Hindu Conceptions of Law

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ANY DISCUSSION of Hindu conceptions of law has to start with the basic observation that nowhere in the Hindu tradition is there a term to express the concept of law, neither in the sense of ius nor in that of lex. Not until the arrival of the colonial powers was the concept of law used on the subcontinent, by Europeans and through the medium of European languages. It was not until 1772, the year in which it was decided that, “in all suits regarding inheritance, marriage, caste, and other religious usages or institutions,” the Hindus should be governed by their own laws, that an effort was made to study and translate the Sanskrit books in which the Hindu laws were codified. These books happen to be the dharmaśāstras, treatises on dharma. Hence, the equation established by the Western editors and translators of these books was dharma śāstra equals lawbook, code, or Institute. They also established the equation: dharma equals law.²

To be sure, Indians have followed this well-established practice.³ When it comes to expressing the concept of law in modern India through the medium of modern Indian languages, however, different...
terms are used. For instance, recent dictionaries of India's official language, Hindi, normally give two terms for law, one borrowed from the Arabic-Persian (Muslim) tradition, kānūn, and one from the Sanskrit (Hindu) tradition, vidhi. In addition, when the Indian Constitution was translated into Hindi, vidhi⁴ became the official translation for law, both in the text of the Constitution and in the English-Hindi wordlist published along with it by the Government of India.

The reason why modern Indian languages looked for different terms to express law may, at least in part, have been due to the fact that, in the meanwhile, they had all accepted dharma as the Indian equivalent for another concept imported from the West—religion. It is not quite clear when and by whom dharma was first used in the restricted sense of religion. One thing is sure, however, it represents a conscious effort to find, for a category that had no equivalent in India, a word from the Indian vocabulary which, even though it was not perfectly identical, came at least closer than any other available term.

Dharma and Law

After the above introductory remarks, this Article will now attempt to interpret the data as they emerge from the Hindu tradition. The pivot of the entire system is dharma, which is neither religion nor law, and yet crucial for the topic of this Article—the Hindu conceptions of law. Dharma has been rightly described as "one of those Sanskrit words that defy all attempts at an exact rendering in English or any other tongue."⁵ It is therefore essential to approach it from within the Hindu tradition, and describe how classical Hinduism itself understood it.

Dharma⁶ is a noun formed with the suffix "ma"⁷ from a root dhar or dhr. The root expresses actions such as to hold, bear, carry, main-

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⁴ Vidhi is a traditional term, meaning "injunction," referring to those sections of the Vedas that contain actual rules rather than other sections that are merely explanatory.

⁵ 1 P.V. Kane, History of Dharmasastra 1 (rev. ed. Poona 1968) [hereinafter cited as Kane]. Kane's monumental work, in five volumes, is the principal sourcebook on dharma and law. Volume 3, addressing Hindu law, appeared in 1946.

⁶ For studies on dharma, see Rocher, Bibliographie du droit hindou ancien in Introduction bibliographique à l'histoire du droit et à l'ethnologie juridique (J. Gilissen ed., Brussels 1985); L. Sternbach, Bibliography on dharma and artha in ancient and mediaeval India (Wiesbaden 1973).

⁷ Compare -men in Latin carmen, -ma in Greek rheuma.
tain, preserve, keep. Hence, dharma is the way in which, or the means by which, one holds, bears, carries, or maintains, and, in accordance with semantic development common in Sanskrit, it means not only the way of doing these things, but also the way of doing them. Dharma, then, is the way in which one ought to hold, bear, carry, or maintain. On a cosmic level, dharma is the way in which one maintains everything, the way in which the cosmos or the balance in the cosmos, is maintained. At the micro level, dharma is the way in which every constituent element of the cosmos contributes its share to maintaining the overall balance. Each element has its own dharma, its svadharma. As long as each element of the cosmos performs its specific svadharma, the overall balance does not suffer. As soon as an element, however, deviates from its own dharma, that is, commits adharma, the balance is disturbed.

Theoreticians of dharma will, of course, insist on the fact that every cosmic element has its svadharma. The sun is supposed to rise in the morning and to set at night; water—the rains—has to arrive at a set time of the year and disappear at another set time. In practice, however, Hindus have primarily paid attention to the dharma of human beings. Each individual human being has a svadharma, which is determined essentially by two factors: belonging to one of the four stages of life (āśrama); and belonging to one of the four social classes (varṇa). From these two factors comes the expression, varṇasramadharma.

For a better understanding of the Hindu conception of law, one characteristic of the human dharma deserves to be pointed out above all. A person’s dharma regulates all activities, whatever their nature. The dharma ordains when the individual shall awaken, how that person shall divide the day, and when the person shall retire at night. The dharma rules a person’s diet, quantitatively and qualitatively. The dharma, of course, regulates the human’s relationship to the supernatural powers, and prescribes the rituals and ceremonies by which these relations shall be sustained; it therefore deals with the Hindu’s religion. Dharma also governs the individual’s relations with fellow people; it rules social contacts, many aspects of which belong to the field of law. To put it differently, Hindu law is, together with every other aspect of a Hindu’s activities, part of Hindu dharma. Hindu rules of law are to be found in the dharmaśāstras, but these texts also contain a variety of other rules which have little or nothing in common with law.
A first important consequence of the concept of dharma is that, in Hinduism, law, religion, and all other topics dealt with in the dharmasastras are inextricably intertwined. All attempts to disentangle the various categories and to label particular concepts or institutions as essentially religious or essentially legal, are bound to force upon them categorizations which are foreign to the Hindu way of thinking.

