III. Zur Natur der Rechtsquellen

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Dharmaśāstra, Custom, 'Real Law' and 'Apocryphal' Smṛtis

One of the questions that we must confront in attempting to examine the relationship between law and the state in ancient India is that of the general nature of *dharmaśāstra*[1]. What is its relationship to 'law'? Does it represent the law of the land? What is its value for the history of Indian society? What does this literature tell us about how people actually lived? I am not the first to ask these questions, obviously. These are questions which underlay much of the scholarship related to *dharmaśāstra*, and one might expect that 200 years of European and Indian scholarship on this question would have settled the issue. This is not the case. The answers to these questions given by various scholars over the years have been contradictory to say the least. The following examples are representative of views held by theoreticians of Hindu Law. The standard textbook on Hindu Law, *Mayne*'s Treatise on Hindu Law and Usage states: '*there can be no doubt that these rules were concerned with the practical administration of law.*'[2]
Govinda Das had a very different opinion: '*It is a profound error to regard these texts as complete codes of law or as getting all their 'rules' rigidly enforced by the political authorities of their time.*[3] [. . .] *Hindu law was in the main [n]ever more than a pious wish of its metaphysically-minded, ceremonial ridden, priestly promulgators and but seldom a stern reality.*'[4] *Ludo Rocher* has said very recently: '*I am convinced that, during the time of the commentaries and digests, these texts did not represent the law of the land. They were purely panditic, learned commentaries on ancient authoritative texts. The fact that they display*

[1] The remarks in this paper are concerned with the *vyavahāra* (legal procedure) portions of dharmaśāstra. Although I believe that the general notion of the ascendancy of custom and the efforts to include rather than exclude local practice within the realm of *dharma* apply equally as well to *ācāra* and *prāyaścitta*, I am not addressing those portions of the *dharmaśāstra* literature here.

[2] [*John D.*] *Mayne*'s Treatise on Hindu Law and Usage, 12th edition, revised by Justice Alladi *Kuppuswami*, Delhi 1986, p. 2. It must be pointed out that this view does not seem to have been stated by *Mayne* himself since it is not found in any edition authored by him. It seems to have been first included in the eleventh edition revised by *N. Chandrasekhara Aiyar* in 1950.

[3] 'The Real Character of Hindu Law,' the introduction to the Vyavahāra-bālambhaṭṭī of Bālambhaṭṭa Pāyagunde, edited by *Nityanand Pant Parvatiya*, Chowkhamba Sanskrit Series 41, Benares 1914, p. 8.

[4] *Ibid.*, p. 16.

differences does not mean, as some have proposed, that the commentators adapted the ancient sacred texts to local customs. That would have been pure sacrilege on their part.'[5]

Thus, on the basis of these examples, the *dharmaśāstra* literature is:

1. undoubtedly concerned with real law
2. merely pious wishes with no political sanction
3. purely panditic commentaries with no relation to custom.

What are we to make of this? Is one view correct and the others not? Are these views mutually exclusive? Are there other alternative views possible? Before I answer any of these questions, it is necessary to remind the reader of the complexity of the *dharma* literature, and to provide myself with a convenient escape. The hundreds of surviving texts that comprise the *dharma* literature extend from the 6th century B. C. to the 18th century A. D. Any generalizations about it are fraught with danger. Yet, the very length, size, and continuity of the tradition means that it must have a cultural import that can be generally described.

Let me begin by giving my view of the nature of the *dharmaśāstra* literature. I believe that the *dharmaśāstra* literature represents a peculiarly Indian record of local social norms and traditional standards of behavior. It represents in very definite terms the law of the land. This is different than the view held by my teacher, Ludo Rocher. It is different than the view of Govinda Das, and in an important way it is different from what *Mayne* understood. What I mean is that the whole of the *dharma* corpus can be viewed as a record of custom. It is not always a clear record because of the idiom and the fictions which came to be the mode of expression of the *dharma* literature. That the *dharma* literature is a record of custom is obfuscated by the fact that the idiom of all the *dharma* literature is one of eternality and timelessness. This means that there are no contemporaneous references which can help us to establish the chronology of these ideas, nor is there admission that custom and practice changed and evolved over time.[6] It is further obfuscated by the fact that the *dharma* literature clings to the claim that all of its provisions can be traced directly or indirectly to the Veda, the very root of dharma.

How can I justify my view that *dharmaśāstra* is a record of custom? by examining the theoretical statements made in the *dharmaśāstra*s and in the *mīmāṃsā* literature, and by examining the nature of particular rules preserved in the *dharmaśāstra* texts.

