grammarian-philosopher, must be a senior contemporary of Diñnāga (see Frauwallner 1959) because Diñnāga apparently had Bharṭṛhari’s work before him when he wrote his *Traikālyaparīkṣā*. Praśastapāda, the Vaiśeṣika philosopher, was a junior contemporary of Diñnāga. Dharmakīrti was the most important exponent of the Diñnāga school in the seventh century.

Śāntarakṣita and his disciple Kamalaśīla flourished in the ninth century and expounded Diñnāga’s views on *pramāṇas*. For Uddyotakara and Kumārila, see chronological note to Chapter 2.

1.1. GENERAL REMARKS ON THE PROBLEM

I shall try to reconstruct here the positions of certain Indian philosophers on some basic problems of epistemology. In general, these

problems are connected with the nature of what is 'given' and with what we 'construct' or 'manipulate' out of this 'given'. In a narrower sense, I shall be concerned here with the relation of our perception and thought-construction to our speech or language. And this will take us eventually into a more general discussion on the status of meaning. Ontological issues will arise at every stage of our discussion and will be tackled in a general way.

A word to justify the procedure I shall adopt here: My interest for the present is not philological, although I will be dealing with the philosophical theories in their historical perspective. Each philosopher I discuss constructed his own philosophical system and tried to explain the basic problems of philosophy 'with particular reference to that system. However we are concerned here not with the full description of those individual systems, but rather with some particular problems which have occurred in their philosophical writings in various forms. I shall outline only as much of these systems as will be necessary to understand the theory under discussion.

Let us formulate some important questions in simple language: What is the status of what *appears* in our cognition? How do we cognize or conceive that there are *external objects*? How is language related to reality? What relation does our language bear to our perceptual cognition?

With the possible exception of what we may call our 'bare acquaintance' of the 'given', our cognitive acts always involve some kind of 'construction' or 'manipulation'. This manipulation or construction may have an objective basis, an objective referent to which it is directed, but it certainly eludes a one-to-one correspondence with any object in the real or objective world. We cannot really define the 'objective world' because to do so leads inevitably to circularity or mutual dependence. But we can give a *prima facie* sense to the expression 'objective world'. It is that much of the world which is, in a sense, independent of our manipulation, our thought-construction.

Let us concentrate for the moment on perception. It is possible to argue that subjectivity plays, if at all, only a minor role in perception. The dispute may eventually develop into a dispute over the definition of perception which I am using here to translate the Indian term 'pratyaksa', or how we propose to use the term 'perception'. Philosophers in India have differed on this point. There are also other factors which have determined the nature of this dispute. One is the philosophical conviction of the disputant. But this is very rarely mentioned,

although always understood, in a dispute over the epistemological problems.

Apart from data and construction, there is a third element which will enter in our discussion. This is language or speech. This comes in inevitably, and offers a common basis for discussion about cognitive states. What each person constructs for himself on the basis of subjective, inner needs, remains sealed off from the imaginative constructs of other people. It is only our often hesitant (there is, after all, the danger of the contamination or even destruction of our private universe, often regarded by others as mere illusion) willingness to attempt verbal communication that allows us to form any idea at all of another person's inner world. Thus the question arises whether what we grasp in perception is exactly represented in our verbalization.)

However, rather than proceed in such general terms, let us investigate the versions of individual philosophers of India in a systematic manner.

1.2. EARLY NYĀYA THEORY OF PERCEPTION: (NYĀYASŪTRA 1.1.4 AND VĀTSYĀYANA)

The awareness of the epistemological problem mentioned above can be traced in *Nyāyasūtra* 1.1.4. A somewhat cryptic formulation of this problem is found in the *Nyāyabhasya* of Vātsyāyana under *Nyāyasūtra* 1.1.4. The author of the *Nyāyasūtras* defined perception as a piece of knowledge or a cognitive state which is born out of sense-object contact and which is to be differentiated from verbalization or from its representation in words. There are two other adjectives in the definition given in the *Nyāyasūtra*. They imply that perceptual knowledge (*pratyakṣa-pramā*) must be distinguished from (a) perceptual error and (b) the uncertain attitude leading to a perceptual doubt.

All these qualifications in the definition gave rise to a vortex of controversies among the later critics and commentators. Incidentally we find in this context development of many interesting epistemological theories. For our purpose, we shall concentrate upon the adjective *a-vyapadeśyam* 'which is not, or cannot be, verbalized'.

The Sanskrit word for 'perception' is *pratyakṣa*, one element of which is *akṣa* meaning 'sense organ'. Thus, perceptual cognition, in the writings of any Indian philosopher, should be described as being dependent, in some way or other, upon the senses. Apparently, the author of the *Nyāyasūtra* was concerned with the definition of sense

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 perception and tried to say that we should not confuse a perceptual state or, for that matter, a cognitive state, with the representation of that state in language. In most cases, our cognitive state is associated with some word or name. But this may lead to the natural assumption that there is no cognitive state without language. Further it might lead us to believe that perception and its verbalization are inseparable from, and hence identical with, each other. Thus, the *Nyāyasūtra* wants, perhaps, to point out that sense perception can take place even when the words denoting the object have not been learned—a clear case where we are forced to make a cautious distinction between perception and the verbalization of a perceptual state.

Vātsyāyana, while commenting on *Nyāyasūtra* 1.1.4, notes a view which says that things are usually designated by words in our language and our conception of each thing occurs along with the word. Conception gives rise to verbalization. Since our language lacks a system of terms to designate the conception of each thing, we designate it by the name of that thing. Thus, even the sense perception of a thing, say a blue colour, is designated by 'blue colour'. The distinction between the cognitive act and the naming or designating act becomes blurred in this way. In order to warn us against this confusion, the author of the *Nyāyasūtra* has added that sense perception is, in principle, unconnected with the object's designation in language.

But this seems to be the view of a critic rather than a commentator. If all cognitive states were inextricably mixed with their verbalizations, any attempt to distinguish them would fail. Vātsyāyana, however, suggests a better explanation in the next passage. In the sense perception of a child (who has not yet learned words to designate things) words do not play any significant role. When a person learns the name of a thing and perceives that thing, he says that it is called such-and-such. But, as far as his awareness of that object is concerned, it does not differ very much from the case of a child's perception. This shows that designation by name is not an essential factor in our perceptual process or cognitive act.

Vātsyāyana acknowledges the fact that we conventionally designate our apprehension of an object by the name of that object. But he also points out that we can, and sometimes do, use artificial means to indicate whether our designatum is the object itself or our apprehension of that object. For example, in Sanskrit, we use the term *iti* (comparable to modern quotation marks) to indicate that it is not the object that we have in mind. It is argued that in order to communicate among ourselves through language (that is, at the time of engaging in worldly

affairs—*vyavahāra*) we need a designating word for our apprehension of the object. Without such a designating word to go along with our conception, verbalization and hence communication through language would be impossible. Vātsyāyana argues that we need this artificial means of adding *iti* for naming the apprehension of an object only when we want to communicate among ourselves through language. But this naming is inessential as far as our awareness of the object is concerned. Perception is different from verbalization.¹

Vātsyāyana's interpretation leaves many points unexplained or unsatisfactorily explained. It also leads to many other problems. But the distinction, made for the first time, between conception and its phonological realization, may be attributed to Vātsyāyana (or, to the philosopher whose view he was reporting). A child might be said to have concepts before he acquires the corresponding words. In modern discussions about language since Chomsky, it is customary to talk in terms of two levels of language: the level of 'deep' grammatical structures to be contrasted with the 'surface' structures. Without doing a great deal of damage to these two well-entrenched concepts, I wish to twist them a little in order to make an observation. There was a standard view (championed by Bhartṛhari, see section 1.4 below), according to which there cannot be a cognition without language: 'no concept without some word or another.' The child's perceptual cognition, on this view, would have to be perpetrated with words—*implicit* or *tactic* words. How can we make sense of this acquisition of the appropriate words by the child before he has learnt the language? We may say that the child has an inborn linguistic ability such that he possesses knowledge of the 'deep' structure of language, whereas what he learns later on is its 'surface' structure. One can thus maintain that the child's cognition is also *linguistically* based at the level of 'deep' structure. Vātsyāyana is, however, arguing against such a view.

1.3. THE RISE OF IDEALISM

Before proceeding any further we should note some other developments in the field of Indian philosophy, developments which affected to a considerable extent later epistemological and logical theories. The Buddha himself, to judge from later works, represented a thoroughly critical attitude to all speculative philosophies and to all dogmas. In

¹ I have tried to give here a reasonable interpretation of the rather obscure passage of Vātsyāyana.

early Buddhism there was thus a consistent attempt to reject the concept of a person, the idea of a soul as a persisting entity through the ever fluctuating mental as well as physical states. The concept of soul was replaced by the five aggregates, that is, the aggregates of matter and different mental states and dispositions. Perception was one of them. Early Buddhism accordingly defined perception as something dependent upon the cooperation of three factors, object (*rūpa*), an organ such as the eye, and pure consciousness.² There is no perceiver but only perception based upon the object and senses.

Nāgārjuna carried the critical attitude of the Buddha to its logical extreme. Not only was the 'perceiver' rejected but also the perceived object or the percept as well as perception itself. Nāgārjuna used the early Buddhist doctrine of dependent origination, and tried to show that in reality there is no logical justification for assuming the reality of anything at all. All our concepts, whether of perception or of the perceptible, are empty (*sūnya*) in the sense that none of them can claim absolute existence or independence. Existence, in Nāgārjuna's philosophy, should be absolute and independent, unrelated and pure.³ What I have given above is of course only a paraphrase of Nāgārjuna's Mādhyamika philosophy, but I do not believe it involves any distortion. In a later chapter I shall deal with the actual presentation of the Mādhyamika philosophy.

Historically, the rise of the Yogācāra school of Buddhism, also called Vijñāna-vāda 'Consciousness school', was a reaction and re-examination of the 'emptiness' doctrine of Nāgārjuna. Asaṅga and Vasubandhu argue that all concepts and entities are empty or without their 'own nature' because they are imagined by, and hence essentially dependent upon, consciousness; but the 'imager' of the unreal (*abhūtaparikalpa*), that is, consciousness, exists. There is no real duality in consciousness, no subject-object dichotomy. The so-called 'given' is nothing but modes of consciousness in perpetual flux. The appearances of duality, the 'given' and the receiving, the apprehended and the apprehension, are all 'our doing', results of our manipulation or construction. Non-existent objects appear in consciousness as they do unquestionably in false cognition or dream states. Besides these appearances, they have no other reality.⁴

Idealists in the East often claim that they prefer a subjective inner

² See *Kathāvatthu*, p. 374.

³ Nāgārjuna [MK], verse 9 of chap. 18.

⁴ Comparative Public Law and Hindu Philosophy (Select Readings) Vasubandhu, *Vimśatika*, verses 1-3.

world of feelings to an external world of real objects because, they say, the inner world actually possesses a greater degree of clarity. What precisely they mean by this term is seldom made clear however and one is left with the feeling that such remarks are often merely the prelude to their abdication of rational discourse. If a man repeatedly claims that everything he experiences defies language, one can begin to suspect that he is simply unwilling to make the attempt. Often such hyperbolic statements mask the speaker's own uncertainties about the ultimate value of his subjective imaginings. This attitude is present in the Yogācāra school of Buddhism. From now on, I shall designate this school as *Idealism*.

Consciousness, or rather the consciousness-moment, creates its own object and imagines the whole universe. External reality is a fragment of the imagination (*kalpanā*), and that which imagines it, that is, the stream-of-consciousness moments, is the only real thing. Thus, in one sense, reality is non-dual (*advaya-tattva*) because it is 'consciousness only' (*viññāna-mātra*). Due to an inherent tendency of humans to externalize the internal (or, to look for the wrong thing, so to say), our cognitive states, which are like waves in the sea of consciousness, grasp themselves as their own objects.

If we strip aside the metaphysical aspect of Buddhist idealism we see that this philosophical position had serious implications. This became increasingly clear in the later phase of its development. An external entity is, in this school, only a fragment of imagination; its existence can never be proved or established. 'Whatever imagination imagines or constructs is only fragment of imagination a mode or modification of consciousness, and hence it does not exist (outside consciousness) and everything is consciousness only.'⁵ Sthiramati comments that if consciousness had the nature of revealing real external objects, there would be no cases of illusory appearance, hallucinations, and dream states. In short, the reality of external objects vanishes into insignificance when examined by the standard of absolute existence just as everything in the Mādhyamika system dissolves into emptiness when considered from an absolute point of view.

In spite of the important difference between the Emptiness doctrine and Idealism, there is one significant agreement between these two schools. Nāgārjuna, being quite consistent with his critical and dialectical method, did not elaborate upon the nature of non-dual reality. But he indicated that it lies beyond the reach of ordinary cognitive states

⁵ Vasubandhu, *Trisika*, verse 17. Comparative Public Law and Hindu Philosophy (Select Readings)

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 and thoughts; it is beyond the description of our language.⁶ Any description would be a distortion of the real nature. The Buddhist idealists also try to say that reality is not captured in our speech or expressed by our language. Translated in terms of data and construction this thesis may be stated as follows: The meaning of a linguistic expression is to be found in the 'construction' side of our cognitive act, the data being independent, standing in isolated glory. The data are, according to them, consciousness-moments. Whether this is a tenable theory or not, that is, whether there is any logical compulsion that data should be kept totally isolated from construction, we shall examine later (chapter 2).

1.4. BHARTṚHARI'S THEORY OF KNOWLEDGE: 'CONSTRUCTION' (VIKALPA)

The interesting point of Bhartṛhari's theory will be better understood when we realize that he developed his monistic metaphysics in the milieu of this Buddhist idealism. If one sloughs aside the metaphysical monism of Bhartṛhari's system, one can maintain that his contribution to epistemology lies in the fact that he recognized quite clearly the very significant role of language in the structure of empirical knowledge.

The Buddhist idealist asserts that the phenomenal world is just a construction of our imagination because each of our cognitive states, which can be regarded as modes of consciousness, cannot reveal anything beyond itself. Bhartṛhari goes further and adds that the form and shape of our cognitive states come from our language. It is obviously implied that our categorization of the world is determined by the structure of our language. Whether this theory is of a piece with the belief of some modern linguists (like Edward Sapir or Benjamin Whorf), that different societies with different languages live in distinct worlds is a question we need not go into here. Our interest lies here in Bhartṛhari's assertion that our initial cognition starts with language, with words, and names.

There is a striking similarity between the argument of Bhartṛhari and that of the Buddhist idealist. Ordinarily we think that so-called external objects have the predominant claim to reality. The Buddhist idealist claims that they appear as real only insofar as they are externalized by our imaginative construction. Bhartṛhari claims that they appear as real only insofar as they are expressed in language.

According to Bhartrhari, there cannot be any cognitive state in this world without the imprint of words. Word, or rather 'the implicit speech element', is the seed (*bīja*) which enlightens our consciousness of the object. The latent word in the speaker generates the cognition when he (is conscious of some object and by expressing that word he) awakens the latent word in the mind of the hearer and in this way the latter becomes conscious of that object. If consciousness were to operate without our linguistic potency, we would be left with an impotent consciousness which could not reveal any object.⁷

It is argued that 'implicit speech' is inherent in the nature of our cognitive states just as illumination is in the nature of fire. One cannot be separated from the other, and hence the two are indistinguishable. Even our perceptual consciousness of an object involves, for all practical purposes, conceptualization and interpretation, and hence can hardly be differentiated from our linguistic habit which goes with it. Conceptualization and interpretation operate with words and names, which may be either uttered or unuttered. Whenever our 'pure' sensation penetrates into the cognitive level, it invariably penetrates, according to Bhartrhari, into the linguistic level or our 'implicit speech' level.

The notion of 'implicit speech' need not create any difficulty in understanding Bhartrhari's position. Our overt speech may be looked upon as the phonological realization of covert or implicit speech. Bhartrhari has an interesting discussion on the analysis of two types of word, two different levels of speech. But this will take us beyond the scope of this chapter and involve us in the full exposition of Bhartrhari's system.⁸ It will be enough for our present purpose to note that covert speech or the implicit word is always present at the cognitive level along with the object revealed by the cognitive state. For example, in our first acquaintance with an external object we may not grasp any special feature, that is, any 'quality', of that object. When no 'quality' is grasped, we cannot have a 'ground for applying' (*pravṛtti-nimitta*) any word or linguistic expression overtly or covertly to that object.⁹ But this rarely happens because we can always find a way to use overt speech or apply an actual word to it. To the extent that we are aware of it as an object, we can use such pronominal words as 'this' or 'that' to verbalize our awareness.

⁷ Bhartrhari, Book I (*Brahma-kāṇḍa*), verses 123-4.

⁸ For discussion of Bhartrhari's system, see M. Biardeau, G. Shastri, and K. Kunjunni Raja (pp. 97-148), and Matilal [1990].

⁹ For a fuller discussion of the theory of implicit in this principle, see chap. 3.

Bhartrhari's point here, of course, is that this verbalization or use of overt language is not just a cloak which our cognitive state picks up and puts on in order to be presentable to others. (There is the implicit word or language which is present in our cognitive state as an inextricable part of it. Bhartrhari claims that it is the very flesh and blood of the cognitive state.)

This theory appears to be, in some sense, diametrically opposed to what the early Naiyāyikas were trying to say (see section 1.2). The early Nyāya says, as we may recall, that although our perceptual state (or, any cognitive state) is inextricably mixed with an implicit or overt word, our naming or identifying the object with a word is not an essential part of our perceptual act. At the very least, sense perception is to be differentiated from its verbalization. This point of the Nyāya school was enforced by the example of a child or a dumb person who cannot use overt language. But, for Bhartrhari this counter-example is of no moment. A child may not use language overtly, but he is certainly not without implicit words, which 'Bhartrhari claims' may be just the residual memory traces from a previous birth.¹⁰ It seems to me that Bhartrhari's point will still remain even if we discredit the hypothesis of previous births. As I have said earlier, a child may have an inborn linguistic competence by which he can be aware of the deep grammatical structures of language before he acquires aptitude for the surface structure.

It appears from the commentary (that is, the *Vṛtti*, which may or may not be by Bhartrhari)¹¹ that Bhartrhari would admit the possibility of a 'pure' sensation level where no distinct (*vyakta*) word seems to emerge. It is also conceded that this 'pure' sensation level can be somewhat cognitive in character. For example, a man running along a village path may have a tactile awareness of the grass or stones without verbalizing his sensations in any way. Even if this state is at all regarded as a cognitive state, it is useless for all practical purposes. For one thing, there cannot be any communication (or *vyavahāra*) of this state. Nor are we able to remember such a state later without the help of implicit words. If we are able to remember it at all in any form, we cannot say that it did not penetrate the 'implicit word' level. Moreover, the difference here is not between the presence and the absence of implicit words, but in fact between the emergence and non-emergence

¹⁰ Bhartrhari, *Kāṇḍa* I, verse 121.

of distinct (*vyakta*) words. Bhartṛhari would say that the 'word seed' is not awakened but lies latent in such cases, and this latent word when awakened is revealed by such pronouns as 'this' or 'that'.

Bhartṛhari's view on perception and its possible connection with speech differed significantly from that of Dīnāga, who introduced a new trend in Buddhist idealism (see next section). But there is an interesting resemblance between Bhartṛhari and Dīnāga regarding their notion of *kalpanā* or *vikalpa* (which one can translate as 'fictional or imaginative construction' or even 'objectification'). Incidentally, *vikalpa* was an important term in Indian philosophical circles, and a good number of eminent philosophers resorted to this term in some way or other in order to explain their philosophical positions.¹²

A fictional construction may be deliberate and conscious. It can also be unconscious and involuntary. When we tell a fairy tale we deliberately enter the land of fiction. But philosophically more interesting is the rather involuntary play of fiction in our experience. One may call it objectification, that is, our intellectual manipulation of 'the given' into a construct or a 'formed datum'. This is what I have called simply construction earlier and opposed it to datum or the 'given'.

A 'formed datum' is not identical with 'the given'. Yet, since it is not a deliberate construction of fiction but an essential factor of our cognitive process, we FEEL that it must refer to an object which is, in some sense, independent of this construction. But the question is not whether this feeling of ours is justified or not, but what could possibly be the nature of this 'independence' of the object referred to or 'the given'. For Bhartṛhari, it is the supreme Speech-reality, the one, imperishable, non-dual, absolute, the 'Substance'.¹³ But in ordinary life, we are not concerned with this non-dual referent, but with the 'meaning' of our linguistic expressions. According to Bhartṛhari, the meaning of a linguistic expression is to be identified with the *vikalpa*, the constructed image which is assumed as external reality. One can easily discover an echo of Buddhist idealism here: External reality is nothing but modes of consciousness externalized.

The plane of construction should be distinguished from mental 'images' or ideas, which are just private properties of each individual. Conceptual construction is instead a public asset, a socially recognized fiction, which all of us, as language-users, share in common, though

¹² Compare *Yogasūtra*, *Samādhipāda*, sūtra 9.

¹³ Bhartṛhari, Book III, chap. 2. This is the point, as I understand it, of the whole

we might not be aware of the fact. Thus, for Bhartṛhari, the plane of construction is neither a copy of external reality, nor is it even caused by such reality. In fact, it is related to nothing beyond itself. The plane of meaning does not constitute a separate world intervening between us and the objective world. The phenomenal world itself can be said to exist only insofar as it can be constructed as meanings of our conventional linguistic expressions.

We may note the following significant aspects of Bhartṛhari's theory: (1) Language and construction, verbalization and conceptualization, are actually indistinguishable from each other. (2) The meaning of a linguistic expression is to be found on the plane of construction. (3) Just as the Buddhist idealists say that a mode of consciousness imagines its object out of itself, Bhartṛhari says that language creates its own meaning. Words are as much indistinguishable from the concepts expressed by them as are modes of consciousness from the contents of consciousness. (4) There is one, absolute, supreme Reality, called *Śadbrahman*, which underlies all forms and diversities, words and objects.

1.5. DĪNNĀGA'S THEORY OF PERFECTION

Although Dīnnāga belonged to the school of Buddhist idealism, he gave a complete reinterpretation to the older theories in such a way that it makes it difficult for us to call him an idealist without qualification. He wrote his *Ālambana-parīkṣā* in an unmistakably idealistic vein. But his logical and epistemological theories set forth in his greatest work, the *Pramāṇasamuccaya*, can be treated as belonging either to idealism or to realism.