An example is the implication, in classical Hinduism, of committing what Western society would call a crime: killing a human being; more specifically, killing a member of the highest class, a Brahmin. Not to complicate the description, this examination shall restrict itself to quoting from a single text, the dharmasastra attributed to Manu.8 First,9 killing a Brahmin is ranked among the four great sins, mahāpātaka. Subsequently,10 punishment for great sins is said to be corporal punishment: in the specific case of killing a Brahmin,11 the brand of a headless corpse on the offender’s forehead. This rule is followed by a number of social implications:

Excluded from all fellowship at meals, excluded from all sacrifices, excluded from instruction and from matrimonial alliances, abject and excluded from all religious duties, let them wander over (this) earth.

Such (persons) who have been branded with (indelible) marks must be cast off by their paternal and maternal relations, and receive neither compassion nor a salutation; that is the teaching of Manu.12

The text continues that corporal punishment13 may be replaced by the highest fine, if the killer at the same time performs a variety—too long to enumerate here—of intricate penances described in great detail elsewhere in the text.14 Manu then15 makes the usual distinction between the case in which the crime was committed by a Brahmin and

8. 25 The Sacred Books of the East (F.M. Muller ed., G. Bühler trans. 1886) [hereinafter cited as Manu]. For editions and translations of the texts, see bibliographies cited in note 6, supra.
10. Id. at 9.236.
11. Id. at 9.237.
12. Id. at 9.238-239.
13. Id. at 9.240.
14. Id. at 11.73-87, 90.
15. E.g., at 9.241-42.
by someone belonging to a lower class; the former has to be less severely punished than the latter. Finally, in another chapter, the text describes the fate of the killer of a Brahmin in the next rebirth: "The slayer of a Brahmana enters the womb of a dog, a pig, an ass, a camel, a cow, a sheep, a deer, a bird, a Candāla, and a Pukkasa."

In short, killing a Brahmin was a transgression of dharma, with all the consequences thereof. The transgression implies a criminal element requiring punishment by the king, an element of sin to be expiated by performing penances, and an element of exclusion from one’s usual social circles. It is also to be noted that the Hindu penal code is strongly influenced by the caste system. For the same offense a member of a lower class is more severely punished than one of a higher class (a Brahmin is totally exempt from any kind of corporal punishment), with the correlative provision that, for the same offense, punishment is higher or lower depending on whether the victim is of a higher or lower class. Also, Hindu crime extends beyond this life, and is linked to the theory of rebirth.

The extent to which private law was interwoven with other categories cannot be better illustrated than by referring to some of the difficulties which the British judges were to experience when they were called upon to apply the dharma texts as legal codes in the Anglo-Hindu law courts. They soon came to the conclusion: "All those old text-books and commentaries are apt to mingle religious and moral considerations, not being positive laws, with rules intended for positive laws." No matter how much they were concerned not to interfere with the religious beliefs of the Hindus—a concern that is expressed over and again in the law reports—they decided that "the Courts are to enforce only rules of positive law and not religious or moral precepts."

One of the simplest applications of this position concerns the validity of adoption. The Sanskrit texts clearly require that, for an adoption to be valid, a particular ritual, called dattahoma, has to be performed. The question arose, whether or not the dattahoma was a legal prerequisite for adoption, the legal character of which was, of course, never doubted. The dilemma was described as follows:

16. Id. at 12.55.
In certain circumstances the point might be the subject of a prolonged and very conflicting argument, as the authorities, ancient and modern, are not in accord on the point as to whether this is a legal as well as a religious requisite. There is a danger, on the one hand, of not paying due respect to those religious rites which are observed and followed among large classes of Indian belief, while, on the other hand, the danger must also be avoided of carrying these, except when the law is clear, into the legal sphere, so as to affect or impair personal or patrimonial rights.19

The result was that, in Anglo-Hindu courts, the legal act, adoption, was separated from the religious act, dattahoma, and that the former was held valid without the latter.20

Another, more complex, example involves both adoption and inheritance. The dharma texts forbid adoption of an only son. Vasishtha,21 for instance, allows the father to give, sell, or abandon his son, but adds the proviso, “let him not give or receive (in adoption) an only son.”22 In a case that was to become very influential, the Privy Council reiterated their view that one should not “take for strict law precepts which are meant to appeal to the moral sense,”23 and decided that the adoption of an only son is not null and void under the Hindu law.

Although the dharma texts rarely exhibit justification for their statements, the rationale of Vasishtha’s rule is clear. The text is obviously concerned about the fate of the natural father who becomes deprived of his only son. The son is, of course, the natural heir of his father. At the same time, however, he is much more than that; he frees his father “from his debt to the Manes,”24 and, after the father’s death, he is the only person capable of performing the ritual, called śrāddha, which is required for the father to join the ranks of his ancestors. This example not only explains why an only son should not be the object of an adoption; it also shows that what we call inheritance in Hinduism involves far more than the legal rights to an estate.