J. D. M. Derrett has made the claim that the *dharmaśāstra* was always only of 'suasive' authority and that the British misunderstood the literature and treated it as positive law.[7] First of all, to say that *dharmaśāstra* is not positive law raises the question of what we mean by positive law. If by positive law we mean law enacted by a properly consti-

[5] *Ludo Rocher*, 'Changing Patterns of Diversification in Hindu Law,' in: Identity and Diversification in Cults and Sects in South Asia, Philadelphia 1984, pp. 31-44 at 41.

[6] The *kalivarjyas* are the only explicit recognition of the possibility of change in custom and its instantiation in rules. The formal theory of *kalivarjyas* is a very late one and its primary purpose seems to have been to explain inconsistencies in the texts whose origins were then lost in the mists of the past. For dates, see *Batuknath Bhattacharya*, The 'Kalivarjyas' or Prohibitions in the 'Kali' Age, Calcutta 1943, pp. 176-177. While the formal theory is late, the notion that the parameters of *dharmic* behavior changed over time is an old one, see, for example, Nirukta 1.20 and Gautamadharmasūtra 1.3-5.

[7] Dharmaśāstra and Juridical Literature, Wiesbaden 1973, p. 9.

tuted authority for the government of society, then it is my view that the provisions of *dharmaśāstra* qualify as positive law. That they are based on normative values or find expression in the exemplary behavior of specific groups does not diminish the positive character of the laws. *All* legal systems are based on norms and beliefs which, if pressed as to their sources, are ultimately normative and in some sense, therefore, 'natural' law.[8]

If we pause for a moment to consider what a properly constituted authority might have been in classical India, we come face to face with one of the most nettlesome problems in the history of *dharmaśāstra*: we do not know by whom or when our texts were composed. The texts themselves — concerned to preserve the fiction of Vedic timelessness — tell us nothing about their own histories. We are left to extrapolate how these texts may have come into being. What we do know — as certainly as we can know anything in *dharmaśāstra* — is that a significant portion of the laws administered in royal courts were those which had been authored by representative bodies of regions, guilds, trade groups, castes, etc. We know from Kātyāyana, Bṛhaspati, Manu, and Pitāmaha that the king was obliged to sanction and enforce those regional conventions which were the consensus of local leaders. These *vyavasthās* were to be the basis for the king's decision in his own courts, not just in the local courts.[9] Nārada (10.2-3) tells us that the king is obliged to enforce even the customs of heretics:

pāṣaṇḍanaigamaśreṇīpūgavrātagaṇādiṣu |
saṃrakṣet samayaṃ rājā durge janapade tathā ‖
yo dharmaḥ karma yac caiṣām upasthānavidhiś ca yaḥ |
yac caiṣāṃ vṛttyutpādānam anumanyeta tat tathā ‖

'The king must protect the conventions of heretics, corporate bodies, guilds, councils, troops, groups, and the like in towns and in the countryside. Whatever their laws, duties, rules for worship, or mode of livelihood, he must permit them.'

Lingat objects that these laws — which he prefers to call statutes (French *statuts*) — are not 'legislation' since they were regulations that applied to 'restricted circles in the population and had not the general application which is required by our definition of 'legislation.''[10] What is more, he does not consider the findings of the court real law because 'It is *dharma* only for the two parties in the case. It cannot leave any trace in the sphere of the law itself.' *Lingat* further objects to describing the findings of the king's court as law because the *rājaśāsana* which results from the king's court is 'merely an expression of the royal policies, which could be inspired by considerations of conven-

[8] For an analysis of the Indian case, one cannot do better than that of *Wilhelm Halbfass* in India and Europe, Albany 1988, pp. 330-333.

[9] 48-50 says: *deśasyānumatenaiva vyavasthā yā nirūpitā | likhitā tu sadā dhāryā mudritā rājamudrayā ‖ 48 ‖ śāstravad yatnato rakṣyā tāṃ nirīkṣya vinirṇayet | naigamasthais tu yat kāryaṃ likhitaṃ yad vyavasthitam ‖ 49 ‖ tasmāt tat saṃpravarteta nānyathaiva pravartayet ‖* 50 ‖ 'A written convention determined by the consensus of regional inhabitants is is to be kept and sealed with the royal seal. It should be strictly enforced just like the *śāstra* and considered when rendering a decision. A regulation which is written down by traders is justiciable and should therefore be adhered to. He (the king?) should not conduct himself otherwise.' For similar passages in Bṛhaspati see Vīramitrodaya Vyavahāraprakāśa p. 22, for Pitāmaha see Smṛticandrikā Vyavahārakāṇḍa p. 58, and Manu 8.41.