Dīnnāga defines perception as a cognitive state which is totally untouched by imaginative construction (*vikalpa, kalpanā*) or conceptualization. He accepts the view implied by Bhartṛhari that conceptualization and verbalization, construction and language, are just two aspects of the same process. Construction, Dīnnāga says, is nothing but our associating any name, viz., a proper name or a class name or a quality-name or an action-name or a substance-name, with the datum.¹⁴ In other words, it is an imposition of our constructed forms upon the 'given'.

In each case, our judgment (let us call it judgment instead of construction in this context) implies a possessive relation or a relation of

qualification. Thus, from the popular point of view we can call the five types of names mentioned above the five designators, and very loosely, the five predicate-constructions. Dinnāga calls them the five 'qualifiers' (*viśeṣaṇa*). In fact, the function of each name, each designator, according to Dinnāga, is to qualify, and to qualify means to differentiate. Qualification and distinguishment or differentiation are, for Dinnāga, just different names for the same function. This will be clear when we discuss Dinnāga's 'differentiation' or 'elimination' (*apoha*) theory of meaning (next section).

Dinnāga illustrates the five 'qualifiers' as follows: In the case of proper names such as *Dittha* the thing appears as qualified, or distinguished, by the name itself.¹⁵ In the case of a class name such as *cow* the thing appears as qualified by a class concept, cow-ness. In the case of a quality name such as *white* it appears as qualified by a quality concept, white colour. In the case of an action name such as *cooks* or a *cook* (*pācaka*) the thing appears as qualified by an action concept, cooking. In the case of a 'substance-name' such as *a staff-bearer* (*daṇḍin*) or *horned (animal)* (*viṣāṇin*) the thing appears as qualified by a substance concept, a staff or horns.

A difficulty arises in the last two cases because these names are patently derivative words.¹⁶ Thus, the meanings of their constituent elements are construed as qualifiers. Dinnāga is careful to point out that according to some the 'qualifiers' are not such 'concrete' notions as a staff or horns and the action of cooking, but rather the abstract properties like the thing's relation to the staff or horns and the agent's relation to the action. One is reminded in this connection of Vyāḍi's theory of implied sense or the 'quality' aspect of meaning of such expressions.¹⁷ It should be noted, however, that unlike Vyāḍi, Dinnāga emphasizes the 'quality' aspect of meaning and hence focuses his attention upon the qualifiers or 'distinguishers' and avoids inclusion, in the domain of meaning, what is purported to be qualified or distinguished. Unlike the Universalists (for example, Vājapyāyana) he does not want to hypostatize the qualifiers, as we will see later.

Dinnāga says that according to another view (and Dinnāga probably agrees with this view; see Hattori, p. 85) all these qualifiers distinguish their objects by virtue of being mere names of them without intending

¹⁵ Hattori [1968], pp. 85-6.

¹⁶ Hattori [1968], p. 25 lines 29-34.

¹⁷ See chap. 3 for a discussion of the views of Vyāḍi and Vājapyāyana.

to refer to real entities. In fact, the situation in the first case, viz., the case of proper names, is to be generalized to cover the rest so that no real entity is assumed as meant except these names or concepts.

A comparison between Dinnāga and Praśastapāda (a junior contemporary of Dinnāga) is in order here. Praśastapāda, the Vaiśeṣika-philosopher, speaks also of a list of five qualifiers (*viśeṣaṇa*), which we can call 'predicables' with more confidence. Praśastapāda is concerned with our perceptual judgment and hence with predication rather than with designation. His examples, unlike those of Dinnāga, have accordingly propositional structures:¹⁸

'The earth (is) existent'—predication of the most generic character.

'The earth (is) a substance'—predication of a specific class-property.

'The cow (is) the possessor of horns'—predication of the possession of a substance.

'The cow (is) white'—predication of a quality.

'The cow (is) moving, or moves'—predication of an action or motion.

We may note that all these predicables are derivable from the system of Vaiśeṣika categories developed by Kaṇāda. And as such all these predicables denote real entities. Since Praśastapāda was not concerned with designation, we do not find the mention of proper names in this list. Dinnāga's list, on the other hand, begins with proper names. But the resemblance between Dinnāga's designators and Praśastapāda's predicables is too obvious to be missed. For Dinnāga, all these predicables could be treated as designators provided we do not hypostatize them into real entities but regard them as constructs.

We should note, however, one subtlety here of the Sanskrit philosophers. The last two, predication of a quality and an action, should be understood here as predication of the possession of a particular instance of a quality (a particular tint of white), or a particular instance of an action (a particular motion). 'This is a cow' is interpreted as predication of a universal property, cowhood; but 'This is white' is differently interpreted—as predicating a particular feature, a particular case of white in the locus. We may call the latter a 'property-particular'. A property-particular is, like an ordinary property, locatable in a locus; it can 'characterize' an object, a substance or a substratum. But, unlike ordinary properties, it is not shared, under ordinary circumstances, by other objects or substrata. The 'white' of the cow is different from the

'white' of the calf, although both 'whites' would be loci of the universal property, whiteness.

Incidentally it should be noted that Patañjali's fourfold classification of words has nothing to do with Diñnāga's list except that the word for proper name *yadr̥cchā-śabda* 'arbitrary name' occurs in both.¹⁹ Patañjali's classification is strictly a grammatical classification of words into proper names ('arbitrary' names), common nouns (conventional class names), adjectives, and verbs. Diñnāga's classification is based on the nature of the qualifiers or distinguishers, that is, the concepts derivable from names. Thus, he mentions a quality name, an action name, and a substance name although grammatically all of them can be treated as adjectives.

All the qualifiers in Diñnāga's list belong to what Diñnāga calls the category of *sāmānya*, universal or generality. To call something a universal is, in Diñnāga's system, to say that it is an imaginative creation, a conceptual construct, and it must be sharply distinguished from the given or the datum, which Diñnāga calls the 'exclusive particular' (*svalakṣaṇa*). The given, in Diñnāga's system, is always characterized by a uniqueness of its own, which is not repeatable and also not definable or expressible in language. Only the unrepeatable and unique particulars are reals, the universals are at best unreal superstructures and at worst fictional images.

Perception, that is, perception proper, according to Diñnāga, is revelation of the pure given, the unique particular. It is untouched by construction and hence uncontaminated by any sort of speech or language whether implicit or explicit. Dharmakīrti gives a wider interpretation of construction (*kalpanā*) so as to include not only actual verbalization but also the latent capacity of infants and dumb persons to verbalize a cognitive state.²⁰ We have already noted that infants may possess concepts at the level of deep grammatical structures. Thus a child need not be considered to be without the constructive faculty, and his perception may be followed by a constructive judgment or imposition of forms²¹ upon the data.

Śāntarakṣita and Kamalaśīla have interpreted Diñnāga's notion of construction (*kalpanā*) in a slightly different manner. For them

¹⁹ I differ from M. Hattori in this respect. See Hattori [1968], pp. 83-4.

²⁰ Dharmakīrti [NB], p. 47.

²¹ A note for the Sanskritist: My use of 'form' here should not be regarded as a translation of the rather technical word *ākāra* in Sanskrit used in *Sākāra-vāda* and *Nirākāra-vāda*.

construction simply amounts to the association of a word or a name with the object (cf. *nāma-yojanā*). In other words, construction is just explicit or implicit verbalization, and not association of concepts, such as a class concept, with the object (that is, not *jātyādi-yojanā*) because it might imply objectivity or reality of class-concepts or universals, such as cow-hood. This interpretation was intended to answer some objections against Dinnāga's explanation of construction. What Dinnāga said might be construed to mean that there are two types of 'construction': One is adding of names, that is, verbalization, while the other is associating class concepts, etc., that is, conceptualization. Śāntarakṣita points out that the first type of construction is what is acceptable to a Buddhist while the second type is what a non-Buddhist tries to speak of. Dinnāga mentions both although he would not admit that there is any essential difference between verbalization and conceptualization.²²

(Thus perception, being mere revelation of the given and entirely free from our subjective manipulation, is completely reliable and has an absolute truth-claim in Dinnāga's system.) The truth claim of other cognitive states is relative. The possibility of what we may call perceptual illusion does not apparently clash with this absolute truth claim of perception as far as Dinnāga is concerned. Whenever the mind is at work conceptualizing there is room for error. But if no mental processes are at work, there can, *ipso facto*, be no possibility of error. Thus according to Dinnāga's theory, to use the expression 'perceptual error' is to misuse the term 'perceptual' which is defined in such a way as to preclude error.)

A problem arises in this theory with regard to the case of persistent illusions due to diseased or defective sense organs, viz., appearance of yellow to jaundiced eyes. Dharmakīrti has added another adjective, 'non-erroneous' (*abhrānta*), to Dinnāga's definition of perception. But some followers of Dinnāga have never been quite sure whether this qualification was necessary for Dinnāga in order to exclude so-called GENUINELY perceptual errors. T. Stcherbatsky has argued that errors are always expressed in the form of a judgement and since the senses cannot judge, sense-perception cannot be wrong. Sense-perception is non-constructive and hence non-judgmental.²³

One might add another point in favor of Dinnāga's non-inclusion of the qualification 'non-erroneous' in his definition of perception. It

²² Śāntarakṣita, pp. 368-70.

²³ T. Stcherbatsky, *Buddhist Logic*, I, pp. 153-61.

is possible to explain away cases which Dharmakīrti and others regard as cases of perceptual error, for example the fact that a man with jaundice tends to see a white conch-shell as if it were yellow. The given or the uniquely particular datum, in this case the so-called error under consideration, is not just a white conch-shell, but rather an indefinite datum-complex, which includes as much the so-called white conch-shell datum as it does the disease of the eye organ. And as long as this perception is mere revelation of this datum-complex (which by definition should be unique to each situation) and free from constructive judgment, it is not wrong at all. But the resulting judgment would be wrong on two counts: (a) It is a construction and all constructions are wrong in some technical sense, and (b) it contradicts, or is inconsistent with, our previous or later knowledge that a conch-shell is always white.

1.6. WORD-MEANING AS 'EXCLUSION' (APOHA)

Nāgārjuna did not say anything specific about the nature of ultimate reality. According to Asaṅga and Vasubandhu, it is 'Consciousness only'. In Dinnāga's system the place of ultimate reality is taken by the unique particulars (*svalakṣaṇa*). Each barest particular can be interpreted either as an internal consciousness-moment or an external point-instant depending upon whether a Yogācārin or a Sautrāntika is the interpreter.

Each particular is an absolute. It is self-sustained and self-destructive, being unique to each moment. This has been called the Buddhist doctrine of 'universal flux'. Stcherbatsky has called it the theory of 'instantaneous being' (*Buddhist Logic*, I, p. 79ff.). Dharmakīrti notes the following criteria for each particular: (a) it is productive of effects or it can function (*arthakriyā-samartha*); (b) it is unique or dissimilar; (c) it lies beyond the 'meaning' of words; and (d) it cannot be grasped by our verbalized cognition. If any of these criteria is not applicable to something, then that thing must be called a universal, an imaginative construct. Particulars, not universals, are real in the ultimate sense.²⁴

Reality, that is, the particular, is supposedly inexpressible in language; our speech reveals the world of universals, the world of construction. These two worlds, the world of particulars and the world of universals, are, in this view, completely separated. This is, at least, one of the ways by which the Dinnāga/Dharmakīrti view of ultimate reality

²⁴ Dharmakīrti [PV], II, verses 1-3.

can be interpreted. (Some, however, would beg to differ.) In support, these interpreters would refer to what Dinnāga said in chapter 1 of his *Pramāṇa-samuccaya*: 'The sense-given datum (*indriya-gocara rūpam*) is self-aware (*sva-samvedyam*) and un-representable (*anirdeśyam*).'¹ If this putative lack of representability means ineffability in language, then it fits well with the original Buddhist position that ultimate reality cannot be revealed by language.) Dinnāga's theory of language is expressed nicely by the famous epigram: 'Speech is born out of conceptual construction and conceptual construction is born out of speech.'

~~If reality is beyond speech and can only be perceived, our speech or words can never reveal or 'refer' to, reality. But Dinnāga suggests that there is an indirect way by which words can refer to real particulars. He has developed an interesting theory of the meaning of names, which is known as the 'exclusion' or 'differentiation' (*apoha*) doctrine. This doctrine can be briefly summarized as follows: The function of a word or a name is the exclusion or elimination of other possibilities.~~

Before we discuss Dinnāga's theory of names, I would like to remind the reader of Dinnāga's list of five 'qualifiers' as five kinds of conceptual constructs. We should not overlook Dinnāga's preference for proper names (which are mentioned first in his list). There is admittedly a philosophical view (notably of some Naiyāyikas) that even a genuine proper name, for example, a personal name like *Devadatta*, implies a 'universal concept' (*jāti* or *sāmānya*) as the qualifier of the thing named. Supposedly, 'Devadatta-ness' is the universal or common property underlying the ever-changing physical and mental states of the person called Devadatta. But this view apart, it is commonplace to regard a proper name as simply pointing to its bearer and implying nothing except that the bearer is qualified by that name. One can mention in this connection John Stuart Mill's contention that genuine proper names only denote and do not connote. In other words, proper names are only appellations (of Matilal [1982], chap. 3).

Dinnāga's point is that the meaning of proper names cannot be hypostatized into a real entity. Proper names are 'devoid of implied senses' (*artha-śūnya*) and the 'qualifier' in the case of a proper name is just the name itself. And just as in the case of proper names we do not hypostatize the 'qualifier', so also in the case of other names we should not hypostatize the respective 'qualifiers'. To correlate this view with Dinnāga's 'exclusion' theory of meaning, one has to say that it is not only in the case of a proper name that the 'qualifier' is the name itself but that also this name is to be understood not as a particular utterance,

but as the underlying form, a universal, which, according to Dinnāga, is also a fictitious construction.

The point may be understood in this way. If a word or a name for a unique datum is just a noise or a sound event, it will be another sense-datum requiring another symbol or name to represent it. And so *ad infinitum*. To avoid this infinite regress we may regard words or names not as particulars but as repeatable universals. A nominalist would say words are the only universals we have.

The 'exclusion' theory of meaning entails many logical, epistemological, and metaphysical problems which we need not go into here.²⁵ The distinction between a conventional reality and the ultimate reality is very fundamental to Buddhism. The conventional reality is often called the 'concealing' (*samvṛti*) level and our speech operates at this level. All our practical behaviour can be reasonably accounted for, or explained, only at this level.²⁶ For Dinnāga, the unique particulars are ultimately real. But the problem is whether we can refer to the unique particular as such in our language without resorting to concepts or universals.

Dinnāga thinks that words or names cannot DIRECTLY designate the particular or datum. In order to refer to a unique particular, one has to use a word or a name, and to use a word or a name one has to use a concept as the 'ground for its application'. The MEANING of a word is the 'ground of application' (cf. Vājapyāyana, chapter 3), which is, according to Dinnāga, a non-objectual fictional construction. The only way a name can identify, or refer to, a particular is through negation and elimination of other concepts.

Dinnāga attacks a theory of names which was presumably propounded by the pre-Dinnāga writers of the Nyāya school. (For a fuller discussion of the Nyāya theory of meaning, see Chapter 2, sections 5, 6.) Let us call this theory the 'name-tag' THEORY. I shall present here this 'denotation' theory more or less as a reconstruction of what Dinnāga thought to be the theory of his opponent.

The name-tag theory states that a word denotes, that is, expresses, an individual, a thing. Apparently this might be interpreted as implying that a word is somewhat like a name-tag put upon a particular thing, so that whenever we utter the word it would be like pulling the tag and the particular thing would be presented (to our mind). This might

²⁵ See R. Hayes [1988].

²⁶ Comparative Public Law and Hindu Philosophy (Select Readings)

For further remarks on *samvṛti*, see Chapter 7.

further imply that there should be one name, one tag, for each object. A particular difficulty will arise when we consider a general term or general name like *cow*. The name-tag theorist will have to say that it is a common name-tag for many individuals, and, to maintain consistency, he will have to add that the 'context' in which the term like *cow* appears determines which particular individual is being denoted. (The 'context' here includes any articles, or determiner, or the whole sentence, or, even broader contexts.) But sometimes the 'context' might be such that we have to say that not any particular cow but the general cow class is intended to be designated by the term *cow*. In such cases, it might be all right to say that *cow* denotes the whole cow class.

The above outline of the name-tag theory is admittedly vague and unclear. But Dinnāga apparently criticized such a view. The clear version of the Nyāya theory of meaning seems to be post-Dinnāga. It is to be noted that the name-tag theorist was not particularly interested in thinking that the 'quality' or the 'universal' might be the meaning of a general term.

Dinnāga argues that a class name like *cow* cannot designate individual cows or cow-particulars because it seems impossible for a SINGLE name *cow* to express innumerable cow-particulars or individual cows. Dinnāga calls this the problem of 'innumerableness' (*ānantya*) and notes it as a fault of the name-tag theory. The second fault of the name-tag theory noted by Dinnāga is called 'deviation' (*vyabhicāra*). These arguments are based upon an implicit premise which we shall now examine.

Our learning of a name as expressing something and our use of that name or word to designate something must in some sense agree with each other. If the word *x* is learned as designating *y*, then *x* should be used to designate *y* and *y* only. As Uddyotakara has put it, if the word's relation to its meaning is not learned when we are learning that word, we cannot understand the meaning from the utterance of that word (1.17-18, p. 320). If *cow* is thought to be learned as expressing a cow-particular, it should be used to express the same particular all the time, because otherwise we will commit the fallacy of 'deviation'. In other words, the situation would be like this: we learn the word *x* as designating *y* and we use *x* to designate *z* and not *y*. Thus, Dinnāga contends that we should rather conclude that *cow* expresses the class concept, the cow universal (which in its turn has a negative implication), and not the cow particular.

It is further argued that *cow*, or *the cow*, cannot help us to identify the individual through any specific characters. A particular cow always

has other specifications, viz., it must have a particular colour, a definite size, and so on. The word *cow* cannot tell us anything about these specifications. Hence, it is not proper to regard *cow* (or, *the cow*) as designating the cow particular.

Again, our metaphorical use of words cannot be justified unless we hold that the word designates 'quality' and not 'substance', that is, the particular. For example, when a servant behaves as the master, one can figuratively call him 'the master', and this use can be justified, provided we hold that *master*, or *the master*, designates master-concept and not a particular master.²⁷

All these arguments of Dinnāga are directed against the name-tag theory of meaning, upheld by the earlier Naiyāyikas and, perhaps, by Vyāḍi (before the Naiyāyikas). Sanskrit unfortunately has only one word *artha* which can ambiguously stand for 'meaning' or 'signification' or 'denotation' or 'connotation'. And also only one relation-word designate (*ucyate, vācaka*) is usually used to relate a word with its *artha*. Apparently the name-tag theorist before Dinnāga argued that the 'meaning' (*artha*) of a name should be the denotatum, the thing or the particular. This view may work very well until and unless we consider the 'meaning' of a word in the context of what B. Russell has called PROPOSITIONAL ATTITUDES.²⁸ When I say 'Bring me a horse', I am asking not for the horse-concept but a particular horse. For Dinnāga, 'perceives' does not imply a propositional attitude and hence the object of perception is the unique particular. But 'perceives that' implies a propositional attitude and hence for Dinnāga it does not express true perception but a conceptual construction.

The upshot of Dinnāga's arguments is that the meaning of an expression is never the object or the particular, and hence the name-tag theorists view is mistaken. Meanings are different sorts of objects. A particular, for example, a fire-particular, is produced and destroyed and it cooks or burns our food, but the meaning of fire is never produced or destroyed, nor does it burn or cook our food. Meanings, for Dinnāga, are fictional constructions and they have a negative function to perform which we shall see presently.

A real entity x exists by itself and only as an indirect consequence of this fact of existence — can we say that it is never otherwise, that is, it is never not- x . A fiction, or a fictitious entity, on the other hand, does

²⁷ My exposition of Dinnāga's arguments is based on the fragments cited by Uddyotakara. See Uddyotakara, pp. 323–32.

²⁸ Russell [1940], chap. 12
Comparative Public Law and Hindu Philosophy (Select Readings)

~~not exist by itself but is assumed as real by our language or speech~~ for the purpose of discourse only, and its sole function is to reject or ~~exclude association of other fictions, other concepts.~~ We may not be able to ride a 'unicorn' but its meaning, the unicorn-concept, rejects association with other concepts, such as dragon-concept or even horse-concept.

But the referring activity is an important function of our discourse, even though the name-tag theorists might have held mistaken notions about it. Thus the question arises: How does a word serve the purpose of referring to a particular? In the context of perception the question may be rephrased as: in what way does a construction refer to a datum? Ḍinnāga answers that it is through 'negation' or 'elimination' or 'differentiation' (apoha). A word expresses a concept and a concept being a fiction cannot POSITIVELY qualify or characterize the particular (as a Nyāya realist believes), but it can NEGATIVELY disqualify the particular from being claimed by other fictions or concepts. Since all concepts are fictions, a particular has equal claim to be associated with just any one of them. But in our construction or naming activity, we reject or exclude association with all other concepts except the concept expressed by the name. ~~Thus, construction and verbalization are to be understood as 'exclusion' of all rival claims.~~ If we associate the name *cow* or, *the cow*, with a particular, it MEANS that it is not what we cannot call a cow.

Each name, as *Ḍinnāga* understands it, ~~dichotomizes the universe into two: those to which it can be applied and those to which it cannot be applied.~~ The function of a name is to EXCLUDE the object from the class of those objects to which it cannot be applied. One might say that the function of a name is to LOCATE the object outside the class of those to which it cannot be applied. There is one advantage in taking a negative approach and using the term 'exclude' rather than using a positive expression such as 'locate'. 'Exclusion' by itself does not imply 'inclusion'. Denial or negation does not always mean affirmation of the contradictory.²⁹ Exclusion, in the context of the premise that there are mutually exclusive classes which taken together exhaust the whole universe of discourse, might imply 'inclusion'. For example, if we exclude something, some particular, from class *A*, it must be included in some other class such as class *B* or *C*, provided we assume that classes *A*, *B*, *C*, . . . exhaust the universe of discourse. (Cf. 'exclusion' negation in chap. 5, section 5.6.)

²⁹ For further remarks on negation, see chap. 5, section 5.6.