22. Id. at 15.3.
The Privy Council became acutely aware of the scope of Hindu inheritance when they were faced with a murderer claiming the estate of his victim. The Council stated:

Before this Board it has been contended that the matter is governed by Hindu Law, and that the Hindu Law makes no provision disqualifying a murderer from succeeding to the estate of his victim, and therefore it must be taken that according to this law he can succeed.25

It was seen earlier that the Hindu dharma does not condone murder. On the contrary, it is both a crime and a sin. The problem confronting the Privy Council lies elsewhere: who are, according to the dharma, those who are disqualified from succeeding to an estate, and, more importantly, what is the underlying justification? Manu has the following enumeration: "Eunuchs and outcasts, (persons) born blind or deaf, the insane, idiots and the dumb, as well as those deficient in any organ (of action or sensation), receive no share."26 Murderers are not among them. Those listed in the text as "incompetent to receive a share" are individuals who are unable to administer it, and, also, to perform for the deceased the necessary funeral rites. In this case, the Privy Council decided to overrule Hindu law: "The alternative is between the Hindu law being as above stated or being for this purpose non-existent, and in that case the High Court have rightly decided that the principle of equity, justice and good conscience exclude the murderer."27

Sources of Law

Another consequence of the Hindu concept of dharma is that law shares its basic features with religion and all other categories treated in the dharmasāstras. To illustrate this point this Article will first present a brief description of these texts, and then it will examine the characteristics of their contents generally and their legal materials in particular.

26. MANU, supra note 8, at 9.201.
27. Section 25 of the Hindu Succession Act, 1956, states: "A person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder."
The source materials for our knowledge of classical Hindu *dharma* are primarily the *dharmasūtras* and *dharmaśāstras*. Although the latter term is also used collectively for both kinds of texts, the principal difference is that the *sūtras* are older, and composed in the succinct and often enigmatic prose style used in many other branches of Hindu learning (such as *Yogasūtras*, *Vedāntasūtras*, and *Pāṇini’s* grammatical *sūtras*). The most important *dharmasūtras* are those attributed to Gautama, Apastamba, Vasiṣṭha, and Baudhāyana.28 They may have been composed between 600 and 300 B.C.29

The more recent *dharmaśāstras* are in verse, in the typical thirty-two syllable distichs called *śloka* or *anusthā*, which are characteristic not only of the Sanskrit epics but also of learned treatises in many fields such as medicine and architecture.30

Closely related to the *dharmaśāstras* are the epics and the Purāṇas. Long passages from these texts are devoted to various aspects of *dharma*, including legal topics. In fact, many verses and passages are more or less identical with verses and passages in the *dharmaśāstras*. The question of which text, in such cases, is the borrower, and which the one borrowed from, is one that is bound to tempt Western, or Western-trained, philologists. For the present purposes, the solution of these problems is less important than the fact that the same legal materials that occur in the *dharmaśāstras*, are also found in epic and bardic literature. The later commentators were to quote from the epics and the Purāṇas, perhaps not as often as from the *dharmaśāstras*, but definitely giving all those sources the same legal authority.


29. The dates of these texts are, like the dates of most Sanskrit texts, highly uncertain. See 3 *Kane*, *supra* note 5, at xvii.

30. The most important texts of this category are attributed to Manu (200 B.C. - A.D. 100), Yajnavalkya (A.D. 100-300), Viṣṇu (A.D. 100-300) Narāda (A.D. 100-400), Brhaspati (A.D. 300-500), and Kātyāyana (A.D. 400-600). There also are numerous minor metrical *dharmasastras*, some of which have been preserved, often in larger collections, whereas others are known only from quotations in later commentarial literature. Dates are from 3 *Kane*, *supra* note 5, at xvii-xviii. See *Manu*, *supra* note 8; *Viṣṇu* in 7 *The Sacred Books of the East*, (F.M. Muller ed., J. Jolly trans.); *Nārada* and *Brhaspati* in 33 *The Sacred Books of the East* (J. Jolly trans. 1889); *Kātyāyana* (Kane ed. & trans. Poona n.d.); Yājñavalkya (A.F. Stenzler trans., Berlin 1849).
The beginning of this century saw the discovery, in South India, of a manuscript of a text which had been known only through a few indirect references. The title of the book is *Arthaśāstra*, and it is attributed to an author variously called Kautilya or Kautalya, and other names, who may have been the minister of Candragupta, the famous Maurya emperor in the third century B.C. This book exhibits a large amount of legal materials, and, especially, provides a totally new, detailed account of Hindu administrative law. Indic scholars have rarely been as excited as they were by the discovery of Kauṭilya’s *Arthaśāstra*, and in a short period of time a vast scholarly literature on Hindu society and law developed, based on Kauṭilya, using the newly discovered book as their principle source, it being considered superior to the well known *dharmasūtras* and allied texts. This author shall place the *Arthaśāstras*, as a source of law, in its correct perspective later in this Article.

**Vedic Basis of Hindu Law**

The *dharma* literature does not exist in a vacuum, according to the Hindu tradition. On the contrary, it has a well-determined place within a larger literary framework, with important consequences for the Hindu conception of law. First, the *dharmasūtras* each belong directly to one of the branches of the Vedas. Together with other sūtras, such as the śrautasūtras, which regulate the most elaborate ritual, the gṛhyasūtras, which describe the more modest house ritual, and the śulbasūtras, which are devoted to the correct construction of the sacrificial altar, the *dharmasūtras* form the class of *kalpasūtras*. One such *kalpasūtra* exists in each branch of the Vedas. Within each branch the sūtras attach themselves to the earlier āraṇyaka, via the āraṇyaka to the brāhmaṇa, and ultimately, to the basic *samhitā*. Thus, the *dharmasūtra* attributed to Vasiṣṭha belongs to the Rigveda, that of Gautama to the Sāmaveda, and those of Āpastamba and Baudhāyana to the Taittirīya branch of the Black Yajurveda.

The way in which the versified *dharmasūstras* are related to Vedic literature is less clear. An idea, first proposed by Max Müller, and
further elaborated by Bühler in the introduction to his translation of Manu, was that the *dharmasūtras* are versified recasts of earlier and lost prose *dharmasūtras*. In this way the *śāstras*, too, belong to specific branches of the Vedas. The *dharmasūtra* attributed to Manu would then belong to the Maitrāyaṇīya branch of the Black Yajurveda, and that attributed to Kātyāyana to the Vājasaneyi branch of the White Yajurveda.

According to a different theory, the *dharmasūtras* came into being at a time when Hinduism was threatened nearly simultaneously by Buddhism and Jainism. To react successfully against these threats it was felt necessary to eliminate the differences between schools and couch the texts in a more popular and more easily accessible form. The result was that the historical, vertical sequence of *saṁhitā, brāhmaṇa, āraṇyaka, sūtras*, within each branch of the Vedas was replaced with a horizontal cross sequence, each of which specialized in one particular topic across school boundaries, *in casu:* *dharma*.

The important point here is that all the texts on *dharma* derive more or less directly from the Veda. The standard phrase is *vedo dharmasya mūlam* (the root of the *dharma* is the Veda.) Veda and *dharma* are, in many ways, synonymous. This premise has important consequences for the nature of the rules on *dharma* and, hence, for the Hindu conception of law. The Veda was not created by men. It has been revealed by a number of privileged sages who subsequently transmitted it to mankind. The Revelation, (*śruti*) *stricto sensu*, comprehends only the *saṁhitās* and *brāhmaṇas*, and most often extends to the *āraṇyakas*, and *upaniṣads*. The various *sūtras*, including the *dharmasūtras* and *dharmasūtras*, technically belong to a less direct type of revelation, *smṛiti*, often translated as "tradition" to distinguish it from revelation. The epics and Purāṇas also belong to this category. This distinction, however, is unimportant for present purposes. The main point to be remembered is that the Veda, and therefore the *dharma*, and, for that reason, law, are, for the orthodox Hindu, perfect, complete, eternal, and, above all, not to be altered through human intervention.

33. See Introduction to *Manu*, supra note 8.
34. This theory was, as far as the author knows, first formulated in P. vom Bradtke, *Ueber das Manavagrhya*, 38 Zeitschrift der Deutschen Morgenländischen Gesellschaft 417-77 (1882).
Comprehensiveness of Hindu *Dharma* and Law

In reality, the situation is far more complex than the above portrays. Even though the useful *Dharmakosa* "Encyclopaedia of Dharma," under most headings, starts its quotations with the extracts from the Vedas, and notwithstanding assertions that the Veda provides information of "considerable importance" on dharma, even a casual observer will notice that there are hardly any rules of dharma and even less rules of law in the śruti.

The extent to which dharma has a Vedic basis may be illustrated with the following example. Yājñavalkya lays down as one of the qualifications required of an acceptable bride the necessity for her to have a brother. Indeed, the Rigveda points, at least twice, to the low reputation of a woman who has no brother; she is tempted to deviate from the right path because she is unable to acquire a regular husband. In addition, Vasiṣṭha indicates the reason why such a woman is unacceptable as a bride: "[a] maiden who has no brothers comes back to the male ancestors (of her own family); returning she becomes their son." The text even adds that this fact "is declared in the Veda." From the above example comes the orthodox conclusion that the rules of Yājñavalkya and Vasiṣṭha have a Vedic basis, and that the passages from the Rigveda are illustrations of their rules in Vedic times.

Elsewhere, at a much higher intellectual level, the tradition does recognize that the dharma, taught by the Veda, is far from complete. Primarily the highly sophisticated Mīmāṃsā, has developed a number of fictions to account for the situation. Some of these fictions are extremely technical and scholastic. Basically, they all say that the Veda is indeed complete, but that it has only partly been revealed to the humans in this world.

35. L.S. Joshi ed. It lists, solely in Sanskrit, all the ancient texts, together with extracts from commentaries, relative to specific topics of dharma. The legal section is in three volumes (Wai 1937-1941).
36. See generally P.V. Kane, Vedic Basis of Hindu Law (Dharwar 1936).
37. *Yājñavalkya* 1.52-53.
38. Vasiṣṭha, *supra* note 21, at 17.16.
39. *Id.*
More important for present purposes than the number of rules of law contained in the Vedas is the fact that the earlier dharmasūtras also remain very sketchy and that they hardly pay any attention to the legal aspects of dharma. Two different historical explanations have been proposed. Either the legal rules had not yet been formulated at the time when the sūtras were composed, or the compilers of these texts felt that legal prescriptions, even though they did exist, were not important enough to be included in a more exhaustive fashion.

As time goes on, more and more legal rules appear in the texts, far more in the dharmasāstras than in the sūtras. Besides the dharma of the four āśramas and the four varnas generally, more prominence is now given to the dharma of one special individual of the kṣatriya caste, namely, the king. Under the heading rājadharma (the king's dharma), to which Manu, for instance, devotes three full chapters, out of twelve, is found assembled a collection of prescriptions which are essentially of a legal nature. This is not to say that law now becomes more separated from religion and the rest; it only means that those aspects of dharma in which western civilization's category of law plays a more prominent role are joined together around the central figure of the king.