Since all class concepts are fictional, if we DENY the claim of a particular to be associated with some class concepts we thereby do not commit ourselves to the admission of its claim to be associated with another class concept. It may be harmless to say that a particular is associated with a fictional class concept as long as we do not derive from it the illegitimate conclusion that such a class concept is, therefore, defined to be a POSITIVE property, and hence it becomes a REAL property of that particular. Dinnāga and his followers think that the negative approach (which they have proposed and which I have tried to outline above) forestalls such a unwelcome implication. It would be unwelcome because NOMINALISM would have to concede REALISM.

Various other aspects of Dinnāga's 'exclusion' theory of meaning were developed by his later followers, but they need not concern us here. There are the extreme Negativists, for example, Prajñākara,³⁰ who think that names cannot have any positive function like 'locating' or 'referring to' the object, that is, the particular. There are also the milder Negativists, for example, Kaṃakagomin and Ratnakīrti,³¹ who acknowledge that the so-called positive function is so prominently experienced when we learn the meaning of the word through ostensive definition that it cannot be totally denied.

1.7. DINNĀGA AND MODERN REDUCTIONISM

All the issues discussed here are not merely museum pieces for the modern philosophers. The questions of perception and meaning, sense-data and appearance, material objects, and momentary events, were quite current at least until a few decades ago. Even today philosophers worry about meanings and intentions, about objects of propositional attitudes and other theoretical abstracts. It might be interesting to connect Dinnāga's doctrines to matters of present day relevance.

Sense-data philosophers in the West (and their history too seems to go back to a much earlier period) have maintained that we never DIRECTLY perceive material objects, but only sense-data or sense qualities, or even our ideas. Bishop Berkeley immediately comes to mind, but there have been many other philosophers in this century in the West who held similar views.

Let me emphasize the well-known point that the fundamental question in almost every philosophical system, whether Eastern or Western,

³⁰ Prajñākara, pp. 262-6.

³¹ Kaṃakagomin, pp. 248-54; Ratnakīrti, p. 60.

not discussed here
↓
modern
↓
take them for granted

centres around the nature of reality, or, to use a modern expression, the discussion 'on what there is'. The attempt of critical philosophers, both in India and in the West, has gradually taken the form of showing that certain categories of objects, which are assumed to be there by the vocabulary of our common language, are really not there. In other words, certain alleged objects are regarded as dispensable in favour of certain less problematic objects. Thus, abstract universals are said to be dispensable in favour of 'concrete' things; 'concrete' material bodies are found less satisfactory than the immediate sense properties.

An effective way of arguing in favour of certain types of objects to the exclusion of certain other types is to supply a set of rules for replacing statements about one type by statements about the other type. This is what has been called reductive analysis or 'radical reductionism' in the West. Reductionism, in one form or another, has been foreshadowed in the writings of many earlier philosophers, though it is only in this century that it has been carried out with zeal and conviction by several empiricists.

Among the early forms of reductionism in the Indian context, we may mention the Buddhist posit of *dharma* (sense properties, etc.) in place of the proto-Vaiśeṣika substance or physical bodies, the Buddhist notion of five 'aggregates' in place of the Brahmanical idea of a soul, the Buddhist doctrine of *apoha* to replace the Nyāya doctrine of universals, and the Navya-nyāya doctrine of 'imposed property' (*apādhi*) to take the place of the problematic *jāti* (generic property). Early British empiricists like Locke and Hume also believed in the principle of reductionism. Modern logical empiricists like R. Carnap, by using, with great ingenuity, the symbolism of mathematical logic, have actually carried out to a considerable extent the scheme of translating statements about the physical world into statements about immediate experience. But, at the present moment, this type of radical procedure is no longer in vogue, and a logician of the stature of W.V. Quine has called it one of the 'two dogmas of empiricism'.³²

Whatever may be the fate of reductionism today, it is always philosophically profitable to compare two rival conceptual schemes such as a phenomenalist one and a physicalist one. The latter posits physical objects and believes that all statements about subjective events of sensation and reflection are reducible into statements about physical occurrences. It will be of no use to produce a counterexample because

the physicalist is convinced (on *a priori* grounds) that the counterexample can be explained away. The physicalist accepts physical objects and claims that this acceptance simplifies our account of experience by unifying thousands of scattered sense-events into one single object. Extending the same line of argument, the Vaiśeṣika can say that he posits the notion of self to unify our 'inner' events. In recent philosophical discussion, the concept of personal identity has, in some circles, occupied the centre stage. There are those who are inclined to reduce the concept of a 'person' to physical and psychological properties. This is not exactly the old Humean bundle theory but a more sophisticated account along similar lines. Buddhological scholars have hailed this new development for its obvious similarity with the non-soul doctrine of the Buddhist. However, we must note an important difference, which is often forgotten. Modern reductionists who reject the notion of a self or a person are not phenomenologists but, in some form, physicalists, for they accept the physical substances or bodies. It should be noted that this goes against the grain of Buddhism, which rejects both the notion of a unified substratum of experience, and that of a unified subject. From the phenomenological point of view, however, the scheme of physical objects is at best a convenient myth. Much in the same way, the Dīnāga school regards the Nyāya-Vaiśeṣika posit of middle-sized bodies as a convenient fiction.

There is, however, an important difference in the methodology of the Dīnāga school. A follower of Dīnāga has to convince himself that the bare particulars are unique point-instants and always in a flux, and thus are beyond the reach of language, much in the same way as some logical positivists (for example, Otto Neurath) asserted at some point that the 'given' can never be spoken of, that we can never expect to compare reality with proposition, and that we always remain within 'the sphere of linguistic thought'.³³ If this conviction is held on *a priori* grounds, a follower of Dīnāga will not have recourse to any reductionism and *Protokollsätze* since this would be a useless endeavour. Reality stands in its own glory and is directly connected with our perceptual mode of consciousness where no speech intervenes. Our only hope to approach it by language is by the process of 'exclusion and negation' outlined above. This is so because our language is a common means of communication among people. It is one of the limitations of such a common property that we cannot, in practice, construct a PURE

³³ Neurath, p. 291. (English translation in the anthology *Logical Positivism*.)

name for a 'pure' momentary particular and hope to communicate it to others so that they will understand the name (and its reference) without recourse to some concept or generality.

The thesis of phenomenalism as well as the arguments of the sense-data philosophers have been criticized from various points of view.³⁴ Modern logical empiricists seem to have more confidence in the middle-sized middle-distanced objects since they are our 'conceptual firsts'. It is now widely felt that sense-data, even when they are admitted as sense-qualities and hence more or less physical occurrences, are not sufficient to replace totally the class of physical objects. Besides, it can be shown that we do not need sensory data to account for our knowledge or discourse of physical objects themselves. Our confidence in the physical objects is, in fact, strengthened by the consideration that terms for such objects are at the focus of our most successful communication. The Nyāya-Vaiśeṣika and the Mimāṃsaka philosophers of the post-Diṅnāga period reformed, to a great extent, their earlier systems of epistemological realism while they tried to absorb the shock of the idealist's attack. We shall review the position of these philosophers in the next chapter.

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Chapter 1

Interpretations or Interventions? Indian Philosophy in the Global Cosmopolis

Christian Coseru

If the history of philosophy could be told without gaps, where and how would Indian philosophy fit in? And, when all is said and done, what are some of the arguments and positions that could be recruited to advance contemporary debates in metaphysics, epistemology, philosophy of mind, logic, philosophy of language, ethics, metaethics, moral psychology, political philosophy, aesthetics, and philosophy of religion? Introductions to Indian philosophy seldom engage these questions. Instead, they proceed to offer prospective readers an appreciation of the richness and real depth of the Indian philosophical tradition in its own terms, and of the intellectual rewards that stand to be gained by delving into it. In this sense, introductions to Indian philosophy differ from introductions to Western philosophy in one significant way: the latter typically lack such incentives, given the widespread assumption (some might say, prejudice) that Western philosophers have shaped not only the way people in the West think about the world today but, in the wake of colonialism, people across the planet. If the study of Indian philosophy, then, is to have scope beyond the confines of intellectual history, questions about its own claims and aspirations to truth cannot be ignored. Indeed, such questions concern the ongoing relevance of its rich repertoire of methods, views, and arguments, and not simply their preservation value.

The chapters of this volume make their own case for how particular figures and texts articulate and seek to answer fundamental questions about the nature of reality and the self, the sources and methods of knowledge, and the norms of moral, social, political, religious, and aesthetic conduct relative to specific goals. They map the conceptual terrain of a primarily, but by no means exclusively,

Sanskritic philosophical culture of similar ancestry and equal breadth and depth to that of China, Greece, and the Latin West. The present introduction concerns the place that this vast body of literature should occupy in the history of philosophy, and the challenge of championing pre-modern modes of inquiry in an era when philosophy, at least in the anglophone world and its satellites, has in large measure become a highly specialized and technical discipline conceived on the model of the sciences. This challenge is particularly acute when philosophical figures and texts that are historically and culturally distant from us are engaged not only exegetically but also with a view to recruiting their topics and arguments for contemporary philosophical debates.

Canon, style, and the question of method

One way to address the questions raised here is to consider the current standard philosophy curriculum. When students in Kolkata, Hong Kong, and Tokyo are introduced to philosophy in philosophy programs, for the most part they end up reading some of the same figures and works that students in Oxford, Berlin, and New York do: Plato, Aristotle, Descartes, Kant, John Stuart Mill, and their influential twentieth- and twenty-first-century descendants. But in Kolkata a student might also get exposure to the works of Vātsyāyana, Gaṅgeśa, and Rāṅunātha Śīromaṇi, and wonder how their contributions to, say, epistemic norms or category theory fit in with contemporary debates in epistemology and philosophy of language. Likewise, students in Tokyo and Hong Kong might get to read Dōgen and Mozi, and ponder the historical roots of paraconsistent logic and rule consequentialism. On the whole, whether it is read in Oxford or in Kolkata, philosophy's Western bias holds sway, which explains why calls for expanding the canon to accommodate important sources of philosophical skill from other cultures have been largely unsuccessful. Cultural chauvinism and a devaluation of indigenous knowledge sources are partly to blame. But what looms large in the imagination of the great majority of philosophers trained on a predominantly Western curriculum, whether in Kolkata or Oxford, is the issue of incommensurability.

When we see the history of philosophy as a series of dialogues among philosophers pursuing unresolved problems by building on the achievements of

their acknowledged forbears we can understand why voices that are not part of the received canon are hard to fit in. Philosophy –the story goes –is constrained by its own genealogy. Consider the student who learns in an epistemology seminar that Gaṅgeśa, a fourteenth-century philosopher from Mithilā and founder of the so-called ‘new reason’ (Navya-Nyāya) school, is the author of an influential non-semantic theory of truth. By making truth statements dependent on the actual occurrence of cognitive events, Gaṅgeśa is able to block such paradoxical statements as the antinomy of the liar (e.g., Epimenides’ paradox) that would be commonplace on, say, a Tarski-inspired, semantic conception of truth.¹ But to account for Gaṅgeśa’s philosophical contribution our student would have to get acquainted with *pramāṇa*-theory – that is, the theory of the means or sources of knowledge – and with a centuries-old debate about whether truth is apprehended intrinsically (*svataḥ*) or dependent on extraneous conditions (*parataḥ*), and the implications of these positions (and their variants) for self-knowledge, testimony, and the grounds of certainty.

Making sense of Gaṅgeśa’s theory of truth by gaining a measure of familiarity with his own Nyāya, Mīmāṃsā, and Buddhist interlocutors, then, is a necessary step. But it is by no means sufficient. One must also become acquainted with the distinctive features of the Indian philosophical genre. There are four categories of writing that stand out: (i) terse formulaic *assertions* (*sūtra*), of an aphorism-like quality, (ii) basic *commentary* (*bhāṣya*), aimed at unpacking the elusive assertions, (iii) main *subcommentary* (*vārttika*), extending the scope of various positions within the commentary usually by way of revision, and further (iv) *subcommentarial* additions (*nibandha*), which continue the process of interrogation and revision until all interpretive and argumentative possibilities have been exhausted. Some subcommentaries are limited in scope either to clarifying the syntax of the text and providing more clear alternatives (the *vṛtti* and *vivaraṇa*) or to elucidating obscure terms (the *īkā*).

Furthermore, the commentarial genre comprises a distinct set of nested statements that begins with ‘the topic’ (*viśaya*) of discussion, followed by the expression ‘of a doubt’ (*saṁśaya*), the citing ‘of an opponent’s position’ (*pūrvapakṣa*), an affirmation ‘of the decided view’ (*siddhānta*), and ending with a statement ‘of purpose’ (*prayojana*). Lastly, there are several types of relations that obtain among the sections of a given commentarial text, all of which aim to

ensure some form of dialogical unity. A successive section should either serve as a corollary (*prasaṅga*) or as a prerequisite (*upodghāta*) to a prior section, either exhibit causal dependence (*hetutva*) on the former or eliminate some potential obstacle (*avasara*), and either share a common goal (*nirvāhakaikya*) or act as the causal condition (*kāryaikya*) of a common outcome. Beyond these structural features there are conceptual rules to ensure that proper channels of belief acquisition are followed, and that beliefs are produced in the right way. And last, but not least, it is paramount that fallacies (*hetvābhāsa*) of reasoning are carefully identified and avoided.

This cursory acquaintance with the discursive strategies of the commentarial genre may signal analytic rigor or a pedantic scholasticism. Either way, it would seem obvious that engaging Indian philosophy without sharing some of its own presuppositions and concerns about the nature of evidence, the proper place of reason, and the aims of inquiry, is a remote possibility at best.² Most important, the contemporary reader looking for the Indian equivalent of a Descartes, Hume, or Kant (or, closer to the present age, of a Husserl, Sartre, or Quine) would need to suspend belief about style and method and proceed with caution so as not to let assumptions about the ‘natural’ order of events get in the way. In India, concerns with the justification of true belief occupied thinkers long before it became fashionable in twentieth-century analytic philosophy with Gettier. And debates about consciousness, intentionality, and self-knowledge flourished during the exact same period – the second half of the first millennium – when philosophy in the West went into progressive decline after the closing of Plato’s Academy in 529 CE.

Shifting attitudes toward doctrine

The new spirit of rational and scientific inquiry that we associate in the West with Descartes and the British empiricists may be absent in India prior to the advent of British colonial rule in the nineteenth century.³ But methodical reasoning of an unprecedented degree of sophistications and technicality, as the Navya Nyāya literature attests, is part of the course. While for the most part still motivated by the need to explain and justify scholastic positions, a new attitude of *critical deference* to (if not yet *distance* from) authority, heralds the arrival of

a proto-modernity. This new attitude is born of the progressive recognition, first, that beliefs justified without any extra-textual evidence – as traditions of thought indebted to the Mīmāṃsā had considered – could be fallible and, second, that causal explanation often trumps appeals to textual coherence and doctrinal consistency.

The roots of this new attitude reach deep into the latter part of first millennium. Indeed, from Dharmottara (eighth century) and Ratnakīrti (eleventh century) to Gaṅgeśa (fourteenth century) and Raghunātha (sixteenth century), Indian philosophers engaged in lengthy debates about such epistemic notions as ‘defect’ (*doṣa*) and ‘excellence’ (*guṇa*). While recognizing the potential fallibility of belief they also noted that veridical cognitions could not be based solely on beliefs one held intrinsically. However, not all traditions of thought embraced this attitude of *critical* deference. But those that did – primarily the ‘new reason’ thinkers following in the footsteps of Gaṅgeśa – ended up scrutinizing more carefully the nature and sources of belief formation. Rather than placing the burden of epistemic responsibility on the belief itself (and how it is held), these ‘new reason’ thinkers gradually shifted the focus to its sources: to how we come to form beliefs in the first place. For instance, they reasoned that if it could be understood that mirrors function the way that they do because of their reflective properties, then the belief that mirrors possess the object reflected, however mysterious these properties might turn out to be, could no longer be justified. If epistemic reliability is a factor of descriptive accuracy, then the view that there are such things as brute common-sense facts becomes untenable.

It is hard to assess how widespread this new attitude toward the scope and aims of philosophical inquiry became in pre-colonial India, and several chapters in this volume seek to tackle this question. What is certain is that a great deal of Indian philosophy, even when directly concerned with the justification of textual, testimonial, or experiential issues, is still permeated by tradition-specific doctrinal assumptions (some of which hinge on the precise number and nature of reliable sources of belief formation (*pramāṇa*), while others on whether constructive philosophical debate requires any such doxastic practices at all). Most emblematic of this hermeneutical approach are Mīmāṃsaka thinkers such as Kumārila and Prabhākara (seventh to eighth century), whose primary concern

is the interpretation of the Vedas and the justification for the observance of Vedic ritual. Kumāriḷa in particular is best known for granting that language has an inexhaustible and unmatched capacity for expression, and for defending a view of the Vedas as repositories of epistemically warranted statements. To claim that cognitions formed on the basis of such statements are inherently justified, argues Kumāriḷa, is to say that they are the bearers of language's own self-expressive and self-revealing power.

Doctrinal assumptions are also at the heart of more robustly metaphysical systems of thought concerned with the nature of ultimate reality and the self. When Rāmānuja – an influential twelfth-century philosopher of religion and founder of a qualified non-dualist school of thought – claims that Advaita (e.g., 'nondual' or lacking in any attributes) conceptions of Brahman are logically incoherent, he appeals to the intuitions of the Sanskrit grammarians about the category of 'being' or 'existence' (*sattva*). For the grammarians, *sattva* serves by definition as the locus of generic properties, qualities, and actions. Likewise, when Utpaladeva and Abhinavagupta (tenth to eleventh century) – proponents of a nondualist, but theist, metaphysical system within the Kashmir Śaiva tradition – put forward a quasi-Sartrean conception of the self as the pure and unhindered freedom (*svātantrya*) of consciousness, they are responding to Buddhist epistemological efforts, championed by Dharmakīrti (seventh century) and his followers, to reconcile a conception of consciousness as inherently self-revealing with the cardinal Buddhist doctrines of momentariness and no-self.

Confronting the metaphilosophical question

As it should be obvious by now, Indian philosophy has its own genealogy and its own rich repertoire of intramural debates. The responsible approach, at least according to the historian of philosophy, would be to chart its course without constant reference to periods and categories in Western philosophy or, worse, outmoded (although still popular) Orientalist conceptions of Indian thought as dominated by religious and spiritual concerns, and, hence, as not really philosophy by the standards of contemporary anglophone philosophy. But the historical approach ignores pragmatic considerations about what, in the absence of cultural affinities, should motivate the study of Indian philosophy outside its

traditional sphere of influence, that is, outside the *gurukula* system and India's modern secular universities. After all, acknowledging the presence of important sources of philosophical insight in the Indian tradition is not enough to motivate contemporary philosophers to engage it, let alone take up the study of Sanskrit.

Whether we are dealing with claims about language, reality, and the self, or with principles of reason and empirical grounding, pragmatic exigencies demand that Indian philosophical views face the same sort of scrutiny as all other presuppositions of the genre. Indeed, from a metaphilosophical standpoint – that is, from the standpoint of inquiry into the nature of philosophy – the question “Is the Indian philosophical genre *philosophy*?” is a perfectly legitimate way to seek clarity about what should count as philosophy.⁴ But the metaphilosophical question cannot be countenanced, if sufficient care to avoid any one conception of its nature and scope from defining the genre as a whole has not been taken. Philosophy may well be emblematic of the human quest to “understand how things in the broadest possible sense of the term hang together in the broadest possible sense of the term.”⁵ But that understanding has already been shaped by a long history of such enduring attempts. And yet, answering the metaphilosophical question requires that we bracket historical considerations altogether and eschew their normative challenges. Are the moral and metaphysical lessons of the *Upaniṣads*, the *Yoga-sūtras*, and the *Bhagavad-Gītā philosophy*, in the critical sense in which that practice has been retrospectively interpreted and adopted in both fourteenth-century India and eighteenth-century Europe? Maybe that is the wrong question. Perhaps we should reconsider, with Ludwig Wittgenstein, Pierre Hadot, and Martha Nussbaum, whether it would not be more appropriate to ask what specific *forms of life* these texts promote, rather than how *philosophical* the seemingly insoluble problems they give rise to are.⁶

Indigenism, comparison, and the cosmopolitan ideal

In so far as philosophy in English or the Anglophone culture at large defines itself against the backdrop of a distinct community of inquiry – nowadays constituted largely of professional philosophers – the question whether the Indian philosophical genre qualifies as philosophy cannot be answered without engaging in the type of intellectual exercise known as ‘comparative philosophy’.

As Bimal Krishna Matilal observed some time ago, anyone who seeks “to explain and translate systematically from Indian philosophical writings into a European language will, knowingly or unknowingly, be using the method of ‘comparative philosophy’.”⁷ Not only explicit attempts to bring Indian and Western philosophers in dialogue, but even text-critical approaches to the genre fall under this category. Doing Indian philosophy in English also means operating with a conceptual vocabulary shaped by the Greek culture of first millennium BCE, the scholasticism of the Latin Middle Ages, and the predominantly French, English, and German intellectual movements of early modern Europe. Thus, one cannot do Indian philosophy without at the same time doing Western philosophy, which means that questions about whether the tenets of one tradition can sustain statement in the other become paramount. Practitioners of the genre ‘comparative philosophy’ are no strangers to expressing misgivings about comparisons that merely tag theories bearing certain resemblances. And skeptics who champion various forms of indigenism have gone as far as to argue that the adoption of English as a medium for doing Indian philosophy has been profoundly alienating, despite invaluable contributions from such influential early modern Indian philosophers as Krishna Chandra Bhattacharya, Surendranath Dasgupta, Mysore Hiriyana, and Anukul Chandra Mukherji.⁸

Reflecting on this practice as a philosopher trained in both the Indian and the Western, primarily phenomenological, tradition, Jitendranath Mohanty singled out the mutually enhancing value of thinking across cultural boundaries, and the promise that such enterprise might one day usher a new kind of philosophy that is global in scope and outlook.⁹ While we are still a long way from fulfilling that promise, a sort of open-ended and non-committal thinking across traditions has taken root among practitioners of what some now call ‘fusion philosophy,’ others ‘cross-cultural philosophy,’ but what might be best described as ‘cosmopolitan philosophy.’¹⁰ This idea is neither new nor particularly revolutionary. When Dignāga (c. fifth to sixth century) embarks on his synthesis of the prevalent epistemological, grammatical, and psychological theories of his day and Vācaspati Miśra (tenth century) authors his empathetic and influential commentaries on Advaita Vedānta, Nyāya, and Sāṃkhya-Yoga texts, they do so as members of a Sanskrit cosmopolis.¹¹ That cosmopolis endures today among

traditionally trained scholars in India and the Indian diaspora. But it functions within, and relative to, an all-encompassing and universalizing cosmopolis that we now call the global West. Doing Indian philosophy today means operating within a larger horizon whose cardinal points of reference are no longer geographical but for the most part conceptual and institutional. Academic philosophy in the global West is a cosmopolitan phenomenon that mirrors the progress of the sciences in its open-ended practice of asking questions and pursuing knowledge.¹²

If one cannot do Indian philosophy in English without doing comparative philosophy, the question naturally arises: is comparative philosophy *philosophy*? The cosmopolitan approach is partly motivated by a deep skepticism about the possibility of doing philosophy comparatively. If comparative religion is not religion and comparative politics is not politics, how is comparative philosophy *philosophy*? Answers to this question run the gamut from outright rejection of the possibility of meaningful comparisons, because of the incommensurability of Indian and Western traditions, to the view that the content of these traditions, save for minor stylistic differences, is practically the same. Skeptics point out that while doctrinal and spiritual concerns are not uncommon for Western figures like Augustine, Aquinas, and Kierkegaard, they are not representative of the dominant ideals of discursive rationality and argumentation that Western philosophy has inherited from the Greeks. Brushing aside such superficial dismissals, defenders argue that the most influential Indian philosophers (e.g., Nāgārjuna, Dharmakīrti, Kumāriḷa, Śrīharṣa, and Gaṅgeśa, among others) show as much penchant for rational deliberation and argumentative rigor as Descartes, Hume, Kant, and Wittgenstein.