Here, as elsewhere, the texts approach the subject etymologically, that is, the king is called rājā because his highest dharma is to make his subjects happy (rañjayati). Once again, his duties are looked upon as a contribution to maintaining the overall equilibrium. His is the responsibility to maintain the balance between the individuals in his kingdom. He shall protect the weak against the attacks of the strong, lest the latter devour the former like fish in water. The molested party in a dispute (vivāda) shall have recourse directly to the king, who sits as judge in a regular legal procedure.

At the most developed stage of the texts, this principle leads to detailed regulations on the composition of a court of law, presided over by the king and assisted by a varying number of Brahmins "who are experts on dharma." This description of the court is followed by a fourfold treatment of the proceedings. The qualifications, or lack of them, of the plaintiff and the written plaint are followed by equally elaborate discussions of the defendant and his plea. The third section analyzes the various types of evidence, and goes into detail on witnesses, written evidence, possession, oaths, and ordeals. The final
section deals, much more briefly, with the verdict, but hardly alludes to its implementation.

In most texts the rules of procedure are set forth on the occasion of the treatment of the first vivādapada, literally path or area of dispute. The vivādapadas are invariably eighteen in number. Manu enumerates them as follows:

Of those (titles) the first is non-payment of debts, (then follow), (2) deposit and pledge, (3) sale without ownership, (4) concerns among partners, and (5) resumption of gifts, (6) non-payment of wages, (7) non-performance of agreements, (8) rescission of sale and purchase, (9) disputes between the owner (of cattle) and his servants, (10) disputes regarding boundaries, (11) assault, (12) defamation, (13) theft, (14) robbery and violence, (15) adultery, (16) duties of man and wife, (17) partition (of inheritance), (18) gambling and betting.4

Rather than discussing the validity of this division of substantive law, it is important, for a proper evaluation of the system, to keep in mind that the number eighteen appears in numerous subdivisions in India.42 This probably means that whoever conceived the idea of eighteen vivādapadas had the number eighteen in mind first, and only later tried to provide eighteen titles. It also explains a later development which first appears in Nārada. The eighteenfold subdivision is not abandoned but the eighteenth title becomes “Miscellaneous,” which allows authors to insert there any materials which do not find a place in any of the other seventeen chapters.

One final remark in connection with the theory that the Veda and Vedic dharma are comprehensive is in order. However lengthy and detailed the later dharmasāstras become in their treatment of law, a number of serious lacunae remain.43 A recent and carefully produced publication44 convinced this author more than ever before how little is known about the Hindu laws of taxation in general, and of the laws of specific times and specific places in particular. It would be equally difficult to draw a clear picture of the laws governing land

41. Manu, supra note 8, at 8.4-7.
42. For example, the Mahābhārata has eighteen books, the Bhagavadgītā has eighteen chapters, and there are eighteen Purānas.
43. These missing links were one of the reasons why the British, when they decided to apply the Sanskrit texts as the law of the land, abandoned the older dharmasāstras in favor of the later and far more voluminous commentaries.
ownership and land tenure in classical India. The texts occasionally refer to these topics but, for some unstated reason, they fail to go into the same kind of details they provide for other and, from a Western point of view, less important subjects.

Unchangeability of Hindu Dharma and Law

The claim of the tradition that dharma, including Hindu law, is uniform and unchanging is even more complex. To be sure, the texts display a rare and fascinating uniformity, given the fact that they have been composed over a period of at least ten centuries and in various parts of the vast Indian subcontinent. There are, however, considerable differences, so much so that one might be inclined to speak of real contradictions.

It is tempting, in cases where one text differs from another, to explain the deviations as local or temporal variations—each text reflective of the situation in the part of India or the historical period in which it was composed. This is no longer an adequate explanation, however, when it is noticed that on various occasions, one and the same text exhibits more than one solution for the same legal question. Thus, Manu’s chapter on inheritance begins with the rule: “After the death of the father and the mother, the brothers, being assembled, may divide among themselves in equal shares the paternal (and the maternal) estate . . . .”\(^4\) The rule, however, immediately following, unmistakably states the principle of primogeniture: “(Or) the eldest alone may take the whole paternal estate, the others shall live under him just as (they lived) under their father.”\(^5\) Another rule speaks of different shares for the sons: “The additional share (deducted) for the eldest shall be one-twentieth (of the estate) and the best of all chattels, for the middlemost half of that, but for the youngest one-fourth.”

Another well known and often discussed example concerns Manu’s attitude toward niyoga (levirate). The text first states: “On failure of issue (by her husband) a woman who has been author-

\(^4\) Manu, supra note 8, at 9.104.
\(^5\) Id. at 9.105. The “(Or)” in Bühler’s translation is not present in the Sanskrit text. Also his “may divide” and “may take” might equally have been meant to mean “shall divide” and “shall take;” they translate the same optative forms of the verbs as “shall live” later in the second stanza.
ised, may obtain, (in the) proper (manner described), the desired off-
spring by (cohabitation with) a brother-in-law or (with some other)
Sapinda (of the husband)." The text goes on to discuss whether
one or two sons should be begotten, insists that the brother-in-law and
the widow should behave even as a father and a daughter-in-law, and
lays down the penalty for not doing so. The text then continues with-
out any transition: "By twice-born men a widow must not be ap-
pointed to (cohabit with) any other (than her husband); for they
who appoint (her) to another (man), will violate the eternal law." It
devotes another four stanzas to the stern repudiation of the insti-
tution of nityoga.

In addition to offering different solutions for the same problem,
the texts explicitly allow specific types of variations. On several
occasions, after a particular topic of dharma has been expounded, sup-
plementary rules are introduced to be applicable only in cases of āpad,
which is usually translated as times of distress. The word is
never, however, clearly defined. It may, obviously, refer to general
calamities, such as floods or droughts, but it definitely also refers to
distress involving one or a few individuals. For instance, the texts
lay down strict rules on the specific occupations for each social group
(varna), but these are invariably followed by exceptions, as in Manu:
"[W]hen a Brahmin cannot live by his own activities as explained
earlier, he may live by the duties of a Kṣatriya . . . ." If he cannot
subsist as a Kṣatriya, he may live as a Vaiṣya. These are clearly
cases of individual āpad, which must have been numerous. An indi-
vidual's dharma, and the law that is applicable, depends to a large
extent on his caste. The theory of āpad, therefore, must be viewed
as an indication that the authors of the dharma texts did recognize,
to a degree, legal variation and adaptation of the law to differing
circumstances.

The theory that dharma is eternal (sanātana) and unchanging
had to be adapted to yet another concept that was very popular in
Hinduism. The Hindus, even as the ancient Greeks, and many other
civilizations, believe in the succession of four yugas (world ages),
from the best to the worst. The present time is the Kaliyuga, which

47. Id. at 9.59.
48. Id. at 9.64.
49. Id. at 9.65-68.
50. Id. at 10.81.
51. Id. at 10.82.
corresponds to the Iron Age. *Dharma* was perfect in the first age, but it diminished by one fourth in each successive age, with the result that in the Kali age, *dharma* stands on one leg only.\(^{52}\) Consequently a number of practices described in the *dharma* texts have been labeled *Kalivarjyas,* "practices to be avoided in the Kali age."\(^{53}\) For instance, later *dharmaśāstras* have used this criterion to account for earlier contradictory statements on *niyoga:* levirate was a common practice in earlier ages, but it should be avoided in the Kaliyuga.

Hinduism believes, first, in the gradual deterioration within each *yuga,* and, second, in the eternal return, with interruptions, of the four ages. The logical conclusion, therefore, is that, for the orthodox Hindu, *dharma* and law are, in fact, subject to continuous change.

Finally, it should be pointed out that the Sanskrit texts themselves recognize unwritten sources of *dharma.* One important source, which often figures in enumerations together with *śruti* and *smṛti,* is variously called *sadācāra* (practices of the good) or *siṣṭācara* (practices of the learned). Irrespective of the lengthy scholastic disquisitions which these terms have provoked at a later stage, it is clear that, by introducing this type of unwritten and vaguely defined source of law, the texts wanted to give recognition to a number of practices which they themselves did not explicitly codify. Even more significant is the recognition by the texts, *expressis verbis,* of a wide variety of more specific customs as sources of *dharma.* As early as Gautama's *Dharmasūtra,* the king, when sitting as judge, is supposed to supplement the *dharma* contained in the *śruti* and *smṛti* with the laws (*dharma*) of specific groups. Thus, it has been stated:

> The laws of countries, castes, and families, which are not opposed to the (sacred) records, (have) also authority.

> Cultivators, traders, herdsmen, money-lenders, and artisans (have authority to lay down rules) for their respective classes.

> Having heard the (state of) affairs from those who (in each class) have authority (to speak he shall give) the legal decision.\(^{54}\)

Similar rules are repeated throughout *dharmaśāstra* literature. Some texts go even further and provide for separate courts of law, which seem to be considered lower than the royal court, but at the

\(^{52}\) Sanskrit uses the same term for "one quarter" and "a foot, a leg."

\(^{53}\) B. BHATTACHARYA, _The Kalivarjyas_ (Calcutta 1943).

\(^{54}\) GAUTAMA 11.20-22.
same time are supposed to judge members of a group according to rules of law current within that group. For instance, Bṛhaspati states: "For persons roaming the forest, a court should be held in the forest; for warriors, in the camp; and for merchants, in the caravan."  

Nowhere in the texts have these specialized laws been described, nor is there any indication of their magnitude or contents. The sole requirement, already mentioned by Gautama and reiterated several times in later texts, is that they not be opposed to the Veda and Vedic dharma.

**Dharmaśāstra v. Legal Practice**

Occasional glimpses into the existence of uncodified and unknown sources of law in Hinduism naturally lead to a basic question: To what extent were the written texts on dharma true sources of law? Do the texts actually allow an evaluation of the real attitude of Hindus toward law?

Answers to these questions vary considerably. At one end of the spectrum there are evaluations such as this: "There can be no doubt that the smriti rules were concerned with the practical administration of the law." At the other end, however, there is the opinion most forcefully expressed thus: "It is a profound error to regard the Smritis as complete codes of law or as getting all their 'rules' rigidly enforced by the political authorities of their times." According to the same author, "Hindu Law was in the main never more than a pious wish of its metaphysically-minded, ceremonial-ridden priestly promulgators, and but seldom a stern reality."

There have been attempts to demonstrate that the dharma texts were indeed put to practical use in classical India, and that they do reflect the law of the land. This author refers to an article published under the title: "The Harmonizing of Law With the Requirements of Economic Conditions According to the Ancient Dharmaśāstras."