Philosophical interventions at the confluence of cultures

So, then: how is comparative philosophy *philosophy*? Pursuing a similar line of inquiry, Arindam Chakrabarti and Ralph Weber give an example of the sort of interventions in solving long-standing philosophical debates in both India and the West that only comparative philosophy is equipped to handle.¹³ Take reflexivism – the thesis that consciousness consists in conscious mental states being implicitly self-aware. In India a group of mainly Buddhist philosophers

beginning with Dignāga and Dharmakīrti have defended versions of this thesis against Naiyāyikas, who claimed instead that the self-awareness which accompanies each instance of cognition is inferred from the effects of that cognition. Where the reflexivist thinks that I can know something only to the extent that each instance of cognition is inherently self-revealing or self-illuminating, his opponent counters that such cognitive acts as ‘seeing something’ are transparent with regard to their own operations. If knowing is an act, we are only aware of it indirectly, when reflection turns within and toward its own operations. We see the tree outside the window, not the seeing of that tree. But we can infer that seeing has occurred for someone from the tree that is now seen. And yet, to postulate a basis for self-knowledge outside the structure of experience, or to locate it solely in the conceptual realm, is to problematically assume that experience is an emergent property of something that is not itself experiential.

Readers familiar with contemporary debates in phenomenology and philosophy of mind would immediately recognize these positions as versions of conceptualism versus non-conceptualism with regard to perceptual content, and of the Higher-Order versus First-Order theories of consciousness. Such recognition opens the possibility of intervention, either from the direction of Indian philosophy or, in this particular case, from that of contemporary philosophy of mind, in solving long-standing debates in each tradition. Examples of such interventions abound in the comparative and cross-cultural philosophical literature, often yielding novel ways of tackling long-standing problems. Sometimes they also provide effective platforms from which to interrogate Western hegemonic forms of language, thought, and morality, and take to task those influential philosophers – with Nietzsche as the prototypical example – most responsible for perpetrating a sort of ‘neglect by appropriation’ approach to Indian philosophy.¹⁴ On this ‘interventionist’ model comparative philosophy is *philosophy* – in the sense of an open-ended concern with asking questions and pursuing knowledge. But is it the sort of philosophy that showcases, if not the unique features, at least the unique trajectory of Indian philosophy?

One worry is that such interventions end up treating Indian philosophy as a sort of standing reserve to be mined for interesting or even original statements, with utter disregard for their historical context and significance. We only need

look at such “manuals of reason” as Mokṣākaragupta’s *Tarkabhāṣā* (twelfth century) and Annambhaṭṭa’s *Tarkasaṃgraha* (seventeenth century) to realize that these worries are misplaced. What is distinctive about these indigenous interventions is precisely their systematic effort to identify, analyze, and evaluate the basic tenets of each school, often disregarding context or attribution, with the aid of various epistemological, methodological, and logical techniques.

An altogether different sort of worry is that many such interventions are anachronistic. Take the example of cutting across historical and cultural boundaries to make the case that, say, the twelfth-century Advaitin Śrīharṣa rather than Gettier should be credited with the Gettier Problem. But a history of philosophy without gaps will have to look beyond linear narratives and realize that such juxtapositions are inevitable if we are to do justice to the progression of thought. If Śrīharṣa is the first to frame and illustrate the (Gettier) problem, and the first to venture interesting solutions, then he addresses not only the concerns of his twelve-century Naiyāyika opponents, but also those of late twentieth-century analytic epistemology.

I have already hinted that chronologies are relative to a given philosophical culture and epoch. If ‘classical’ is an apt term for much of the early period of Indian philosophy, ‘mediaeval’ is not. There is no break with the past in India similar to the onset of the European Middle Ages. Foundational *sūtras* for the Sāṃkhya, Yoga, Buddhist, Jaina, Cārvāka, Nyāya, Vaiśeṣika, Mīmāṃsā, and Vedānta traditions are continuously composed over several centuries beginning around 500 BCE, and the commentarial tradition continues well into the middle of the second millennium of the Common Era.¹⁵

Apart from these worries there is also the objection that this sort of cosmopolitan intervention either ignores or glosses over issues of cultural difference and conceptual incommensurability. Indian philosophy is host to conceptual, argumentative, and experiential strategies that do not map neatly onto Western categories and practices. Render classical Indian logic in Western terms, and the *anumāna* system of inference ends up being indistinguishable from the Aristotelian syllogism. Retain the original format with its distinctive steps and characteristics, and the Indian tradition of debate can seem alien and contrived. One response to this objection is predictably straightforward: whether one thinks inside or outside the categorical framework of a particular

philosophical tradition or culture,¹⁶ one need not endorse its conceptual schema. Mādhyamika philosophers make good use of the sophisticated categorical frameworks of Abhidharma, Nyāya, and the Sanskrit grammarians, and yet treat them as ‘worldly conventions’ (*lokasaṃvṛiti*) that do not capture the way things are ultimately. For Mādhyamikas, just as for many contemporary global antirealists, seeking to capture the intrinsic order of reality through a categorical framework (be it that of Vaiśeṣika or Aristotle) has to contend with the very notion of an ‘essence’ or ‘intrinsic order’ of things. Effective as they may be, such categories are subject to revision. And, if it should turn out that there are better ways of knowing and being, it is hard to see how pursuing them would not be preferable to the status quo.

Sometimes the best way to make progress is not to start anew, by breaking with the past, but to consider an alternative course, specifically one that philosophy might have taken had it been shaped by a different cultural geography. In the West philosophy begins in wonder about the natural world and the reach of reason; in India, by contrast, it begins in speculations about the origins, nature, and function of language as a vehicle of philosophical insight. While the Pre-Socratics wonder about the ultimate principle of things (*arche*) using the vocabulary of nature, Indian philosophers beginning with Jaimini (fourth century BCE), Gautama (second century CE), and Nāgārjuna (*fl.* second century CE) are concerned with finding out what the relation between words and their referents is ultimately like. Is it a primordial (*autpattika*) relation, as Jaimini claims? Does it depend on a certain capacity to generate knowledge that awareness-episodes (*pramā*) have, as Gautama stipulates? Or is this relation simply the result of an illegitimate metaphysical use of language prone to reification, as Nāgārjuna would have it? As should be obvious to all readers of *Cratylus*, such concerns are by no means unique to the Indian philosophical tradition. But in India they contribute to the articulation of a sophisticated philosophy of language that does not become the norm in the West until the middle of the eighteenth century.

If the study of Indian philosophy is to resist retreat into the familiar terrain of tradition and its scholastic proclivities, perhaps a confluence of perspectives rather than their comparison is more methodologically apt. Such confluence is not without historical precedent. Contact between India and the Greek world

following Alexander the Great's military campaigns set the stage for a work of Buddhist apologetics (the *Milinda Pañha*), and allowed such attitudes as 'freedom from emotion' (*apatheia*) and 'contentedness' (*eukolia*) – which Pyrrho is said to have witnessed among the so-called 'naked wise men' (*gymnosophists*) of India – to inform Hellenistic skepticism. The cosmopolitan oasis towns of Bukhara, Samarkand, Kashgar, Khotan, and Kucha served as a land bridge between Indian Buddhists and Chinese intellectuals drawn to the philosophy of emptiness. Their encounter resulted in a practice of matching Buddhist and Daoist concepts (*ko-i fo-chiao*) that, by the fourth century CE, would render core Mahāyāna Buddhist ideas indistinguishable from the teachings of *Daodejing* and *Zhuangzi*. And, the more tolerant sixteenth- and seventeenth-century Mughal rules of Akbar and Shah Jahan made possible Dārā Shukoh's momentous translation project of the Upaniṣads, exposing Persian and Arabic intelligentsia to the same Sanskrit philosophical lore that a century and a half later would end up, via translations from Persian to Latin, on Schopenhauer's desk.

Significant as these confluences are we must not forget that they tell as much of a story of admiration as of appropriation, assimilation, and refutation. For the anonymous compilers of *Milinda Pañha* ('Questions of Milinda'), the Greek philosopher-king Milinda (Menander I) is simply a foil for Nāgasena's compelling defense of the Buddhist no-self view. Pyrrho, to the extent that we can reconstruct his views, mainly engages with Democritus, Plato, and the Eleatics. And Schopenhauer's main interlocutor is Kant rather than Yājñavalkya, despite his high regard for the Upaniṣads.

As we look to the future of philosophy in the twenty-first century we can only hope that a better knowledge of Indian philosophy would result in many and more fruitful conversations about knowledge, being, and what there is, and about the proper place of reason in the midst of it all.

Notes

- 1 See Mohanty (1966), Matilal (1985), and Phillips (2012: 87–91) for detailed treatments of Gaṅgeśa's theories of truth that also engage contemporary issues in epistemology.
- 2 As I have argued elsewhere (Coseru 2012: 279), the most important aspect of this intercultural philosophical engagement is not the recognition that there are different approaches to philosophy, but the promise that such recognition holds for enhancing, refining, and expanding the range of argument and possibilities that are available to us.

- 3 Ganeri (2012: 6) argues otherwise, but see Garfield (2014) and Phillips (2016) for more skeptical views about whether the outlook of ‘new reason’ Naiyāyika like Raghunātha is of a piece with that of early modern thinkers in Europe.
- 4 Perrett (2016: 3), rightly in my view, notes that as exasperating as this question can be for Indologists and historians of Indian philosophy, is it perfectly legitimate if we are to distinguish between ‘descriptive’ and ‘evaluative’ (or ‘normative’) uses of the term ‘philosophy’. By the same token one could ask the question: “Is this creative form *art*?” or “Is this writing *literature*?” and conclude that while something does descriptively fall under the category ‘art’ or ‘literature,’ it may still not belong to the class of *good* art or literature.
- 5 Sellars (1962: 1).
- 6 See Wittgenstein (2001: 192), Hadot (2001: ch. 1), and Nussbaum (1994: 14).
- 7 Matilal (1971: 13).
- 8 Daya Krishna went so far as to claim that “anyone who is writing in English is not an Indian philosopher” and thus is doing neither philosophy nor Indian philosophy (in Bhushan and Garfield 2011: xiii–xiv).
- 9 Mohanty (1992: 401).
- 10 Siderits (2015) canvases the ‘fusion philosophy’ model, while Garfield (2002) and Ganeri (2012) champion the ‘cross-cultural’ and ‘cosmopolitan’ approaches, respectively.
- 11 Pollock (2006: 12) argues that in exercising its transregional cultural power, Sanskrit did engender a conceptual and methodological universalism. But the Sanskrit cosmopolis “never objectified, let alone, enforced its universalism” (Pollock 2006: 12).
- 12 Halbfass (1988: 273) thinks that this is precisely the reason why Western philosophy has undergone such dramatic changes in modern history.
- 13 Chakrabarti and Weber (2016: 15ff.).
- 14 Bilimoria (2008: 375) finds in Nietzsche’s ambivalent encounter with Asian perspectives the resources of an ‘instrumentalist’ approach to Asian thought, one whose lingering effects comparative philosophy has been struggling to counter for nearly a century.
- 15 New attempts at the periodization of Indian philosophy that reflect its own evolution rather than how that evolution maps onto periods and movements in Western philosophy are found in Franco (2013) and contributions therein.
- 16 See Frazier (2014: 7) for a plea for thinking with, rather than against, Indian categories inherited from the Naiyāyikas and their followers, and thus “inside the box” rather than outside of it.

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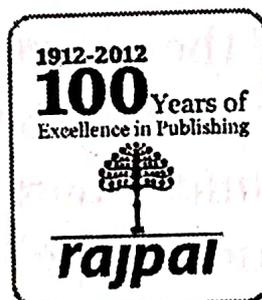
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Hind Swaraj

Mahatma Gandhi

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engage counsel and resort to English or any law courts. Two men fight; both have their heads broken, or one only. How shall a third party distribute justice amongst them? Those who fight may expect to be injured.

CHAPTER XI

THE CONDITION OF INDIA (Continued): LAWYERS

Reader: You tell me that when two men quarrel they should not go to a law-court. This is astonishing.

Editor: Whether you call it astonishing or not, it is the truth. And your question introduces us to the lawyers and the doctors. My firm opinion is that the lawyers have enslaved India, have accentuated Hindu-Mahomedan dissensions and have confirmed English authority.

Reader: It is easy enough to bring these charges, but it will be difficult for you to prove them. But for the lawyers, who would have shown us the road to independence? Who would have protected the poor? Who would have secured justice? For instance, the late Manmohan Ghose defended many a poor man free of charge. The Congress, which you have praised so much is dependent for its existence and activity upon the work of the lawyers. To denounce such an estimable class of men is to spell injustice, and you are abusing the liberty of the press by decrying lawyers.

Editor: At one time I used to think exactly like you. I have no desire to convince you that they have never done a single good thing. I honor Mr. Ghose's memory. It is quite true that he helped the poor. That the Congress owes the lawyers something is believable. Lawyers are also men, and there is something good in every man. Whenever instances of lawyers having done good can be brought forward, it will be found that the good is due to them as men rather than as lawyers. All I am

concerned with is to show you that the profession teaches immorality; it is exposed to temptation from which few are saved.

The Hindus and the Mahomedans have quarrelled. An ordinary man will ask them to forget all about it, he will tell them that both must be more or less at fault, and will advise them no longer to quarrel. But they go to lawyers. The latter's duty is to side with their clients and to find out ways and arguments in favour of the clients to which they (the clients) are often strangers. If they do not do so they will be considered to have degraded their profession. The lawyers therefore, will, as a rule, advance quarrels instead of repressing them. Moreover, men take up that profession, not in order to help others out of their miseries, but to enrich themselves. It is one of the avenues of becoming wealthy and their interest exists in multiplying disputes. It is within my knowledge that they are glad when men have disputes. Petty pleaders actually manufacture them. Their touts, like so many leeches, suck the blood of the poor people. Lawyers are men who have little to do. Lazy people, in order to indulge in luxuries, take up such professions. This is a true statement. Any other argument is a mere pretension. It is the lawyers who have discovered that theirs is an honorable profession. They frame laws as they frame their own praises. They decide what fees they will charge and they put on so much side that poor people almost consider them to be heaven-born.

Why do they want more fees than common labourers? Why are their requirements greater? In what way are they more profitable to the country than the labourers? Are those who do good entitled to greater payment? And, if they have done anything for the country for the sake of money, how shall it be counted as good?

Those who know anything of the Hindu-Mahomedan quarrels know that they have been often due to the intervention of lawyers. Some families have been ruined through them; they have made brothers enemies. Principalities, having come under the lawyers' power, have become loaded with debt. Many have been robbed of their all. Such instances can be multiplied.

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But the greatest injury they have done to the country is that they have tightened the English grip. Do you think that it would be possible for the English to carry on their Government without law courts? It is wrong to consider that courts are established for the benefit of the people. Those who want to perpetuate their power do so through the courts. If people were to settle their own quarrels, a third party would not be able to exercise any authority over them. Truly, men were less unmanly when they settled their disputes either by fighting or by asking their relatives to decide for them. They became more unmanly and cowardly when they resorted to the courts of law. It was certainly a sign of savagery when they settled their disputes by fighting. Is it any the less so, if I ask a third party to decide between you and me? Surely, the decision of a third party is not always right. The parties alone know who is right. We, in our simplicity and ignorance, imagine that a stranger, by taking our money, gives us justice.

The chief thing, however, to be remembered is that without lawyers courts could not have been established or conducted and without the latter the English could not rule. Supposing that there were only English judges, English pleaders and English police, they could only rule over the English. The English could not do without Indian judges and Indian pleaders. How the pleaders were made in the first instance and how they were favoured you should understand well. Then you will have the same abhorrence for the profession, that I have. If pleaders were to abandon and consider it just as degrading as prostitution, English rule would break up in a day. They have been instrumental in having the charge laid against us that we love quarrels and courts as fish love water. What I have said with reference to the pleaders necessarily applies to the judges; they are first cousins; and the one gives strength to the other.

Swaraj in Ideas – Krishna Chandra Bhattacharya

Given below is the text of a lecture delivered by Krishna Chandra Bhattacharya (1875- 1949) in October 1931 under Sir Asutosh Memorial Lectures series, organized at Chandernagore by Charu Chandra Roy.

(As the lecture contains some ideas and views of the great philosopher likely to stimulate thinking in our own day, it was considered worthwhile to resuscitate it from his old papers and present it before our readers.) From Visvabharati Quarterly 20, 103-114 (1954)

Available at:

<https://multiversityindia.org/wp-content/uploads/2009/12/Swaraj-in-Ideas.pdf>

We speak today of Swaraj¹ or self-determination in politics. Man's domination over man is felt in the most tangible form in the political sphere. There is however a subtler domination exercised in the sphere of ideas by one culture on another, a domination all the more serious in the consequence, because it is not ordinarily felt. Political subjection primarily means restraint on the outer life of a people and although it tends gradually to sink into the inner life of the soul, the fact that one is conscious of it operates against the tendency. So long as one is conscious of a restraint, it is possible to resist it or to bear it as a necessary evil and to keep free in spirit. Slavery begins when one ceases to feel the evil and it deepens when the evil is accepted as a good.

Cultural subjection is ordinarily of an unconscious character and it implies slavery from the very start. When I speak of cultural subjection, I do not mean the assimilation of an alien culture. That assimilation need not be an evil; it may be positively necessary for healthy progress and in any case, it does not mean a lapse of freedom. There is cultural subjection only when one's traditional cast of ideas and sentiments is superseded without comparison or competition by a new cast representing an alien culture which possesses one like a ghost. This subjection is slavery of the spirit: when a person can shake himself free from it, he feels as though the scales fell from his eyes. He experiences a rebirth and that is what I call Swaraj in Ideas.

In these days when our political destinies are in the melting pot, one is tempted to express a doubt – till now vaguely felt but suppressed as the uncultured – how far generally we have assimilated our 'Western' education and how far it has operated as an obsession. Certainly, there has been some sort of assimilation – at least by some of us – but even of them it may be asked whether the alien culture has been accepted by them after a full and open-eyed struggle had been allowed to develop between it and their indigenous culture. It is admitted today – what was not sufficiently recognized in the earlier days of our Western education – that we had an indigenous culture of a high degree of development, the comparative value of which cannot be said to have been yet sufficiently appraised. Under the present system we generally receive Western culture in the first instance and then we sometimes try to peer into our ancient culture as a curiosity and with the attitude of foreign oriental scholars and yet we say that this ancient culture of ours is no curiosity.

Many of our educated men do not know and do not care to know much of this indigenous culture of ours, and when they seek to know, they do not feel, as they ought to feel, that they are discovering their own self.

There is no gainsaying the fact that this Western culture – which means an entire system of ideas and sentiments – has been simply imposed on us. I do not mean that it has been imposed on unwilling minds: we ourselves asked for this education, and we feel, and perhaps rightly, that it has been a blessing in certain ways. I mean only that it has not generally been assimilated by us in an open-eyed way with our old-world Indian mind. That Indian mind has simply lapsed in most cases for our educated men, and has subsided below the conscious level of culture. It operates still in the persisting routine of their family life and in some of their social and religious practices which have no longer, however, any vital meaning for them. It neither welcomes nor resists the ideas received through the new education. It dares not exert itself in the cultural sphere. There can be no vital assimilation, in such a case, of the imposed culture. And yet the new ideas are assimilated in a fashion. They are understood and imaginatively realized; they are fixed in language and in certain imposed institutions. A drill in this language and in those institutions induces certain habits of soulless thinking which appear like real thinking.

Springing as these ideas do from a rich and strong life – the life of the West – they induce in us a shadow mind that functions like a real mind except in the matter of genuine creativeness. One would have expected after a century of contact with the vivifying ideas of the West that there should be a vigorous output of Indian contribution in a distinctive Indian style to the culture and thought of the modern world, -- contribution specially to the humane subjects like history, philosophy or literature, a contributions such as may be enjoyed by our countrymen who still happen to retain their vernacular mind and which might be recognized by others as reflecting the distinctive soul of India. Barring the contribution of a few men of genius, -- and genius is largely independent of the times, -- there is not much evidence of such creative work done by our educated men.

I may refer also to more modest forms of creativeness, creativeness such as is evidenced in the daily business of our lives, e.g., in the formation of judgments about our real position in the world.

We speak of world movements and have a fair acquaintance with the principles and details of Western life and thought, but we do not always sufficiently realize where we actually stand today and how to apply our bookish principles to our situation in life. We either accept or repeat the judgments passed on us by Western culture, or we impotently resent them but have hardly any estimates of our own, wrung from an inward perception of the realities of our position.

In the field of politics, for example, we are only today beginning to realize that we have for long wrongly counted on principles that have application only to countries that are already free and already established and have not had sufficient perception of the dark think they call 'power' which is more real than any logic or political scholarship. In the field of social reform, we have never cared to understand the inwardness of our traditional social structure and to examine how far the sociological principles of the West are universal in their application. We have contented ourselves either with an unthinking conservatism or with an imaginary progressiveness merely imitative of the West.