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55. Bṛhaspati 1.25.
58. Id. at 16.
One example mentioned in this article concerns the rate of interest. All dharmasāstras agree on the normal rate of interest, fifteen percent. If the debtor, however, undertakes a long and, by implication, dangerous voyage, the interest is raised to 120%, and in case of a voyage overseas, to 200%. Although the texts reflect a logical adaptation of the rate of interest to risk, the very fact that this adaptation is identical throughout the literature proves that the system as such was considered more important than local or temporal differences.60

A more elaborate and far-reaching attempt to show the practical use of the dharma compares the legal systems as they emerge from the dharmasāstras of Manu and Yājñavalkya, and concludes that they reflect two very different economic and social situations. Manu represents the Hindu nation of the Brāhmaṇic empire (150 B.C.); Yājñavalkya echoes the prosperous and liberal Sātavāhana empire (A.D. 150).61 A detailed analysis of these arguments would lead this Article too far. This discussion shall therefore restrict itself to one example, to point out the danger of the tendency to apply modern concepts to the ancient Hindu lawbooks.

Manu distinguishes three levels of fines: the highest (1000 panas), the middlemost (500), and the lowest (250). These fines are just one of numerous instances throughout Hindu technical literature where quantitative categories are divided into three, each one following being half as large as the preceding one. Yājñavalkya follows the same system, yet his figures are different: 1080, 540, 270. The difference is attributed to a devaluation of the pana in the time separating both texts. In reality, Yājñavalkya’s sole innovation—and a good one from the traditional point of view—is that he replaced Manu’s round figure of 1000 by 1080, a variant on the basic number eighteen which has been met earlier in this study.

The above example probably allows, better than many others, an understanding of the true nature of the Hindu lawbooks. On the one hand, and most fundamental, there is the system. From the texts that have been preserved one can, to a certain extent, follow the

60. Even Sternbach acknowledged that “from the point of view of law, the Indian law-system can be discussed only as a static and not as a dynamic law, although there is no doubt that the Indian law, like all other laws, has its gradual development.” Id. at 528.
61. See generally K.P. Jayaswal, Manu and Yājñavalkya, A Comparison and a Contrast (Calcutta 1930).
development and formation of a number of specific systems. Once a system has been established, however, it is never again altered or abandoned. One example of the static nature of a system is the subdivision of substantive law. Once the basic scheme of eighteen titles is introduced, no later text deviates from it. Another example is that of the three degrees of fines. This author looks upon the compilers of the _dharmaśāstras_ primarily as pandits, who worked with a set of data which they tried—very hard, as they ought to—to arrange within a number of acceptable systems. Some of them, totally unknown to us, succeeded in elaborating such systems. From then onward, these systems remained unchanged. This stability is the remarkable element in Sanskrit technical literature, and it is not restricted to law and _dharmaśāstra_.

On the other hand, there is the equally typical tendency of the Indian pandit to enrich, sophisticate, and beautify the work of his predecessors. This tendency explains why the later _dharmaśāstras_ are far more detailed than the earlier ones. It explains why Nārada—more correctly, the pandit who piled the _Nāradadharmaśāstra_—further subdivided the eighteen titles of law into one hundred and thirty-two subtitles. It also explains why Yājñavalkya replaced Manu’s highest fine of 1000 _panas_ by 1080.

Many of the legal prescriptions in the _dharmaśāstras_ must be more or less literal renditions of the mass of floating versified maxims which were current in India from very early times and in many fields. When the _dharmaśūtras_ are described as the older type of texts, it is sometimes forgotten that many of these _sūtras_, the literary style of the time, incorporate sections of existing maxims in _śloka_ meter, the style of the later _dharmaśāstras_. It is these maxims which were collected, ordered according to subject matter, elaborated into systems, and enriched with an ever growing number of details in the texts. The fact that two or more maxims provided two or more different solutions for the same problem was no obstacle to their being included in the same texts. An example would be Manu’s differing rules on the succession of an estate. It is possible that the differing maxims reflected different local usages. Too modern a view of local usages in ancient India, however, overlooks that these usages were definitely not the usages of North, South, East, or any other province of India. They may, from the beginning, have coexisted within small geographic areas. On the other hand, once they were formulated as maxims, they must, together with numerous other maxims, have started on
their intriguing and inexplicable voyage across the width and breadth of the subcontinent.

Next to nothing is known about actual legal practice in ancient India. The texts on dharma, as they exist today, edited, published, and easily accessible in bookshops and libraries, were certainly not the most wide-spread sources of law. It must be logically accepted that those Brahmins who knew the texts must have tried also to enforce them, at least to a certain extent, whenever they were called on for advice. It is also logical to accept that, in such cases, the ancient Indian kings and minor executives would not normally and intentionally transgress rules of dharma, an attitude which would not only harm them in this existence but also in later incarnations.

More important than the texts were the legal maxims referred to earlier. These maxims, not necessarily in Sanskrit, and perhaps merely via illustrative parables, were much better known, as they are today. To the extent to which the maxims were applied to settle disputes, Hindu dharma was indeed a source of law. Finally, there must have been the whole spectrum of customs, the existence of which is, as we have seen, confirmed by the texts. Numerous disputes must have been solved in very definite and constant ways for the sole reason that they had been solved in these ways from time immemorial.62

Conclusion: Later Developments

Until now this Article has concentrated on the classical period of Hinduism, the time of the dharmasūtras and dharmasāstras. To conclude, a few remarks on later developments are in order. Even though some of the less important dharmasāstras may have been composed at a much later period, by about the eighth century A.D., possibly a little earlier or later, a new period sets in in the history of Hindu dharma. From that time onward the entire literature which has been discussed so far becomes, for about ten centuries, the object

62. In a letter dated 1714, Father Bouchet, S.J., reported at length on the legal system of the Hindus as he observed it. He said that they did not have written laws, but they did have a number of well established maxims, some of which Father Bouchet treated in detail. Also, he stated they had a wide array of customs and usages, unwritten but transmitted from parent to child, from which they would under no circumstance deviate. Bouchet assured his readers that, against all expectations, the system worked and justice prevailed. Bouchet's description may very well apply to most situations in ancient India.
of numerous and endless commentaries. A strict distinction is now made between, on the one hand, the smṛti which obtains absolute authority, and, on the other hand, its interpretation by the commentators which is subject to continuous discussion, innovation, and improvement. Two types of commentaries should be distinguished: (1) the commentaries *stricto sensu* that explain one particular text, sūtra after sūtra, or śloka after śloka, comparing them with select passages from other dharmaśāstras as they proceed; and (2) the nibandhas, often translated as digests, which treat one subject after another, quoting and commenting on ancient texts irrespective of their original contexts.

Opinions again vary on the role that the legal sections of the commentaries and digests played as sources of law. Most modern scholars, Western first, Indian later, believe that the commentators used the ancient texts actually to codify the laws of their respective provinces. The most recent study of classical Hindu law even equates the transition from śāstra to commentary with the passage "from *dharma* to law."

This author has consistently defended a very different interpretation of the commentarial period of *dharma* literature. The commentaries *stricto sensu* do not in any way attach greater importance to the legal sections of the ancient texts than they do to any other section of the *dharma*, nor do they treat them in any different way. The commentarial technique is identical throughout. In the digests there are now separate sections on *vivāda*, substantive law, *vyavahāra*, either procedure or procedure and substantive law, and *nīti*, administrative law. Once again, however, these legal sections are not more important nor are they in any way different from the many other sections which, together with them, make up the *nibandha*. The basic misunderstanding of these texts, and a total loss of historical perspective, came about during the colonial period, when the legal sections of the commentaries and digests were edited, translated into English, and used as lawbooks, whereas all other sections were left to be studied by historians of religion or totally neglected.

In this author's opinion the Hindu attitude toward law in these Indian Middle Ages was not different from what it had been in more

64. Id. at 143.
ancient times. In principle, the śāstra was still the theoretical source of law. In practice, maxims and customs were paramount. There was one difference, though. In many parts of India where the Moghul Empire was strong, Muslim law took over from Hindu law, also for Hindus. Some of this author’s recent research seems to indicate that in certain areas Hindu law had, for all practical purposes, disappeared at the time when the colonial powers appeared on the scene.

As indicated at the beginning of this Article, in 1772 the British, under the impulse of Governor General Warren Hastings, decided that, in a number of areas of private law, Hindus should be governed by their own laws. The answer to the question where these laws might be found, was predictable: the śāstra. The British interpreted this answer literally and elevated, for the first time in Indian history, the dharmaśāstras qua texts to the rank of lawbooks. British judges were given the task of applying laws in the courts, the extent of which they did not know, the language of which they were unable to read, and the general background of which they could not understand. For several years, pandits were appointed to the courts to research the laws governing each case. Dissatisfaction with the system and distrust of the pandits led Sir William Jones to study Sanskrit and translate Manu’s dharmaśāstra. The need to have a complete code of Hindu law led to the compilation, by hired pandits, of new digests, which were subsequently translated into English. The vagueness of these codes in turn created the concept of schools of Hindu law based on the premise, wrong in this author’s opinion, that the medieval digests codified the laws of different provinces of India, and that they could be used as such. In short, a slowly growing number of legal sections of commentaries and digests were translated into English, and the British judges applied them, as well as they could, even against occasional odds. For instance, when a party or a lawyer presented the judge with a Sanskrit text which had not yet been translated, it should not therefore be less authoritative. Inevitably, the judges introduced a few changes of their own. They arbitrarily separated law from religion. The commentaries were, relatively speaking, the least ambiguous sources of law, therefore the judges reversed the traditional hierarchy, and stated that the wording of the commentary overrules that of the dharmaśāstra, and the latter that of the Vedas. They gradually avoided consulting and reinterpreting the translations of Sanskrit texts by making Hindu law into a regular case law, invoking precedent and stare decisis. When the
Hindu lawbooks appeared to be unacceptable, they overruled them on the grounds of justice, equity, and good conscience.

This description would be irrelevant for the study of Hindu conceptions of law, were it not that the Hindu judges, Hindu attorneys, and the Hindu public at large fully accepted this well-intended but perfectly hybrid system of law created by the British. They accepted it before independence, and they continued to live by it after 1947.

In the meanwhile, a number of basically Western codes had been introduced: the Penal Code (1860); the Indian Evidence Act (1872); the Criminal Procedure Code (1898); and the Code of Civil Procedure (1908). For more than a century, in the field of private law, several legislative Acts overruled and abrogated more and more provisions of classical Hindu law. In the years before independence, a serious effort was made to codify Hindu private law. The “Hindu Code Bill,” however, never became law, in view of the lack of agreement, even among Indians, on the basic principles upon which private laws applicable to all Hindus should be built. The Indian Constitution was even more ambitious: “The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.” Today, nearly three decades later, there is no evidence to show that this ideal will be realized in the near future.

65. Indian Constitution, art. 44 (1950).