Then again in the field of learning, how many of us have had distinctively Indian estimates of Western literature and thought? It is possible for a foreigner to appreciate the literature of a country, but it is only to be expected that his mind would react to it differently from the mind of a native of the country. A Frenchman, for example, would not I imagine, appreciate Shakespeare just as an Englishman would do. Our education has largely been imparted to us through English literature. The Indian mind is much further removed by tradition and history than the French or the German mind from the spirit of English literature, and yet no Indian, so far as I am aware, has passed judgments on English literature that reflect his Indian mentality. His judgments do not differ materially from the judgment of an English critic and that raises the suspicion whether it is his judgment at all, whether it is not merely the mechanical thinking of the galvanic mind induced in us through our Western education.

In philosophy hardly anything that has been written by a modern educated Indian show that he has achieved a synthesis of Indian thought with Western thought. There is nothing like a judgment on Western systems from the standpoint of Indian philosophy, and although some appraisal of Indian philosophy has been attempted from the Western standpoint, there appears to be no recognition yet that a criticism of the fundamental notions of either philosophy is necessary before there can be any useful comparative estimate. And yet it is in philosophy that one could look for an effective contact between Eastern and Western ideas. The most prominent contribution of ancient India to the culture of the world is in the field of philosophy and if the modern Indian mind is to philosophise at all to any purpose, it has to confront Eastern thought and Western thought with one another and attempt a synthesis or a reasoned rejection

of either, if that were possible. It is in philosophy, if anywhere, that the task of discovering the soul of India is imperative for the modern Indian: the task of achieving, if possible, the continuity of his old self with his present-day self, of realizing what is nowadays called the Mission of India, if it has any. Genius can unveil the soul of India in art, but it is through philosophy that we can methodically attempt to discover it.

Our education has not so far helped us to understand ourselves, to understand the significance of our past, the realities of our present and our mission of the future. It has tended to drive our real mind into the unconscious and to replace it by a shadow mind that has no roots in our past and in our real present. Our old mind cannot be wholly driven underground and its imposed substitute cannot function effectively and productively. The result is that there is a confusion between the two minds and a hopeless Babel in the world of ideas. Our thought is hybrid through and through and inevitably sterile. Slavery has entered into our very soul.

The hybridisation of our ideas is evidenced by the strange medley of vernacular and English in which our educated people speak to one another. For the expression of cultural ideas specially we find it very difficult to use the pure vernacular medium. If I were asked, for example, to conduct today's discourse here in Bengali, I would have to make a particularly strenuous effort. One notices a laudable tendency at the present day to make such an effort. It is not that it is always successful.

Perhaps that is only to be expected in a period of transition. If the language difficulty could be surmounted, it would mean a big step towards the achievement of what I have called Swaraj in Ideas.

The hybridisation of ideas brought about by our education and the impact of Western political, social and economic institutions of our daily life is one of the most distressing features of our present situation. It is unnatural and may be regarded with the same sentiment with which an old-world Hindu looks upon varna-samkara. It does not simply mean a confusion in the intellectual region. All vital ideas involve ideals. They embody an entire theory and an insight into life. Thought or reason may be universal, but ideas are carved out of it differently by different cultures according to their respective genius. No idea of one cultural language can exactly be translated in another cultural language. Every culture has its distinctive 'physiognomy' which is reflected in each vital idea and ideal presented by the culture.

A patchwork of ideas of different cultures offends against scholarly sense just as much as patchwork of ideals offends against the spiritual sense. There is room indeed for an adjustment and synthesis, within limits of different cultures and cultural ideals. Life means adaptation to varying times and to varying ideals. But we are not always clear about the method of this adaptation. As we have to live, we have to accept facts and adapt our secular life and secular ideas to the times. We have to alter ourselves here to suit the situation. In spiritual life, however, there is no demand for compromising our ideals in order to have a smooth sailing with the times.

Here, if possible and so far, as lies in our power, the times have to be adapted to our life and not our life to the times. But the world confronts us not only with aggressive interests but also with aggressive ideals. What response should our traditional ideals make to these imposed ideals? We may respect the new ideals without accepting them, we may attempt a synthesis without compromise or we may accept them as the fulfilment of our ideals. Different responses may be demanded with respect to different ideals, but in any case, a patchwork without adjustment or with a mechanical adjustment, if complacently accepted as a solution, is an evil, as no ideal here gets the entire devotion of the soul.

Where different ideals are accepted in the prayerful hope that a synthesis will come, the patchwork is not accepted as a solution and need not be an evil.

We talk – a little too glibly perhaps – of a conflict of the ideas and ideals of the West with our traditional ideas and ideals. In many cases it is confusion rather than a conflict and the real problem is to clear up the confusion and to make it develop in the first instance into a definite conflict. The danger is in the complacent acquiescence in the confusion. The realization of a conflict of ideals implies a deepening of the soul. There is conflict proper only when one is really serious about ideals, feels each ideal to be a matter of life and death. We sometimes sentimentally indulge in the thought of a conflict before we are really serious with either ideal.

We speak also a little too readily of the demand for a synthesis of the ideals of the East and the West. It is not necessary in every case that a synthesis should be attempted. The ideals of a community spring from its past history and from the soil: they have not necessarily a universal application, and they are not always self-luminous to other communities. There are ideals of the West which we may respect from a distance without recognizing any specific appeal to ourselves.

Then again there are ideals that have a partial appeal to us, because they have an affinity with our own ideals, though still with a foreign complexion. What they prescribe to us is to be worshipped in our own fashion with the ceremonials of our own religion. The form of practical life in which an ideal has to be translated, has to be decided by ourselves according to the genius of our own community. A synthesis of our ideal with western ideals is not demanded in every case. Where it is demanded, the foreign ideal is to be assimilated to our ideal and not the other way. There is no demand for the surrender of our individuality in any case: Svadharme nidhanam sreyah paradharmo bhayaavahah. There are those who take this emphasis on the individuality of a historical community to be overstrained. It appears to them to be the expression of national, communal or racial conceit and the excuse for a perverse obscurantism. They believe in abstract self-luminous ideals for all humanity, in a single universal religion and a single universal region.

There is, however, a case for universalism. The progress of a community and of humanity implies a gradual simplification and unification of ideals. This is just the rationalizing movement, the emergence of a common reason. We have to distinguish, however, between two forms of rationalism, two directions of this simplifying movement. In the one, reason is born after the travail of the spirit: rationalism is here the efflux of reverence, reverence for the traditional institutions through which customary sentiments are deepened into transparent ideals. In the other form of rationalism – what is commonly meant by the name, the simplification and generalization of ideals is effected by unregenerate understanding with its mechanical separation of the essential from the inessential. The essential is judged as such here not through reverence, not through deepened spiritual insight, but through the accidental likes and dislikes of the person judging. Customs and institutions bound up with age-long sentiments are brushed aside (in the name of reason) as meaningless and dead without any imaginative effort to realize them in an attitude of humility.

Decisions as to what is essential or inessential have indeed to be taken, for time tarries not and mere historical sentimentalism will not avail. In practical life, one may have to move before ideals have clarified; but it is well to recognize the need of humility and patience in the adjustment of the world of ideas. Order is evolved in the world of our ideas through infinite patience and humility. That is the right kind of

rationalism: it is only in the wrong and graceless form of rationalism that brusque decisions in the practical manner are taken in the name of reason, in the world of our ideals.

There is then a legitimate and obligatory form of rationalism. It is wrong not to accept an ideal that is felt to be a simpler and deeper expression of our own ideals simply because it hails from a foreign country. To reject it would be to insist on individuality for the sake of individuality and would be a form of national conceit and obscurantism. The acceptance of such an ideal is really no surrender of individuality: to serve this foreign god is to serve our own god: the foreign ideal is here in our own ideal. The guru or teacher has to be accepted when he is found to be a real guru, whatever the community from which he comes. But it is not every foreign ideal that is felt to be the soul of our own ideal. Some foreign ideals have affinity with our own, and are really alternative expressions of them in a foreign idiom that has not sacredness for us and there are others which have no real application to our conditions.

It is sometimes forgotten by the advocates of universalism that the so-called universalism of reason or of religion is only in the making and cannot be appealed to as an actually established code of universal principles. What is universal is only the spirit, the loyalty to our own ideals and the openness to other ideals, the determination not to reject them if they are found within our ideals and not to accept them till they are so found. The only way to appraise a new ideal is to view it through our actual ideal; the only way to find a new reverence is to deepen our old reverence.

Progress in the spiritual world is not achieved by a detached reason judging between an old god and a new god. The way to know facts is not the way to know values. So much for the objection, which is often raised in the name of universalism, to the stress I have laid on the individuality of Indian thought and spirit, on the conservatism of the distinctive values evolved through ages of continuous historical life of Indian society. I have thought it necessary to examine universalism in some detail at the risk of tiring the reader with abstract arguments because this appears to me to be our greatest danger. It is the inevitable result of our 'rootless' education and it stands more than anything else in the way of what I call Swaraj in Ideas.

The other danger of national conceit and the unthinking glorification of everything in our culture and depreciation of everything in other cultures appears to me, in our circumstances, to require less stressing. Not that it is less serious abstractly considered, but as a matter of fact our educated men suffer more from over-diffidence than from over-confidence, more from a 'rootless' universalism than from clinging particularism. We are more ready to accept others' judgments about us than to resent them. There is the old immemorial habit of regarding what we are taught as sacred learning, and the habit is not easily altered even though the learning imparted is the mere opinion of others – opinion about us, for example, of men who might be presumed to be ignorant of us and unsympathetic to us. There is so much, kind or unkind, written about us and preached to us by others that raises the legitimate question if they have a sufficient perception of the inwardness of our life. Prima facie it is very difficult for a foreigner to understand the mind of a people from whom he is widely removed by tradition and history unless he has intimately participated in their life for a long time. It is only natural that the people in question should receive his judgment about them with a certain amount of mental reserve. It might lead them to self-examination if the foreigner is not obviously ignorant and abusive; but docile acceptance is not certainly demanded in the first instance.

Now there is a good deal in the name of learning – history, philosophy or moral sermon – imparted to us through our education which is unconsciously or consciously of a tendentious or propagandist character.

That imply a valuation of ourselves, an appraisal of our past history and present position from a foreign standard. Our attitude towards them should be one of critical reserve, and not of docile acceptance. And yet the critical attitude would in many cases be condemned by our foreign teachers and by our own educated men as uncultured and almost absurdly ignorant as a hesitation to accept the truth of geometry. That is inevitable where the education of a people is undertaken by foreign rulers. There is bound in such a case to be some imposition of foreign valuations on the learner and a discouragement of the critical attitude.

The question of imposition does not arise in the case of certain branches of learning – mathematics and the natural sciences, for example, which have no nationality and imply no valuation. Whenever there is valuation, there is the suspicion of a particular point of view – national, communal or racial, of the person who judges the value. A valuation of our culture by a foreigner from the standpoint of his own culture should be regarded by us as meant not for our immediate acceptance but for our critical examination. It should be a fillip to which we should react.

I remember a remark of Sir John Woodroffe to this purpose. That our first impulse here should be one of self-defensive resentment is only natural and need not imply an uncultured self-conceit. Docile acceptance without criticism would mean slavery. The critical attitude is demanded pre-eminently in the field of valuations of ideals. Mere acceptance here makes not only for confusion but for moral evil. But barring the concepts of the sciences – even here there may be some doubt – all concepts and ideas have the distinctive character of the particular culture to which they belong. What should be our reaction to such cultural ideas? They have to be accepted, but as metaphors and symbols to be translated into our own indigenous concepts. The ideas embodied in a foreign language are properly understood only when we can express them in our own way. I plead for a genuine translation of foreign ideas into our native ideas before we accept or reject them. Let us everywhere resolutely think in our own concepts. It is only thus that we can think productively on our own account.

In politics our educated men have been compelled to realize by the logic of facts that they have absolutely no power for good, though they have much power for evil, unless they can carry the masses with them. In other fields there is not such realization of this circumstance. In the social sphere, for example, they still believe that they can impose certain reforms on the masses – by mere preaching from without, by passing resolutions in social conferences and by legislation. In the sphere of ideas, there is hardly yet any realization that we can think effectively only when we think in terms of the indigenous ideas that pulsate in the life and mind of the masses. We condemn the caste system of our country, but we ignore the fact that we who have received Western education constitute a caste more exclusive and intolerant than any of the traditional castes. Let us resolutely break down the barriers of this new caste, let us come back to the cultural stratum of the real Indian people and evolve a culture along with them suited to the time and to our native genius. That would be to achieve Swaraj in Ideas

A HISTORY
OF
INDIAN PHILOSOPHY

BY

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CHAPTER IX

MĪMĀMSĀ PHILOSOPHY¹

A Comparative Review.

THE Nyāya-Vaiśeṣika philosophy looked at experience from a purely common sense point of view and did not work with any such monistic tendency that the ultimate conceptions of our common sense experience should be considered as coming out of an original universal (e.g. prakṛti of the Sāṃkhya). Space, time, the four elements, soul, etc. convey the impression that they are substantive entities or substances. What is perceived of the material things as qualities such as colour, taste, etc. is regarded as so many entities which have distinct and separate existence but which manifest themselves in connection with the substances. So also karma or action is supposed to be a separate entity, and even the class notions are perceived as separate entities inhering in substances. Knowledge (*jñāna*) which illuminates all things is regarded only as a quality belonging to soul, just as there are other qualities of material objects. Causation is viewed merely as the collocation of conditions. The genesis of knowledge is also viewed as similar in nature to the production of any other physical event. Thus just as by the collocation of certain physical circumstances a jug and its qualities are produced, so by the combination and respective contacts of the soul, mind, sense, and the objects of sense, knowledge (*jñāna*) is produced. Soul with Nyāya is an inert unconscious entity in which knowledge, etc. inhere. The relation between a substance and its quality, action, class notion, etc. has also to be admitted as a separate entity, as without it the different entities being without any principle of relation would naturally fail to give us a philosophic construction.

Sāṃkhya had conceived of a principle which consisted of an infinite number of reals of three different types, which by their combination were conceived to be able to produce all substances, qualities, actions, etc. No difference was acknowledged to exist between substances, qualities and actions, and it was conceived

¹ On the meaning of the word Mīmāṃsā see Chapter IV.

that these were but so many aspects of a combination of the three types of reals in different proportions. The reals contained within them the rudiments of all developments of matter, knowledge, willing, feelings, etc. As combinations of reals changed incessantly and new phenomena of matter and mind were manifested, collocations did not bring about any new thing but brought about a phenomenon which was already there in its causes in another form. What we call knowledge or thought ordinarily, is with them merely a form of subtle illuminating matter-stuff. Sāṃkhya holds however that there is a transcendent entity as pure consciousness and that by some kind of transcendent reflection or contact this pure consciousness transforms the bare translucent thought-matter into conscious thought or experience of a person.

But this hypothesis of a pure self, as essentially distinct and separate from knowledge as ordinarily understood, can hardly be demonstrated in our common sense experience; and this has been pointed out by the Nyāya school in a very strong and emphatic manner. Even Sāṃkhya did not try to prove that the existence of its transcendent puruṣa could be demonstrated in experience, and it had to attempt to support its hypothesis of the existence of a transcendent self on the ground of the need of a permanent entity as a fixed object, to which the passing states of knowledge could cling, and on grounds of moral struggle towards virtue and emancipation. Sāṃkhya had first supposed knowledge to be merely a combination of changing reals, and then had as a matter of necessity to admit a fixed principle as puruṣa (pure transcendent consciousness). The self is thus here in some sense an object of inference to fill up the gap left by the inadequate analysis of consciousness (*buddhi*) as being non-intelligent and incessantly changing.

Nyāya fared no better, for it also had to demonstrate self on the ground that since knowledge existed it was a quality, and therefore must inhere in some substance. This hypothesis is again based upon another uncritical assumption that substances and attributes were entirely separate, and that it was the nature of the latter to inhere in the former, and also that knowledge was a quality requiring (similarly with other attributes) a substance in which to inhere. None of them could take their stand upon the self-conscious nature of our ordinary thought and draw their conclusions on the strength of the direct evidence of this self-

conscious thought. Of course it is true that Sāṃkhya had approached nearer to this view than Nyāya, but it had separated the content of knowledge and its essence so irrevocably that it threatened to break the integrity of thought in a manner quite unwarranted by common sense experience, which does not seem to reveal this dual element in thought. Anyhow the unification of the content of thought and its essence had to be made, and this could not be done except by what may be regarded as a make-shift—a transcendent illusion running on from beginningless time. These difficulties occurred because Sāṃkhya soared to a region which was not directly illuminated by the light of common sense experience. The Nyāya position is of course much worse as a metaphysical solution, for it did not indeed try to solve anything, but only gave us a schedule of inferential results which could not be tested by experience, and which were based ultimately on a one-sided and uncritical assumption. It is an uncritical common sense experience that substances are different from qualities and actions, and that the latter inhere in the former. To base the whole of metaphysics on such a tender and fragile experience is, to say the least, building on a weak foundation. It was necessary that the importance of the self-revealing thought must be brought to the forefront, its evidence should be collected and trusted, and an account of experience should be given according to its verdict. No construction of metaphysics can ever satisfy us which ignores the direct immediate convictions of self-conscious thought. It is a relief to find that a movement of philosophy in this direction is ushered in by the Mīmāṃsā system. The *Mīmāṃsā sūtras* were written by Jaimini and the commentary (*bhāṣya*) on it was written by Śabara. But the systematic elaboration of it was made by Kumārila, who preceded the great Śaṅkarācārya, and a disciple of Kumārila, Prabhākara.

The Mīmāṃsā Literature.

It is difficult to say how the sacrificial system of worship grew in India in the Brāhmaṇas. This system once set up gradually began to develop into a net-work of elaborate rituals, the details of which were probably taken note of by the priests. As some generations passed and the sacrifices spread over larger tracts of India and grew up into more and more elaborate details, the old rules and regulations began to be collected probably as tradition

had it, and this it seems gave rise to the smṛti literature. Discussions and doubts became more common about the many intricacies of the sacrificial rituals, and regular rational enquiries into them were begun in different circles by different scholars and priests. These represent the beginnings of Mīmāṃsā (lit. attempts at rational enquiry), and it is probable that there were different schools of this thought. That Jaimini's *Mīmāṃsā sūtras* (which are with us the foundations of Mīmāṃsā) are only a comprehensive and systematic compilation of one school is evident from the references he gives to the views in different matters of other preceding writers who dealt with the subject. These works are not available now, and we cannot say how much of what Jaimini has written is his original work and how much of it borrowed. But it may be said with some degree of confidence that it was deemed so masterly a work at least of one school that it has survived all other attempts that were made before him. Jaimini's *Mīmāṃsā sūtras* were probably written about 200 B.C. and are now the ground work of the Mīmāṃsā system. Commentaries were written on it by various persons such as Bharṭṛmitra (alluded to in *Nyāyaratnākara* verse 10 of *Śloka-vārttika*), Bhavadāsa (*Pratijñasūtra* 63), Hari and Upavaṛṣa (mentioned in *Śāstradīpikā*). It is probable that at least some of these preceded Śabara, the writer of the famous commentary known as the *Śabara-bhāṣya*. It is difficult to say anything about the time in which he flourished. Dr Gaṅgānātha Jhā would have him about 57 B.C. on the evidence of a current verse which speaks of King Vikramāditya as being the son of Śabaravāmin by a Kṣatriya wife. This bhāṣya of Śabara is the basis of the later Mīmāṃsā works. It was commented upon by an unknown person alluded to as Vārttikakāra by Prabhākara and merely referred to as "yathāhuḥ" (as they say) by Kumārila. Dr Gaṅgānātha Jhā says that Prabhākara's commentary *Bṛhatī* on the *Śabara-bhāṣya* was based upon the work of this Vārttikakāra. This *Bṛhatī* of Prabhākara had another commentary on it—*Ṛjuvimālā* by Śālikanātha Miśra, who also wrote a compendium on the Prabhākara interpretation of Mīmāṃsā called *Prakaraṇapañcikā*. Tradition says that Prabhākara (often referred to as Nibandhakāra), whose views are often alluded to as "gurumata," was a pupil of Kumārila. Kumārila Bhaṭṭa, who is traditionally believed to be the senior contemporary of Śaṅkara (788 A.D.), wrote his celebrated independent

exposition of Śabara's bhāṣya in three parts known as *Śloka-vārttika* (dealing only with the philosophical portion of Śabara's work as contained in the first chapter of the first book known as Tarkapāda), *Tantravārttika* (dealing with the remaining three chapters of the first book, the second and the third book) and *Tuṭṭikā* (containing brief notes on the remaining nine books)¹. Kumārila is referred to by his later followers as Bhaṭṭa, Bhaṭṭapāda, and Vārttikakāra. The next great Mīmāṃsā scholar and follower of Kumārila was Maṇḍana Miśra, the author of *Vidhiviveka*, *Mīmāṃsānukramaṇī* and the commentator of *Tantravārttika*, who became later on converted by Śaṅkara to Vedantism. Pārthasārathi Miśra (about ninth century A.D.) wrote his *Śāstradīpikā*, *Tantrarātna*, and *Nyāyaratnamālā* following the footprints of Kumārila. Amongst the numerous other followers of Kumārila, the names of Sucarita Miśra the author of *Kāśikā* and Someśvara the author of *Nyāyasudhā* deserve special notice. Rāmakṛṣṇa Bhaṭṭa wrote an excellent commentary on the *Tarkapāda* of *Śāstradīpikā* called the *Yuktisnehapūraṇī-siddhānta-candrikā* and Somanātha wrote his *Mayūkhamālikā* on the remaining chapters of *Śāstradīpikā*. Other important current Mīmāṃsā works which deserve notice are such as *Nyāyamālāvistara* of Mādhava, *Subodhinī*, *Mīmāṃsābālaprakāśa* of Śaṅkara Bhaṭṭa, *Nyāyakanikā* of Vācaspati Miśra, *Mīmāṃsāparibhāṣa* by Kṛṣṇayajvan, *Mīmāṃsānyāyaprakāśa* by Anantadeva, Gāgā Bhaṭṭa's *Bhaṭṭacintāmaṇi*, etc. Most of the books mentioned here have been consulted in the writing of this chapter. The importance of the Mīmāṃsā literature for a Hindu is indeed great. For not only are all Vedic duties to be performed according to its maxims, but even the smṛti literatures which regulate the daily duties, ceremonials and rituals of Hindus even at the present day are all guided and explained by them. The legal side of the smṛtis consisting of inheritance, proprietary rights, adoption, etc. which guide Hindu civil life even under the British administration is explained according to the Mīmāṃsā maxims. Its relations to the Vedānta philosophy will be briefly indicated in the next chapter. Its relations with Nyāya-Vaiśeṣika have also been pointed out in various places of this chapter. The views of the two schools of Mīmāṃsā as propounded by Prabhākara and Kumārila on all the important topics have

¹ Mahāmahopādhyāya Haraprasāda Śāstri says, in his introduction to *Six Buddhist Nyāya Tracts*, that "Kumārila preceded Śaṅkara by two generations."

also been pointed out. Prabhākara's views however could not win many followers in later times, but while living it is said that he was regarded by Kumārila as a very strong rival¹. Hardly any new contribution has been made to the Mīmāṃsā philosophy after Kumārila and Prabhākara. The *Mīmāṃsā sūtras* deal mostly with the principles of the interpretation of the Vedic texts in connection with sacrifices, and very little of philosophy can be gleaned out of them. Śabara's contributions are also slight and vague. Vārttikakāra's views also can only be gathered from the references to them by Kumārila and Prabhākara. What we know of Mīmāṃsā philosophy consists of their views and theirs alone. It did not develop any further after them. Works written on the subject in later times were but of a purely expository nature. I do not know of any work on Mīmāṃsā written in English except the excellent one by Dr Gaṅgānātha Jhā on the Prabhākara Mīmāṃsā to which I have frequently referred.

The Parataḥ-prāmāṇya doctrine of Nyāya and the Svataḥ-prāmāṇya doctrine of Mīmāṃsā.

The doctrine of the self-validity of knowledge (*svataḥ-prāmāṇya*) forms the cornerstone on which the whole structure of the Mīmāṃsā philosophy is based. Validity means the certitude of truth. The Mīmāṃsā philosophy asserts that all knowledge excepting the action of remembering (*smṛti*) or memory is valid in itself, for it itself certifies its own truth, and neither depends on any other extraneous condition nor on any other knowledge for its validity. But Nyāya holds that this self-validity of knowledge is a question which requires an explanation. It is true that under certain conditions a piece of knowledge is produced in us, but what is meant by saying that this knowledge is a proof of its own truth? When we perceive anything as blue, it is the direct result of visual contact, and this visual contact cannot certify that the knowledge generated is true, as the visual contact is not in any touch with the knowledge

¹ There is a story that Kumārila, not being able to convert Prabhākara, his own pupil, to his views, attempted a trick and pretended that he was dead. His disciples then asked Prabhākara whether his burial rites should be performed according to Kumārila's views or Prabhākara's. Prabhākara said that his own views were erroneous, but these were held by him only to rouse up Kumārila's pointed attacks, whereas Kumārila's views were the right ones. Kumārila then rose up and said that Prabhākara was defeated, but the latter said he was not defeated so long as he was alive. But this has of course no historic value.

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it has conditioned. Moreover, knowledge is a mental affair and how can it certify the objective truth of its representation? In other words, how can my perception “a blue thing” guarantee that what is subjectively perceived as blue is really so objectively as well? After my perception of anything as blue we do not have any such perception that what I have perceived as blue is really so. So this so-called self-validity of knowledge cannot be testified or justified by any perception. We can only be certain that knowledge has been produced by the perceptual act, but there is nothing in this knowledge or its revelation of its object from which we can infer that the perception is also objectively valid or true. If the production of any knowledge should certify its validity then there would be no invalidity, no illusory knowledge, and following our perception of even a mirage we should never come to grief. But we are disappointed often in our perceptions, and this proves that when we practically follow the directions of our perception we are undecided as to its validity, which can only be ascertained by the correspondence of the perception with what we find later on in practical experience. Again, every piece of knowledge is the result of certain causal collocations, and as such depends upon them for its production, and hence cannot be said to rise without depending on anything else. It is meaningless to speak of the validity of knowledge, for validity always refers to objective realization of our desires and attempts proceeding in accordance with our knowledge. People only declare their knowledge invalid when proceeding practically in accordance with it they are disappointed. The perception of a mirage is called invalid when proceeding in accordance with our perception we do not find anything that can serve the purposes of water (e.g. drinking, bathing). The validity or truth of knowledge is thus the attainment by practical experience of the object and the fulfilment of all our purposes from it (*arthakriyājñāna* or *phalajñāna*) just as perception or knowledge represented them to the perceiver. There is thus no self-validity of knowledge (*svataḥ-prāmānya*), but validity is ascertained by *saṃvāda* or agreement with the objective facts of experience¹.

It is easy to see that this Nyāya objection is based on the supposition that knowledge is generated by certain objective collocations of conditions, and that knowledge so produced can

¹ See *Nyāyamañjarī*, pp. 160–173.

only be tested by its agreement with objective facts. But this theory of knowledge is merely an hypothesis; for it can never be experienced that knowledge is the product of any collocations; we have a perception and immediately we become aware of certain objective things; knowledge reveals to us the facts of the objective world and this is experienced by us always. But that the objective world generates knowledge in us is only an hypothesis which can hardly be demonstrated by experience. It is the supreme prerogative of knowledge that it reveals all other things. It is not a phenomenon like any other phenomenon of the world. When we say that knowledge has been produced in us by the external collocations, we just take a perverse point of view which is unwarranted by experience; knowledge only photographs the objective phenomena for us; but there is nothing to show that knowledge has been generated by these phenomena. This is only a theory which applies the ordinary conceptions of causation to knowledge and this is evidently unwarrantable. Knowledge is not like any other phenomena for it stands above them and interprets or illumines them all. There can be no validity in things, for truth applies to knowledge and knowledge alone. What we call agreement with facts by practical experience is but the agreement of previous knowledge with later knowledge; for objective facts never come to us directly, they are always taken on the evidence of knowledge, and they have no other certainty than what is bestowed on them by knowledge. There arise indeed different kinds of knowledge revealing different things, but these latter do not on that account generate the former, for this is never experienced; we are never aware of any objective fact before it is revealed by knowledge. Why knowledge makes different kinds of revelations is indeed more than we can say, for experience only shows that knowledge reveals objective facts and not why it does so. The rise of knowledge is never perceived by us to be dependent on any objective fact, for all objective facts are dependent on it for its revelation or illumination. This is what is said to be the self-validity (*svataḥ-prāmāṇya*) of knowledge in its production (*utpatti*). As soon as knowledge is produced, objects are revealed to us; there is no intermediate link between the rise of knowledge and the revelation of objects on which knowledge depends for producing its action of revealing or illuminating them. Thus knowledge is not only independent

of anything else in its own rise but in its own action as well (*svakāryakaraṇe svataḥ prāmāṇyam jñānasya*). Whenever there is any knowledge it carries with it the impression that it is certain and valid, and we are naturally thus prompted to work (*pravṛtti*) according to its direction. There is no indecision in our mind at the time of the rise of knowledge as to the correctness of knowledge; but just as knowledge rises, it carries with it the certainty of its revelation, presence, or action. But in cases of illusory perception other perceptions or cognitions dawn which carry with them the notion that our original knowledge was not valid. Thus though the invalidity of any knowledge may appear to us by later experience, and in accordance with which we reject our former knowledge, yet when the knowledge first revealed itself to us it carried with it the conviction of certainty which goaded us on to work according to its indication. Whenever a man works according to his knowledge, he does so with the conviction that his knowledge is valid, and not in a passive or uncertain temper of mind. This is what Mīmāṃsā means when it says that the validity of knowledge appears immediately with its rise, though its invalidity may be derived from later experience or some other data (*jñānasya prāmāṇyam svataḥ aprāmāṇyam paratali*). Knowledge attained is proved invalid when later on a contradictory experience (*bādhakajñāna*) comes in or when our organs etc. are known to be faulty and defective (*karanadoṣajñāna*). It is from these that knowledge appearing as valid is invalidated; when we take all necessary care to look for these and yet find them not, we must think that they do not exist. Thus the validity of knowledge certified at the moment of its production need not be doubted unnecessarily when even after enquiry we do not find any defect in sense or any contradiction in later experience. All knowledge except memory is thus regarded as valid independently by itself as a general rule, unless it is invalidated later on. Memory is excluded because the phenomenon of memory depends upon a previous experience, and its existing latent impressions, and cannot thus be regarded as arising independently by itself.

The place of sense organs in perception.

We have just said that knowledge arises by itself and that it could not have been generated by sense-contact. If this be so, the diversity of perceptions is however left unexplained. But in

face of the Nyāya philosophy explaining all perceptions on the ground of diverse sense-contact the Mīmāṃsā probably could not afford to remain silent on such an important point. It therefore accepted the Nyāya view of sense-contact as a condition of knowledge with slight modifications, and yet held their doctrine of svataḥ-prāmānya. It does not appear to have been conscious of a conflict between these two different principles of the production of knowledge. Evidently the point of view from which it looked at it was that the fact that there were the senses and contacts of them with the objects, or such special capacities in them by virtue of which the things could be perceived, was with us a matter of inference. Their actions in producing the knowledge are never experienced at the time of the rise of knowledge, but when the knowledge arises we argue that such and such senses must have acted. The only case where knowledge is found to be dependent on anything else seems to be the case where one knowledge is found to depend on a previous experience or knowledge as in the case of memory. In other cases the dependence of the rise of knowledge on anything else cannot be felt, for the physical collocations conditioning knowledge are not felt to be operating before the rise of knowledge, and these are only inferred later on in accordance with the nature and characteristic of knowledge. We always have our first start in knowledge which is directly experienced from which we may proceed later on to the operation and nature of objective facts in relation to it. Thus it is that though contact of the senses with the objects may later on be imagined to be the conditioning factor, yet the rise of knowledge as well as our notion of its validity strikes us as original, underived, immediate, and first-hand.

Prabhākara gives us a sketch as to how the existence of the senses may be inferred. Thus our cognitions of objects are phenomena which are not all the same, and do not happen always in the same manner, for these vary differently at different moments; the cognitions of course take place in the soul which may thus be regarded as the material cause (*samavāyikāraṇa*); but there must be some such movements or other specific associations (*asamavāyikāraṇa*) which render the production of this or that specific cognition possible. The immaterial causes subsist either in the cause of the material cause (e.g. in the case of the colouring of a white piece of cloth, the colour of the yarns which

is the cause of the colour in the cloth subsists in the yarns which form the material cause of the cloth) or in the material cause itself (e.g. in the case of a new form of smell being produced in a substance by fire-contact, this contact, which is the immaterial cause of the smell, subsists in that substance itself which is put in the fire and in which the smell is produced). The soul is eternal and has no other cause, and it has to be assumed that the immaterial cause required for the rise of a cognition must inhere in the soul, and hence must be a quality. Then again accepting the Nyāya conclusions we know that the rise of qualities in an eternal thing can only take place by contact with some other substances. Now cognition being a quality which the soul acquires would naturally require the contact of such substances. Since there is nothing to show that such substances inhere in other substances they are also to be taken as eternal. There are three eternal substances, time, space, and atoms. But time and space being all-pervasive the soul is always in contact with them. Contact with these therefore cannot explain the occasional rise of different cognitions. This contact must then be of some kind of atom which resides in the body ensouled by the cognizing soul. This atom may be called *manas* (mind). This *manas* alone by itself brings about cognitions, pleasure, pain, desire, aversion, effort, etc. The *manas* however by itself is found to be devoid of any such qualities as colour, smell, etc., and as such cannot lead the soul to experience or cognize these qualities; hence it stands in need of such other organs as may be characterized by these qualities; for the cognition of colour, the mind will need the aid of an organ of which colour is the characteristic quality; for the cognition of smell, an organ having the odorous characteristic and so on with touch, taste, vision. Now we know that the organ which has colour for its distinctive feature must be one composed of *tejas* or light, as colour is a feature of light, and this proves the existence of the organ, the eye—for the cognition of colour; in a similar manner the existence of the earthly organ (organ of smell), the aqueous organ (organ of taste), the *ākāśic* organ (organ of sound) and the airy organ (organ of touch) may be demonstrated. But without *manas* none of these organs is found to be effective. Four necessary contacts have to be admitted, (1) of the sense organs with the object, (2) of the sense organs with the qualities of the object, (3) of the *manas*

with the sense organs, and (4) of the manas with the soul. The objects of perception are of three kinds, (1) substances, (2) qualities, (3) jāti or class. The material substances are tangible objects of earth, fire, water, air in large dimensions (for in their fine atomic states they cannot be perceived). The qualities are colour, taste, smell, touch, number, dimension, separateness, conjunction, disjunction, priority, posteriority, pleasure, pain, desire, aversion, and effort¹.

It may not be out of place here to mention in conclusion that Kumārila Bhaṭṭa was rather undecided as to the nature of the senses or of their contact with the objects. Thus he says that the senses may be conceived either as certain functions or activities, or as entities having the capacity of revealing things without coming into actual contact with them, or that they might be entities which actually come in contact with their objects², and he prefers this last view as being more satisfactory.

Indeterminate and determinate perception.

There are two kinds of perception in two stages, the first stage is called *nirvikalpa* (indeterminate) and the second *savikalpa* (determinate). The *nirvikalpa* perception of a thing is its perception at the first moment of the association of the senses and their objects. Thus Kumārila says that the cognition that appears first is a mere *ālocana* or simple perception, called non-determinate pertaining to the object itself pure and simple, and resembling the cognitions that the new-born infant has of things around himself. In this cognition neither the genus nor the differentia is presented to consciousness; all that is present there is the individual wherein these two subsist. This view of indeterminate perception may seem in some sense to resemble the Buddhist view which defines it as being merely the specific individuality (*svalakṣaṇa*) and regards it as being the only valid element in perception, whereas all the rest are conceived as being imaginary

¹ See *Prakaranapañcikā*, pp. 52 etc., and Dr Gaṅgānātha Jhā's *Prabhākaramīmāṃsā*, pp. 35 etc.

² *Ślokaṅgīkā*, see *Pratyakṣasūtra*, 40 etc., and *Nyāyaratnākara* on it. It may be noted in this connection that Sāṃkhya-Yoga did not think like Nyāya that the senses actually went out to meet the objects (*prāpyakāritva*) but held that there was a special kind of functioning (*vṛtti*) by virtue of which the senses could grasp even such distant objects as the sun and the stars. It is the functioning of the sense that reached the objects. The nature of this *vṛtti* is not further clearly explained and Pārthasārathi objects to it as being almost a different category (*tattvāntara*).

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impositions. But both Kumārila and Prabhākara think that both the genus and the differentia are perceived in the indeterminate stage, but these do not manifest themselves to us only because we do not remember the other things in relation to which, or in contrast to which, the percept has to show its character as genus or differentia; a thing can be cognized as an "individual" only in comparison with other things from which it differs in certain well-defined characters; and it can be apprehended as belonging to a class only when it is found to possess certain characteristic features in common with some other things; so we see that as other things are not presented to consciousness through memory, the percept at the indeterminate stage cannot be fully apprehended as an individual belonging to a class, though the data constituting the characteristic of the thing as a genus and its differentia are perceived at the indeterminate stage¹. So long as other things are not remembered these data cannot manifest themselves properly, and hence the perception of the thing remains indeterminate at the first stage of perception. At the second stage the self by its past impressions brings the present perception in relation to past ones and realizes its character as involving universal and particular. It is thus apparent that the difference between the indeterminate and the determinate perception is this, that in the latter case memory of other things creeps in, but this association of memory in the determinate perception refers to those other objects of memory and not to the percept. It is also held that though the determinate perception is based upon the indeterminate one, yet since the former also apprehends certain such factors as did not enter into the indeterminate perception, it is to be regarded as a valid cognition. Kumārila also agrees with Prabhākara in holding both the indeterminate and the determinate perception valid².

**Some Ontological Problems connected with the
Doctrine of Perception.**

The perception of the class (*jāti*) of a percept in relation to other things may thus be regarded in the main as a difference between determinate and indeterminate perceptions. The problems of *jāti* and *avayavāvayavī* (part and whole notion) were

¹ Compare this with the Vaiśeṣika view as interpreted by Śrīdhara.

² See *Prakaraṇapañcikā* and *Śāstradīpikā*.

the subjects of hot dispute in Indian philosophy. Before entering into discussion about jāti, Prabhākara first introduced the problem of *avayava* (part) and *avayavī* (whole). He argues as an exponent of svataḥ-prāmāṇyavāda that the proof of the true existence of anything must ultimately rest on our own consciousness, and what is distinctly recognized in consciousness must be admitted to have its existence established. Following this canon Prabhākara says that gross objects as a whole exist, since they are so perceived. The subtle atoms are the material cause and their connection (*samyoga*) is the immaterial cause (*asamavāyikāraṇa*), and it is the latter which renders the whole altogether different from the parts of which it is composed ; and it is not necessary that all the parts should be perceived before the whole is perceived. Kumārila holds that it is due to the point of view from which we look at a thing that we call it a separate whole or only a conglomeration of parts. In reality they are identical, but when we lay stress on the notion of parts, the thing appears to be a conglomeration of them, and when we look at it from the point of view of the unity appearing as a whole, the thing appears to be a whole of which there are parts (see *Ślokavārttika, Vanavāda*)¹.

Jāti, though incorporating the idea of having many units within one, is different from the conception of whole in this, that it resides in its entirety in each individual constituting that jāti (*vyāsajya-*

¹ According to Sāṃkhya-Yoga a thing is regarded as the unity of the universal and the particular (*sāmānyaviśeṣasamudāyo dravyam, Vyāsbhāṣya, III. 44*); for there is no other separate entity which is different from them both in which they would inhere as Nyāya holds. Conglomerations can be of two kinds, namely those in which the parts exist at a distance from one another (e.g. a forest), and those in which they exist close together (*nirantarā hi tadavayavāḥ*), and it is this latter combination (*ayutasiddhāvayava*) which is called a dravya, but here also there is no separate whole distinct from the parts ; it is the parts connected in a particular way and having no perceptible space between them that is called a thing or a whole. The Buddhists as Paṇḍitāśoka has shown did not believe in any whole (*avayavī*) ; it is the atoms which in connection with one another appeared as a whole occupying space (*paramāṇava eva hi pararūpadeśaparihāreṇoppannāḥ parasparasahitā avabhāsamānā deśavitānavanto bhavanti*). The whole is thus a mere appearance and not a reality (see *Avayavinirūkarāṇa, Six Buddhist Nyāya Tracts*). Nyāya however held that the atoms were partless (*niravayava*) and hence it would be wrong to say that when we see an object we see the atoms. The existence of a whole as different from the parts which belong to it is directly experienced and there is no valid reason against it :

“*aduṣṭakaraṇodbhūta-manāvīrbhūtabādhakam*

asandigdāñca vijñānam katham mithyeti kathyate.”

Nyāyamañjarī, pp. 550 ff.

vrtti), but the establishment of the existence of wholes refutes the argument that *jāti* should be denied, because it involves the conception of a whole (class) consisting of many parts (individuals). The class character or *jāti* exists because it is distinctly perceived by us in the individuals included in any particular class. It is eternal in the sense that it continues to exist in other individuals, even when one of the individuals ceases to exist. When a new individual of that class (e.g. cow class) comes into being, a new relation of inherence is generated by which the individual is brought into relation with the class-character existing in other individuals; for inherence (*samavāya*) according to Prabhākara is not an eternal entity but an entity which is both produced and not produced according as the thing in which it exists is non-eternal or eternal, and it is not regarded as one as Nyāya holds, but as many, according as there is the infinite number of things in which it exists. When any individual is destroyed, the class-character does not go elsewhere, nor subsist in that individual, nor is itself destroyed, but it is only the inherence of class-character with that individual that ceases to exist. With the destruction of an individual or its production it is a new relation of inherence that is destroyed or produced. But the class-character or *jāti* has no separate existence apart from the individuals as Nyāya supposes. Apprehension of *jāti* is essentially the apprehension of the class-character of a thing in relation to other similar things of that class by the perception of the common characteristics. But Prabhākara would not admit the existence of a highest genus *sattā* (being) as acknowledged by Nyāya. He argues that the existence of class-character is apprehended because we find that the individuals of a class possess some common characteristic possessed by all the heterogeneous and disparate things of the world as can give rise to the conception of a separate *jāti* as *sattā*, as demanded by the *naiyāyikas*. That all things are said to be *sat* (existing) is more or less a word or a name without the corresponding apprehension of a common quality. Our experience always gives us concrete existing individuals, but we can never experience such a highest genus as pure existence or being, as it has no concrete form which may be perceived. When we speak of a thing as *sat*, we do not mean that it is possessed of any such class-characters as *sattā* (being); what we mean is simply that the individual has its specific existence or *svarū-*

pasattā. Thus the Nyāya view of perception as taking only the thing in its pure being apart from qualities, etc. (*sanmātra-viṣayam pratyakṣam*) is made untenable by Prabhākara, as according to him the thing is perceived direct with all its qualities. According to Kumārila however *jāti* is not something different from the individuals comprehended by it and it is directly perceived. Kumārila's view of *jāti* is thus similar to that held by Sāṃkhya, namely that when we look at an individual from one point of view (*jāti* as identical with the individual), it is the individual that lays its stress upon our consciousness and the notion of *jāti* becomes latent, but when we look at it from another point of view (the individual as identical with *jāti*) it is the *jāti* which presents itself to consciousness, and the aspect as individual becomes latent. The apprehension as *jāti* or as individual is thus only a matter of different points of view or angles of vision from which we look at a thing. Quite in harmony with the conception of *jāti*, Kumārila holds that the relation of inherence is not anything which is distinct from the things themselves in which it is supposed to exist, but only a particular aspect or phase of the things themselves (*Ślokavārttika, Pratyakṣasūtra, 149, 150, abhedāt samavāyo'stu svarūpam dharmadharmiṇoḥ*), Kumārila agrees with Prabhākara that *jāti* is perceived by the senses (*tatraikabuddhinirgrāhyā jātirindriyagocarā*).

It is not out of place to mention that on the evidence of Prabhākara we find that the category of *viśeṣa* admitted by the Kaṇāda school is not accepted as a separate category by the Mīmāṃsā on the ground that the differentiation of eternal things from one another, for which the category of *viśeṣa* is admitted, may very well be effected on the basis of the ordinary qualities of these things. The quality of *prthaktva* or specific differences in atoms, as inferred by the difference of things they constitute, can very well serve the purposes of *viśeṣa*.

The nature of knowledge.

All knowledge involves the knower, the known object, and the knowledge at the same identical moment. All knowledge whether perceptual, inferential or of any other kind must necessarily reveal the self or the knower directly. Thus as in all knowledge the self is directly and immediately perceived, all knowledge may be regarded as perception from the point of view of self. The division

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of the *pramāṇas* as *pratyakṣa* (perception), *anumāna* (inference), etc. is from the point of view of the objects of knowledge with reference to the varying modes in which they are brought within the purview of knowledge. The self itself however has no illumining or revealing powers, for then even in deep sleep we could have knowledge, for the self is present even then, as is proved by the remembrance of dreams. It is knowledge (*saṃvid*) that reveals by its very appearance both the self, the knower, and the objects. It is generally argued against the self-illuminative character of knowledge that all cognitions are of the forms of the objects they are said to reveal; and if they have the same form we may rather say that they have the same identical reality too. The *Mīmāṃsā* answer to these objections is this, that if the cognition and the cognized were not different from one another, they could not have been felt as such, and we could not have felt that it is by cognition that we apprehend the cognized objects. The cognition (*saṃvedana*) of a person simply means that such a special kind of quality (*dharma*) has been manifested in the self by virtue of which his active operation with reference to a certain object is favoured or determined, and the object of cognition is that with reference to which the active operation of the self has been induced. Cognitions are not indeed absolutely formless, for they have the cognitional character by which things are illumined and manifested. Cognition has no other character than this, that it illumines and reveals objects. The things only are believed to have forms and only such forms as knowledge reveal to us about them. Even the dream cognition is with reference to objects that were perceived previously, and of which the impressions were left in the mind and were aroused by the unseen agency (*adr̥ṣṭa*). Dream cognition is thus only a kind of remembrance of that which was previously experienced. Only such of the impressions of cognized objects are roused in dreams as can beget just that amount of pleasurable or painful experience, in accordance with the operation of *adr̥ṣṭa*, as the person deserves to have in accordance with his previous merit or demerit.

The *Prabhākara Mīmāṃsā*, in refuting the arguments of those who hold that our cognitions of objects are themselves cognized by some other cognition, says that this is not possible, since we do not experience any such double cognition and also because it would lead us to a *regressus ad infinitum*, for if a second cognition

is necessary to interpret the first, then that would require a third and so on. If a cognition could be the object of another cognition, then it could not be self-valid. The cognition is not of course unknown to us, but that is of course because it is self-cognized, and reveals itself to us the moment it reveals its objects. From the illumination of objects also we can infer the presence of this self-cognizing knowledge. But it is only its presence that is inferred and not the cognition itself, for inference can only indicate the presence of an object and not in the form in which it can be apprehended by perception (*pratyakṣa*). Prabhākara draws a subtle distinction between perceptuality (*saṃvedyatva*) and being object of knowledge (*prameyatva*). A thing can only be apprehended (*saṃvedyate*) by perception, whereas inference can only indicate the presence of an object without apprehending the object itself. Our cognition cannot be apprehended by any other cognition. Inference can only indicate the presence or existence of knowledge but cannot apprehend the cognition itself¹.

Kumārila also agrees with Prabhākara in holding that perception is never the object of another perception and that it ends in the direct apprehensibility of the object of perception. But he says that every perception involves a relationship between the perceiver and the perceived, wherein the perceiver behaves as the agent whose activity in grasping the object is known as cognition. This is indeed different from the Prabhākara view, that in one manifestation of knowledge the knower, the known, and the knowledge, are simultaneously illuminated (the doctrine of *tripuṭīpratyakṣa*)².

The Psychology of Illusion.

The question however arises that if all apprehensions are valid, how are we to account for illusory perceptions which cannot be regarded as valid? The problem of illusory perception and its psychology is a very favourite topic of discussion in Indian philosophy. Omitting the theory of illusion of the Jains called *satkhyāti* which we have described before, and of the Vedāntists, which we shall describe in the next chapter, there are three different theories of illusion, viz. (1) *ātmakhyāti*, (2) *viparītakhyāti* or *anyathākhyāti*, and (3) *akhyāti* of the Mīmāṃsā school. The

¹ See *Prabhākaramīmāṃsā*, by Dr Gaṅgānātha Jhā.

² *loc. cit.* pp. 26–28.

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viparītākhyāti or anyathākhyāti theory of illusion is accepted by the Nyāya, Vaiśeṣika and the Yoga, the ākhyāti theory by Mīmāṃsā and Sāṃkhya and the ātmakhyāti by the Buddhists.

The commonest example of illusion in Indian philosophy is the illusory appearance of a piece of broken conch-shell as a piece of silver. That such an illusion occurs is a fact which is experienced by all and agreed to by all. The differences of view are with regard to its cause or its psychology. The idealistic Buddhists who deny the existence of the external world and think that there are only the forms of knowledge, generated by the accumulated karma of past lives, hold that just as in the case of a correct perception, so also in the case of illusory perception it is the flow of knowledge which must be held responsible. The flow of knowledge on account of the peculiarities of its own collocating conditions generates sometimes what we call right perception and sometimes wrong perception or illusion. On this view nothing depends upon the so-called external data. For they do not exist, and even if they did exist, why should the same data sometimes bring about the right perception and sometimes the illusion? The flow of knowledge creates both the percept and the perceiver and unites them. This is true both in the case of correct perception and illusory perception. Nyāya objects to the above view, and says that if knowledge irrespective of any external condition imposes upon itself the knower and the illusory percept, then the perception ought to be of the form "I am silver" and not "this is silver." Moreover this theory stands refuted, as it is based upon a false hypothesis that it is the inner knowledge which appears as coming from outside and that the external as such does not exist.

The viparītākhyāti or the anyathākhyāti theory supposes that the illusion takes place because on account of malobservation we do not note the peculiar traits of the conch-shell as distinguished from the silver, and at the same time by the glow etc. of the conch-shell unconsciously the silver which I had seen elsewhere is remembered and the object before me is taken as silver. In illusion the object before us with which our eye is associated is not conch-shell, for the traits peculiar to it not being grasped, it is merely an object. The silver is not utterly non-existent, for it exists elsewhere and it is the memory of it as experienced before that creates confusion and leads us to think of the conch-shell as silver. This school agrees with the ākhyāti school that the fact

that I remember silver is not taken note of at the time of illusion. But it holds that the mere non-distinction is not enough to account for the phenomenon of illusion, for there is a definite positive aspect associated with it, viz. the false identification of silver (seen elsewhere) with the conch-shell before us.

The akhyāti theory of Mīmāṃsā holds that since the special peculiarities of the conch-shell are not noticed, it is erroneous to say that we identify or cognize positively the conch-shell as the silver (perceived elsewhere), for the conch-shell is not cognized at all. What happens here is simply this, that only the features common to conch-shell and silver being noticed, the perceiver fails to apprehend the difference between these two things, and this gives rise to the cognition of silver. Owing to a certain weakness of the mind the remembrance of silver roused by the common features of the conch-shell and silver is not apprehended, and the fact that it is only a memory of silver seen in some past time that has appeared before him is not perceived; and it is as a result of this non-apprehension of the difference between the silver remembered and the present conch-shell that the illusion takes place. Thus, though the illusory perception partakes of a dual character of remembrance and apprehension, and as such is different from the ordinary valid perception (which is wholly a matter of direct apprehension) of real silver before us, yet as the difference between the remembrance of silver and the sight of the present object is not apprehended, the illusory perception appears at the moment of its production to be as valid as a real valid perception. Both give rise to the same kind of activity on the part of the agent, for in illusory perception the perceiver would be as eager to stoop and pick up the thing as in the case of a real perception. Kumārila agrees with this view as expounded by Prabhākara, and further says that the illusory judgment is as valid to the cognizer at the time that he has the cognition as any real judgment could be. If subsequent experience rejects it, that does not matter, for it is admitted in Mīmāṃsā that when later experience finds out the defects of any perception it can invalidate the original perception which was self-valid at the time of its production¹. It is easy to see that the Mīmāṃsā had to adopt this view of illusion to maintain the doctrine that all cognition at the moment of its production is valid. The ākhyāti theory

¹ See *Prakaraṇapañcikā*, *Śāstradīpikā*, and *Ślokaṅkārttika*, sūtra 2.

tries to establish the view that the illusion is not due to any positive wrong knowledge, but to a mere negative factor of non-apprehension due to certain weakness of mind. So it is that though illusion is the result, yet the cognition so far as it is cognition, is made up of two elements, the present perception and memory, both of which are true so far as they are individually present to us, and the cognition itself has all the characteristics of any other valid knowledge, for the mark of the validity of a cognition is its power to prompt us to action. In doubtful cognitions also, as in the case "Is this a post or a man?" what is actually perceived is some tall object and thus far it is valid too. But when this perception gives rise to two different kinds of remembrance (of the pillar and the man), doubt comes in. So the element of apprehension involved in doubtful cognitions should be regarded as self-valid as any other cognition.

Inference.

Śabara says that when a certain fixed or permanent relation has been known to exist between two things, we can have the idea of one thing when the other one is perceived, and this kind of knowledge is called inference. Kumārila on the basis of this tries to show that inference is only possible when we notice that in a large number of cases two things (e.g. smoke and fire) subsist together in a third thing (e.g. kitchen, etc.) in some independent relation, i.e. when their coexistence does not depend upon any other eliminable condition or factor. It is also necessary that the two things (smoke and fire) coexisting in a third thing should be so experienced that all cases of the existence of one thing should also be cases involving the existence of the other, but the cases of the existence of one thing (e.g. fire), though including all the cases of the existence of the other (smoke), may have yet a more extensive sphere where the latter (smoke) may not exist. When once a permanent relation, whether it be a case of coexistence (as in the case of the contiguity of the constellation of Kṛttikā with Rohiṇī, where, by the rise of the former the early rise of the latter may be inferred), or a case of identity (as in the relation between a genus and its species), or a case of cause and effect or otherwise between two things and a third thing which had been apprehended in a large number of cases, is perceived, they fuse together in the mind as forming

one whole, and as a result of that when the existence of the one (e.g. smoke) in a thing (hill) is noticed, we can infer the existence of the thing (hill) with its counterpart (fire). In all such cases the thing (e.g. fire) which has a sphere extending beyond that in which the other (e.g. smoke) can exist is called *gamyā* or *vyāpaka* and the other (e.g. smoke) *vyāpya* or *gamaka* and it is only by the presence of *gamaka* in a thing (e.g. hill, the *pakṣa*) that the other counterpart the *gamyā* (fire) may be inferred. The general proposition, universal coexistence of the *gamaka* with the *gamyā* (e.g. wherever there is smoke there is fire) cannot be the cause of inference, for it is itself a case of inference. Inference involves the memory of a permanent relation subsisting between two things (e.g. smoke and fire) in a third thing (e.g. kitchen); but the third thing is remembered only in a general way that the coexisting things must have a place where they are found associated. It is by virtue of such a memory that the direct perception of a basis (e.g. hill) with the *gamaka* thing (e.g. smoke) in it would naturally bring to my mind that the same basis (hill) must contain the *gamyā* (i.e. fire) also. Every case of inference thus proceeds directly from a perception and not from any universal general proposition. Kumārila holds that the inference gives us the minor as associated with the major and not of the major alone, i.e. of the fiery mountain and not of fire. Thus inference gives us a new knowledge, for though it was known in a general way that the possessor of smoke is the possessor of fire, yet the case of the mountain was not anticipated and the inference of the fiery mountain is thus a distinctly new knowledge (*deśakālādhikeyādyuktamagrhitagrāhitvam anumānasya, Nyāyaratnākara, p. 363*)¹. It should also be noted that in forming the notion of the permanent relation between two things, a third thing in which these two subsist is always remembered and for the conception of this permanent relation it is enough that in the large number of cases where the concomitance was noted there was no knowledge of any case where the concomitance failed, and it is not indispensable that the negative instances in which the absence of the *gamyā* or *vyāpaka* was marked by an

¹ It is important to note that it is not unlikely that Kumārila was indebted to Dinnāga for this; for Dinnāga's main contention is that "it is not fire, nor the connection between it and the hill, but it is the fiery hill that is inferred" for otherwise inference would give us no new knowledge (see Vidyābhūṣaṇa's *Indian Logic, p. 87* and *Tātparyatīkā, p. 120*).

absence of the gamaka or vyāpya, should also be noted, for a knowledge of such a negative relation is not indispensable for the forming of the notion of the permanent relation¹. The experience of a large number of particular cases in which any two things were found to coexist together in another thing in some relation associated with the non-perception of any case of failure creates an expectancy in us of inferring the presence of the gamya in that thing in which the gamaka is perceived to exist in exactly the same relation². In those cases where the circle of the existence of the gamya coincides with the circle of the existence of the gamaka, each of them becomes a gamaka for the other. It is clear that this form of inference not only includes all cases of cause and effect, of genus and species but also all cases of coexistence as well.

The question arises that if no inference is possible without a memory of the permanent relation, is not the self-validity of inference destroyed on that account, for memory is not regarded as self-valid. To this Kumārila's answer is that memory is not invalid, but it has not the status of pramāṇa, as it does not bring to us a new knowledge. But inference involves the acquirement of a new knowledge in this, that though the coexistence of two things in another was known in a number of cases, yet in the present case a new case of the existence of the gamya in a thing is known from the perception of the existence of the gamaka and this knowledge is gained by a means which is not perception, for it is only the gamaka that is seen and not the gamya. If the gamya is also seen it is no inference at all.

As regards the number of propositions necessary for the explicit statement of the process of inference for convincing others (*pārārthānumāna*) both Kumārila and Prabhākara hold that three premisses are quite sufficient for inference. Thus the first three premisses pratijñā, hetu and dr̥ṣṭānta may quite serve the purpose of an anumāna.

There are two kinds of anumāna according to Kumārila viz. pratyakṣatodr̥ṣṭasambandha and sāmānyatodr̥ṣṭasambandha. The former is that kind of inference where the permanent

¹ Kumārila strongly opposes a Buddhist view that concomitance (*vyāpti*) is ascertained only by the negative instances and not by the positive ones.

² “*tasmādanavagatē'pi sarvatrānvaye sarvataśca vyatireke bahuśah sāhityāvagamamātrādeva vyabhicārādarśanasanāthādanumānotpattiraṅgikartavyaḥ.*” *Nyāyaratnākara*, p. 288.

relation between two concrete things, as in the case of smoke and fire, has been noticed. The latter is that kind of inference where the permanent relation is observed not between two concrete things but between two general notions, as in the case of movement and change of place, e.g. the perceived cases where there is change of place there is also motion involved with it; so from the change of place of the sun its motion is inferred and it is held that this general notion is directly perceived like all universals¹.

Prabhākara recognizes the need of forming the notion of the permanent relation, but he does not lay any stress on the fact that this permanent relation between two things (fire and smoke) is taken in connection with a third thing in which they both subsist. He says that the notion of the permanent relation between two things is the main point, whereas in all other associations of time and place the things in which these two subsist together are taken only as adjuncts to qualify the two things (e.g. fire and smoke). It is also necessary to recognize the fact that though the concomitance of smoke in fire is only conditional, the concomitance of the fire in smoke is unconditional and absolute². When such a conviction is firmly rooted in the mind that the concept of the presence of smoke involves the concept of the presence of fire, the inference of fire is made as soon as any smoke is seen. Prabhākara counts separately the fallacies of the minor (*pakṣābhāsa*), of the enunciation (*pratijñābhāsa*) and of the example (*drṣṭāntābhāsa*) along with the fallacies of the middle and this seems to indicate that the Mīmāṃsā logic was not altogether free from Buddhist influence. The cognition of smoke includes within itself the cognition of fire also, and thus there would be nothing left unknown to be cognized by the inferential cognition. But this objection has little force with Prabhākara, for he does not admit that a *pramāṇa* should necessarily bring us any new knowledge, for *pramāṇa* is simply defined as “apprehension.” So though the inferential cognition always pertains to things already known it is yet regarded by him as a *pramāṇa*, since it is in any case no doubt an apprehension.

¹ See *Ślokaṅkārttika*, *Nyāyaratnākara*, *Śāstradīpikā*, *Yuktisnehapūraṇī*, *Siddhāntacandrikā* on anumāna.

² On the subject of the means of assuring oneself that there is no condition (*upādhi*) which may vitiate the inference, Prabhākara has nothing new to tell us. He says that where even after careful enquiry in a large number of cases the condition cannot be discovered we must say that it does not exist (*prayatnenānvīṣyamāṇe aupādhiakatvānavagamūt*, see *Prakaranāpañcikā*, p. 71).

Upamāna, Arthāpatti.

Analogy (*upamāna*) is accepted by Mīmāṃsā in a sense which is different from that in which Nyāya took it. The man who has seen a cow (*go*) goes to the forest and sees a wild ox (*gavaya*), and apprehends the similarity of the *gavaya* with the *go*, and then cognizes the similarity of the *go* (which is not within the limits of his perception then) with the *gavaya*. The cognition of this similarity of the *gavaya* in the *go*, as it follows directly from the perception of the similarity of the *go* in the *gavaya*, is called *upamāna* (analogy). It is regarded as a separate *pramāṇa*, because by it we can apprehend the similarity existing in a thing which is not perceived at the moment. It is not mere remembrance, for at the time the *go* was seen the *gavaya* was not seen, and hence the similarity also was not seen, and what was not seen could not be remembered. The difference of Prabhākara and Kumārila on this point is that while the latter regards similarity as only a quality consisting in the fact of more than one object having the same set of qualities, the former regards it as a distinct category.

Arthāpatti (implication) is a new *pramāṇa* which is admitted by the Mīmāṃsā. Thus when we know that a person Devadatta is alive and perceive that he is not in the house, we cannot reconcile these two facts, viz. his remaining alive and his not being in the house without presuming his existence somewhere outside the house, and this method of cognizing the existence of Devadatta outside the house is called *arthāpatti* (presumption or implication).

The exact psychological analysis of the mind in this *arthāpatti* cognition is a matter on which Prabhākara and Kumārila disagree. Prabhākara holds that when a man knows that Devadatta habitually resides in his house but yet does not find him there, his knowledge that Devadatta is living (though acquired previously by some other means of proof) is made doubtful, and the cause of this doubt is that he does not find Devadatta at his house. The absence of Devadatta from the house is not the cause of implication, but it throws into doubt the very existence of Devadatta, and thus forces us to imagine that Devadatta must remain somewhere outside. That can only be found by implication, without the hypothesis of which the doubt cannot be removed. The mere absence of Devadatta from the house is not enough for

making the presumption that he is outside the house, for he might also be dead. But I know that Devadatta was living and also that he was not at home; this perception of his absence from home creates a doubt as regards my first knowledge that he is living, and it is for the removal of this doubt that there creeps in the presumption that he must be living somewhere else. The perception of the absence of Devadatta through the intermediate link of a doubt passes into the notion of a presumption that he must then remain somewhere else. In inference there is no element of doubt, for it is only when the smoke is perceived to exist beyond the least element of doubt that the inference of the fire is possible, but in presumption the perceived non-existence in the house leads to the presumption of an external existence only when it has thrown the fact of the man's being alive into doubt and uncertainty¹.

Kumārila however objects to this explanation of Prabhākara, and says that if the fact that Devadatta is living is made doubtful by the absence of Devadatta at his house, then the doubt may as well be removed by the supposition that Devadatta is dead, for it does not follow that the doubt with regard to the life of Devadatta should necessarily be resolved by the supposition of his being outside the house. Doubt can only be removed when the cause or the root of doubt is removed, and it does not follow that because Devadatta is not in the house therefore he is living. If it was already known that Devadatta was living and his absence from the house creates the doubt, how then can the very fact which created the doubt remove the doubt? The cause of doubt cannot be the cause of its removal too. The real procedure of the presumption is quite the other way. The doubt about the life of Devadatta being removed by previous knowledge or by some other means, we may presume that he must be outside the house when he is found absent from the house. So there cannot be any doubt about the life of Devadatta. It is the certainty of his life associated with the perception of his absence from the house that leads us to the presumption of his external existence. There is an opposition between the life of Devadatta and his absence from the house, and the mind cannot come to rest without the presumption of his external existence. The mind oscillates between two contradictory poles both of which it accepts but

¹ See *Prakaranapañcikā*, pp. 113-115.

cannot reconcile, and as a result of that finds an outlet and a reconciliation in the presumption that the existence of Devadatta must be found outside the house.

Well then, if that be so, inference may as well be interpreted as presumption. For if we say that we know that wherever there is smoke there is fire, and then perceive that there is smoke in the hill, but no fire, then the existence of the smoke becomes irreconcilable, or the universal proposition of the concomitance of smoke with fire becomes false, and hence the presumption that there is fire in the hill. This would have been all right if the universal concomitance of smoke with fire could be known otherwise than by inference. But this is not so, for the concomitance was seen only in individual cases, and from that came the inference that wherever there is smoke there is fire. It cannot be said that the concomitance perceived in individual cases suffered any contradiction without the presumption of the universal proposition (wherever there is smoke there is fire); thus arthāpatti is of no avail here and inference has to be accepted. Now when it is proved that there are cases where the purpose of inference cannot be served by arthāpatti, the validity of inference as a means of proof becomes established. That being done we admit that the knowledge of the fire in the hill may come to us either by inference or by arthāpatti.

So inference also cannot serve the purpose of arthāpatti, for in inference also it is the hetu (reason) which is known first, and later on from that the sādhyā (what is to be proved); both of them however cannot be apprehended at the same moment, and it is exactly this that distinguishes arthāpatti from anumāna. For arthāpatti takes place where, without the presumption of Devadatta's external existence, the absence from the house of Devadatta who is living cannot be comprehended. If Devadatta is living he must exist inside or outside the house. The mind cannot swallow a contradiction, and hence without presuming the external existence of Devadatta even the perceived non-existence cannot be comprehended. It is thus that the contradiction is resolved by presuming his existence outside the house. Arthāpatti is thus the result of arthānupapatti or the contradiction of the present perception with a previously acquired certain knowledge.

It is by this arthāpattipramāṇa that we have to admit that there is a special potency in seeds by which they produce the

shoots, and that a special potency is believed to exist in sacrifices by which these can lead the sacrificer to Heaven or some such beneficent state of existence.

Śabda pramāṇa.

Śabda or word is regarded as a separate means of proof by most of the recognized Indian systems of thought excepting the Jaina, Buddhist, Cārvāka and Vaiśeṣika. A discussion on this topic however has but little philosophical value and I have therefore omitted to give any attention to it in connection with the Nyāya, and the Sāṃkhya-Yoga systems. The validity and authority of the Vedas were acknowledged by all Hindu writers and they had wordy battles over it with the Buddhists who denied it. Some sought to establish this authority on the supposition that they were the word of God, while others, particularly the Mīmāṃsists strove to prove that they were not written by anyone, and had no beginning in time nor end and were eternal. Their authority was not derived from the authority of any trustworthy person or God. Their words are valid in themselves. Evidently a discussion on these matters has but little value with us, though it was a very favourite theme of debate in the old days of India. It was in fact the most important subject for Mīmāṃsā, for the *Mīmāṃsā sūtras* were written for the purpose of laying down canons for a right interpretation of the Vedas. The slight extent to which it has dealt with its own epistemological doctrines has been due solely to their laying the foundation of its structure of interpretative maxims, and not to writing philosophy for its own sake. It does not dwell so much upon salvation as other systems do, but seeks to serve as a rational compendium of maxims with the help of which the Vedas may be rightly understood and the sacrifices rightly performed. But a brief examination of the doctrine of word (*śabda*) as a means of proof cannot be dispensed with in connection with Mīmāṃsa as it is its very soul.

Śabda (word) as a pramāṇa means the knowledge that we get about things (not within the purview of our perception) from relevant sentences by understanding the meaning of the words of which they are made up. These sentences may be of two kinds, viz. those uttered by men and those which belong to the Vedas. The first becomes a valid means of knowledge when it is not

uttered by untrustworthy persons and the second is valid in itself. The meanings of words are of course known to us before, and cannot therefore be counted as a means of proof; but the meanings of sentences involving a knowledge of the relations of words cannot be known by any other acknowledged means of proof, and it is for this that we have to accept śabda as a separate means of proof. Even if it is admitted that the validity of any sentence may be inferred on the ground of its being uttered by a trustworthy person, yet that would not explain how we understand the meanings of sentences, for when even the name or person of a writer or speaker is not known, we have no difficulty in understanding the meaning of any sentence.

Prabhākara thinks that all sounds are in the form of letters, or are understandable as combinations of letters. The constituent letters of a word however cannot yield any meaning, and are thus to be regarded as elements of auditory perception which serve as a means for understanding the meaning of a word. The reason of our apprehension of the meaning of any word is to be found in a separate potency existing in the letters by which the denotation of the word may be comprehended. The perception of each letter-sound vanishes the moment it is uttered, but leaves behind an impression which combines with the impressions of the successively dying perceptions of letters, and this brings about the whole word which contains the potency of bringing about the comprehension of a certain meaning. If even on hearing a word the meaning cannot be comprehended, it has to be admitted that the hearer lacks certain auxiliaries necessary for the purpose. As the potency of the word originates from the separate potencies of the letters, it has to be admitted that the latter is the direct cause of verbal cognition. Both Prabhākara and Kumārila agree on this point.

Another peculiar doctrine expounded here is that all words have natural denotative powers by which they themselves out of their own nature refer to certain objects irrespective of their comprehension or non-comprehension by the hearer. The hearer will not understand the meaning unless it is known to him that the word in question is expressive of such and such a meaning, but the word was all along competent to denote that meaning and it is the hearer's knowledge of that fact that helps him to

understand the meaning of a word. Mīmāṃsā does not think that the association of a particular meaning with a word is due to conventions among people who introduce and give meanings to the words¹. Words are thus acknowledged to be denotative of themselves. It is only about proper names that convention is admitted to be the cause of denotation. It is easy to see the bearing of this doctrine on the self-validity of the Vedic commandments, by the performance of which such results would arise as could not have been predicted by any other person. Again all words are believed to be eternally existent; but though they are ever present some manifestive agency is required by which they are manifested to us. This manifestive agency consists of the effort put forth by the man who pronounces the word. Nyāya thinks that this effort of pronouncing is the cause that produces the word while Mīmāṃsā thinks that it only manifests to the hearer the ever-existing word.

The process by which according to Prabhākara the meanings of words are acquired may be exemplified thus: a senior commands a junior to bring a cow and to bind a horse, and the child on noticing the action of the junior in obedience to the senior's commands comes to understand the meaning of "cow" and "horse." Thus according to him the meanings of words can only be known from words occurring in injunctive sentences; he deduces from this the conclusion that words must denote things only as related to the other factors of the injunction (*anvitābhidhāna vāda*), and no word can be comprehended as having any denotation when taken apart from such a sentence. This doctrine holds that each word yields its meaning only as being generally related to other factors or only as a part of an injunctive sentence, thus the word *gām* accusative case of *go* (cow) means that it is intended that something is to be done with the cow or the bovine genus, and it appears only as connected with a specific kind of action, viz. bringing in the sentence *gām ānaya*—bring the cow. Kumārila however thinks that words independently express separate meanings which are subsequently combined into a sentence expressing one connected idea (*abhihitānvayavāda*). Thus in *gām ānaya*, according to Kumārila, *gām* means the bovine class in the accusative character and *ānaya* independently means

¹ According to Nyāya God created all words and associated them with their meanings.

bring; these two are then combined into the meaning “bring the cow.” But on the former theory the word *gām* means that it is connected with some kind of action, and the particular sentence only shows what the special kind of action is, as in the above sentence it appears as associated with bringing, but it cannot have any meaning separately by itself. This theory of Kumārila which is also the Nyāya theory is called *abhihitānvayavāda*¹.

Lastly according to Prabhākara it is only the Veda that can be called *śabda-pramāṇa*, and only those sentences of it which contain injunctions (such as, perform this sacrifice in this way with these things). In all other cases the validity of words is only inferred on the ground of the trustworthy character of the speaker. But Kumārila considers the words of all trustworthy persons as *śabda-pramāṇa*.

The Pramāṇa of Non-perception (*anupalabdhi*).

In addition to the above *pramāṇas* Kumārila admits a fifth kind of *pramāṇa*, viz. *anupalabdhi* for the perception of the non-existence of a thing. Kumārila argues that the non-existence of a thing (e.g. there is no jug in this room) cannot be perceived by the senses, for there is nothing with which the senses could come into contact in order to perceive the non-existence. Some people prefer to explain this non-perception as a case of *anumāna*. They say that wherever there is the existence of a visible object there is the vision of it by a perceiver. When there is no vision of a visible object, there is no existence of it also. But it is easy to see that such an inference presupposes the perception of want of vision and want of existence, but how these non-perceptions are to be accounted for is exactly the point to be solved. How can the perception of want of vision or want of existence be grasped? It is for this that we have to admit a separate mode of *pramāṇa* namely *anupalabdhi*.

All things exist in places either in a positive (*sadrūpa*) or in a negative relation (*asadrūpa*), and it is only in the former case

¹ See *Prabhākaramīmāṃsā* by Dr Gaṅgānātha Jhā and S. N. Dasgupta's *Study of Patanjali*, appendix. It may be noted in this connection that Mīmāṃsā did not favour the Sphoṭa doctrine of sound which consists in the belief that apart from the momentary sounds of letters composing a word, there was a complete word form which was manifested (sphoṭa) but not created by the passing sounds of the syllables. The work of the syllable sounds is only to project this word-manifestation. See Vācaspati's *Tattva-bindu*, *Śloka-vārttika* and *Prakaranapañcikā*. For the doctrine of *anvitābhidhāna* see Śālikanātha's *Vākyārthamātrkāvyūtti*.

that they come within the purview of the senses, while in the latter case the perception of the negative existence can only be had by a separate mode of the movement of the mind which we designate as a separate *pramāṇa* as *anupalabdhi*. Prabhākara holds that non-perception of a visible object in a place is only the perception of the empty place, and that therefore there is no need of admitting a separate *pramāṇa* as *anupalabdhi*. For what is meant by empty space? If it is necessary that for the perception of the non-existence of jug there should be absolutely empty space before us, then if the place be occupied by a stone we ought not to perceive the non-existence of the jug, inasmuch as the place is not absolutely empty. If empty space is defined as that which is not associated with the jug, then the category of negation is practically admitted as a separate entity. If the perception of empty space is defined as the perception of space at the moment which we associated with a want of knowledge about the jug, then also want of knowledge as a separate entity has to be accepted, which amounts to the same thing as the admission of the want or negation of the jug. Whatever attempt may be made to explain the notion of negation by any positive conception, it will at best be an attempt to shift negation from the objective field to knowledge, or in other words to substitute for the place of the external absence of a thing an associated want of knowledge about the thing (in spite of its being a visible object) and this naturally ends in failure, for negation as a separate category has to be admitted either in the field of knowledge or in the external world. Negation or *abhāva* as a separate category has anyhow to be admitted. It is said that at the first moment only the ground is seen without any knowledge of the jug or its negation, and then at the next moment comes the comprehension of the non-existence of the jug. But this also means that the moment of the perception of the ground is associated with the want of knowledge of the jug or its negation. But this comes to the same thing as the admission of negation as a separate category, for what other meaning can there be in the perception of “only the ground” if it is not meant that it (the perception of the ground) is associated with or qualified by the want of knowledge of the jug? For the perception of the ground cannot generate the notion of the non-existence of the jug, since even where there is a jug the ground is perceived. The qualifying phrase that “only the ground is perceived” be-

comes meaningless, if things whose presence is excluded are not specified as negative conditions qualifying the perception of the ground. And this would require that we had already the notion of negation in us, which appeared to us of itself in a special manner unaccountable by other means of proof. It should also be noted that non-perception of a sensible object generates the notion of negation immediately and not through other negations, and this is true not only of things of the present moment but also of the memory of past perceptions of non-existence, as when we remember that there was no jug here. Anupalabdhi is thus a separate *pramāṇa* by which the absence or want of a sensible object—the negation of a thing—can be comprehended.

Self, Salvation, God.

Mīmāṃsā has to accept the existence of soul, for without it who would perform the Vedic commandments, and what would be the meaning of those Vedic texts which speak of men as performing sacrifices and going to Heaven thereby? The soul is thus regarded as something entirely distinct from the body, the sense organs, and buddhi; it is eternal, omnipresent, and many, one in each body. Prabhākara thinks that it is manifested to us in all cognitions. Indeed he makes this also a proof for the existence of self as a separate entity from the body, for had it not been so, why should we have the notion of self-persistence in all our cognitions—even in those where there is no perception of the body? Kumārila however differs from Prabhākara about this analysis of the consciousness of self in our cognitions, and says that even though we may not have any notion of the parts of our body or their specific combination, yet the notion of ourselves as embodied beings always appears in all our cognitions. Moreover in our cognitions of external objects we are not always conscious of the self as the knower; so it is not correct to say that self is different from the body on the ground that the consciousness of self is present in all our cognitions, and that the body is not cognized in many of our cognitions. But the true reason for admitting that the self is different from the body is this, that movement or willing, knowledge, pleasure, pain, etc., cannot be attributed to the body, for though the body exists at death these cannot then be found. So it has to be admitted that they must belong to some other entity owing to the association with which the body ap-

pears to be endowed with movement etc. Moreover knowledge, feeling, etc. though apparent to the perceiver, are not yet perceived by others as other qualities of the body, as colour etc., are perceived by other men. It is a general law of causation that the qualities of the constituent elements (in the cause) impart themselves to the effect, but the earth atoms of which the body is made up do not contain the qualities of knowledge etc., and this also corroborates the inference of a separate entity as the vehicle of knowledge etc. The objection is sometimes raised that if the soul is omnipresent how can it be called an agent or a mover? But Mīmāṃsā does not admit that movement means atomic motion, for the principle of movement is the energy which moves the atoms, and this is possessed by the omnipresent soul. It is by the energy imparted by it to the body that the latter moves. So it is that though the soul does not move it is called an agent on account of the fact that it causes the movement of the body. The self must also be understood as being different from the senses, for even when one loses some of the senses he continues to perceive his self all the same as persisting all through.

The question now arises, how is self cognized? Prabhākara holds that the self as cognizer is never cognized apart from the cognized object, nor is the object ever cognized without the cognizer entering into the cognition as a necessary factor. Both the self and the object shine forth in the self-luminous knowledge in what we have already described as *tripuṭī-pratyakṣa* (perception as three-together). It is not the soul which is self-illuminated but knowledge; so it is knowledge which illumines both the self and the object in one operation. But just as in the case of a man who walks, the action of walking rests upon the walker, yet he is regarded as the agent of the work and not as the object, so in the case of the operation of knowledge, though it affects the self, yet it appears as the agent and not as the object. Cognition is not soul, but the soul is manifested in cognition as its substratum, and appears in it as the cognitive element "I" which is inseparable from all cognitions. In deep sleep therefore when no object is cognized the self also is not cognized.

Kumārila however thinks that the soul which is distinct from the body is perceived by a mental perception (*mānasa-pratyakṣa*) as the substratum of the notion of "I," or in other words the self perceives itself by mental perception, and the perception of its

own nature shines forth in consciousness as the "I." The objection that the self cannot itself be both subject and object to its own operation does not hold, for it applies equally to Prabhākara's theory in which knowledge reveals the self as its object and yet considers it as the subject of the operation. The analogy of linguistic usage that though the walking affects the walker yet he is the agent, cannot be regarded as an escape from this charge, for the usage of language is not philosophical analysis. Though at the time of the cognition of objects the self is cognized, yet it does not appear as the knower of the knowledge of objects, but reveals itself as an object of a separate mental perception which is distinct from the knowledge of objects. The self is no doubt known as the substratum of "I," but the knowledge of this self does not reveal itself necessarily with the cognition of objects, nor does the self show itself as the knower of all knowledge of objects, but the self is apprehended by a separate mental intuition which we represent as the "I." The self does not reveal itself as the knower but as an object of a separate intuitive process of the mind. This is indeed different from Prabhākara's analysis, who regarded the cognition of self as inseparable from the object-cognition, both being the result of the illumination of knowledge. Kumārila agrees with Prabhākara however in holding that soul is not self-illuminating (*svayamprakāśa*), for then even in deep sleep the soul should have manifested itself; but there is no such manifestation then, and the state of deep sleep appears as an unconscious state. There is also no bliss in deep sleep, for had it been so people would not have regretted that they had missed sensual enjoyments by untimely sleep. The expression that "I slept in bliss" signifies only that no misery was felt. Moreover the opposite representation of the deep sleep state is also found when a man on rising from sleep says "I slept so long without knowing anything not even my own self." The self is not atomic, since we can simultaneously feel a sensation in the head as well as in the leg. The Jaina theory that it is of the size of the body which contracts and expands according to the body it occupies is unacceptable. It is better therefore that the soul should be regarded as all-pervading as described in the Vedas. This self must also be different in different persons for otherwise their individual experiences of objects and of pleasure and pain cannot be explained¹.

¹ See *Śloka-vārttika*, ātmavāda *Śāstra-dīpikā*, ātmavāda and mokṣavāda.

Kumārila considered the self to be merely the potency of knowledge (*jñānaśakti*)¹. Cognitions of things were generated by the activity of the manas and the other senses. This self itself can only be cognized by mental perception. Or at the time of salvation there being none of the senses nor the manas the self remains in pure existence as the potency of knowledge without any actual expression or manifestation. So the state of salvation is the state in which the self remains devoid of any of its characteristic qualities such as pleasure, pain, knowledge, willing, etc., for the self itself is not knowledge nor is it bliss or ānanda as Vedānta supposes; but these are generated in it by its energy and the operation of the senses. The self being divested of all its senses at that time, remains as a mere potency of the energy of knowledge, a mere existence. This view of salvation is accepted in the main by Prabhākara also.

Salvation is brought about when a man enjoys and suffers the fruits of his good and bad actions and thereby exhausts them and stops the further generation of new effects by refraining from the performance of kāmya-karmas (sacrifices etc. performed for the attainment of certain beneficent results) and guarantees himself against the evil effects of sin by assiduously performing the nitya-karmas (such as the sandhyā prayers etc., by the performance of which there is no benefit but the non-performance of which produces sins). This state is characterized by the dissolution of the body and the non-production of any further body or rebirth.

Mīmāṃsā does not admit the existence of any God as the creator and destroyer of the universe. Though the universe is made up of parts, yet there is no reason to suppose that the universe had ever any beginning in time, or that any God created it. Every day animals and men are coming into being by the action of the parents without the operation of any God. Neither is it necessary as Nyāya supposes that dharma and adharma should have a supervisor, for these belong to the performer and

¹ It may be mentioned in this connection that unlike Nyāya Mīmāṃsā did not consider all activity as being only of the nature of molecular vibration (*parispanda*). It admitted the existence of energy (*śakti*) as a separate category which manifested itself in actual movements. The self being considered as a śakti can move the body and yet remain unmoved itself. Manifestation of action only means the relating of the energy with a thing. Nyāya strongly opposes this doctrine of a non-sensible (atīndriya) energy and seeks to explain all action by actual molecular motion.

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no one can have any knowledge of them. Moreover there cannot be any contact (*samyoga*) or inherence (*samavāya*) of dharma and adharma with God that he might supervise them; he cannot have any tools or body wherewith to fashion the world like the carpenter. Moreover he could have no motive to create the world either as a merciful or as a cruel act. For when in the beginning there were no beings towards whom should he be actuated with a feeling of mercy? Moreover he would himself require a creator to create him. So there is no God, no creator, no creation, no dissolution or pralaya. The world has ever been running the same, without any new creation or dissolution, *sṛṣṭi* or pralaya.

Mīmāṃsā as philosophy and Mīmāṃsā as ritualism.

From what we have said before it will be easy to see that Mīmāṃsā agrees in the main with Vaiśeṣika about the existence of the categories of things such as the five elements, the qualities, rūpa, rasa, etc. Kumārila's differences on the points of jāti, samavāya, etc. and Prabhākara's peculiarities have also been mentioned before. On some of these points it appears that Kumārila was influenced by Sāṃkhya thought rather than by Nyāya. Sāṃkhya and Vaiśeṣika are the only Hindu systems which have tried to construct a physics as a part of their metaphysics; other systems have generally followed them or have differed from them only on minor matters. The physics of Prabhākara and Kumārila have thus but little importance, as they agree in general with the Vaiśeṣika view. In fact they were justified in not laying any special stress on this part, because for the performance of sacrifices the common-sense view of Nyāya-Vaiśeṣika about the world was most suitable.

The main difference of Mīmāṃsā with Nyāya consists of the theory of knowledge. The former was required to prove that the Veda was self-valid and that it did not derive its validity from God, and also that it was not necessary to test its validity by any other means. To do this it began by trying to establish the self-validity of all knowledge. This would secure for the Veda the advantage that as soon as its orders or injunctions were communicated to us they would appear to us as valid knowledge, and there being nothing to contradict them later on there would be nothing in the world which could render the Vedic injunctions

invalid. The other *pramāṇas* such as perception, inference, etc. were described, firstly to indicate that they could not show to us how *dharma* could be acquired, for *dharma* was not an existing thing which could be perceived by the other *pramāṇas*, but a thing which could only be produced by acting according to the injunctions of the Vedas. For the knowledge of *dharma* and *adharma* therefore the *śabdapramāṇa* of the Veda was our only source. Secondly it was necessary that we should have a knowledge of the different means of cognition, as without them it would be difficult to discuss and verify the meanings of debatable Vedic sentences. The doctrine of creation and dissolution which is recognized by all other Hindu systems could not be acknowledged by the *Mīmāṃsā* as it would have endangered the eternity of the Vedas. Even God had to be dispensed with on that account.

The Veda is defined as the collection of Mantras and *Brāhmaṇas* (also called the *vidhis* or injunctive sentences). There are three classes of injunctions (1) *apūrva-vidhi*, (2) *niyama-vidhi*, and (3) *parisaṅkhyā-vidhi*. *Apūrva-vidhi* is an order which enjoins something not otherwise known, e.g. the grains should be washed (we could not know that this part of the duty was necessary for the sacrifice except by the above injunction). *Niyama-vidhi* is that where when a thing could have been done in a number of ways, an order is made by the Veda which restricts us to following some definite alternative (e.g. though the chaff from the corn could be separated even by the nails, the order that “corn should be threshed” restricts us to the alternative of threshing as the only course acceptable for the sacrifice). In the *niyama-vidhi* that which is ordered is already known as possible but only as an alternative, and the *vidhi* insists upon one of these methods as the only one. In *apūrva-vidhi* the thing to be done would have remained undone and unknown had it not been for the *vidhi*. In *parisaṅkhyā-vidhi* all that is enjoined is already known but not necessarily as possible alternatives. A certain mantra “I take up the rein” (*imām agrybhnām raśanām*) which could be used in a number of cases should not however be used at the time of holding the reins of an ass.

There are three main principles of interpreting the Vedic sentences. (1) When some sentences are such that connectively they yield a meaning but not individually, then they should be

taken together connectively as a whole. (2) If the separate sentences can however yield meanings separately by themselves they should not be connected together. (3) In the case of certain sentences which are incomplete suitable words from the context of immediately preceding sentences are to be supplied.

• The vidhis properly interpreted are the main source of dharma. The mantras which are generally hymns in praise of some deities or powers are to be taken as being for the specification of the deity to whom the libation is to be offered. It should be remembered that as dharma can only be acquired by following the injunctions of the Vedas they should all be interpreted as giving us injunctions. Anything therefore found in the Vedas which cannot be connected with the injunctive orders as forming part of them is to be regarded as untrustworthy or at best inexpressive. Thus it is that those sentences in the Vedas which describe existing things merely or praise some deed of injunction (called the *arthavādas*) should be interpreted as forming part of a vidhi-vākya (injunction) or be rejected altogether. Even those expressions which give reasons for the performance of certain actions are to be treated as mere arthavādas and interpreted as praising injunctions. For Vedas have value only as mandates by the performance of which dharma may be acquired.

When a sacrifice is performed according to the injunctions of the Vedas, a capacity which did not exist before and whose existence is proved by the authority of the scriptures is generated either in the action or in the agent. This capacity or positive force called *apūrva* produces in time the beneficent results of the sacrifice (e.g. leads the performer to Heaven). This *apūrva* is like a potency or faculty in the agent which abides in him until the desired results follow¹.

It is needless to dilate upon these, for the voluminous works of Śabara and Kumāriḷa make an elaborate research into the nature of sacrifices, rituals, and other relevant matters in great detail, which anyhow can have but little interest for a student of philosophy.

¹ See Dr Gaṅgānātha Jhā's *Prabhākaramīmāṃsā* and Mādhava's *Nyāyamālā-vistara*.