[10] *Robert Lingat*, The Classical Law of India (translated from the French with additions by *J. Duncan M. Derrett*), Berkeley 1973, p. 228 and note 53.

ience, opportunism, or equity, of which the king is and must remain the sole judge.'[11] This seems to me to be a parochial view of the phenomena of law. To claim, as *Lingat* does, that 'law is understood to express the will of all' is naive insofar as there is not, nor has there ever been, a society in which the 'will of all' is anything more than a fiction. To require that every law apply uniformly to every person is to establish a standard for ancient India that is ludicrous. There is *no* system where laws apply equally to all whom they govern. Quite aside from the fact that specific laws are never applied to certain individuals (for example, laws restricting the activities of physicians have no applicability to plumbers or professors unless they are also physicians), there is inherent in every society relationships which mitigate the application of laws. Whether it is the policeman who winks at the excesses of his colleagues or the rich man who hires enough legal talent to intimidate and exhaust his wronged opponent,[12] the fact is that using universal applicability as a standard is not helpful. *Lingat*'s judgement on the nature of the *dharma* literature is clouded by his definition of positive law. As to the objection that a decision by the king is motivated by convenience, opportunism, or equity, this seems a peculiar view in light of the contemporary judicial history in France, Great Britain, and the United States. Surely *Lingat* does not mean to suggest that there is a single, brilliantly apparent set of immutable legal norms obvious to and uniformly applied by every judge.

Blackstone and *Cicero* provide us with definitions of law which are more useful for Indian society. *Cicero* said, 'Law (*lex*) is the highest reason, implanted in nature, which commands what ought to be done and forbids the opposite.'[13] *Blackstone* stated that law is 'a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.'[14] In the light of these definitions, the pronouncements of the king's court are most assuredly law. They are law because they command what is right and prohibit what is wrong.

Lingat's objection that the decisions of a king's court are not law because they are *dharma* only for the litigants is not a sound objection, because we must consider that nearly all *dharma* is *svadharma.* That is, questions of right and wrong — questions of dharma — are unique to each individual. We know from anthropological literature that dispute settlement in India is never done by weighing a set of facts in abstraction (except in government courts), rather the total history and relationship of the individuals involved is taken into account either overtly or implicitly.[15] The reason for this is that

[11] *Ibid.* p. 256.

[12] See, for example, *Marc Galanter,* 'Why the 'haves' come out ahead: speculations on the limits of legal change,' in: Law and Society Review 9 (1974), pp. 95-160.

[13] *De Legibus*, Book I vi (Loeb Classical Library ed. transl. by *C. W. Keyes*), Cambridge, Mass. 1928, p. 317.

[14] *Sir William Blackstone,* Commentaries on the laws of England, 4 vols., Buntingford (England) 1966 (reprint of 1st ed. 1765-1769), vol.1 p. 44.

[15] See *Bernard S. Cohn*, 'Some Notes on Law and Change in North India,' in: Economic Development and Cultural Change 8 (1959-60) pp. 79-93, and 'Anthropological Notes on Disputes and Law in India,' in: American Anthropologist 67 (1965) pp. 82-122. 'A Caste Dispute Among Washermen of Mysore,' in: Eastern Anthropologist 6-7 (1952-54) pp. 148-168. Also *Robert M. Hayden,* 'Excommunication as Everyday Event and Ultimate Sanction: The Nature of Suspension from an Indian Caste,' in: The Journal of Asian Studies 42 (1983) pp. 291-308, and

in the Indian view each set of facts is unique and each dispute is therefore unique. To be bound by precedent is to be bound to give a wrong verdict since no previous decision can be anything more than the most general guidepost.[16]

I think that too much has been made of the difference between *dharmaśāstra* and positive law. From our outsiders', western perspective we see huge gaps between an articulated theory of the law and the society we know from other sources such as inscriptions, literature, and anthropology. We conclude that this system must be a priestly fabrication or at least something other than law. Since it is not like Gaius or Justinian or the U.S. Constitution it must not be positive law. This is wrong. The Indian tradition is simply more overt and bold about the theological underpinnings of its legal system.[17] There is a sophistication and wisdom about the nature of law and legal literature that we have only begun to approach in the Common Law tradition.

We in the west have deluded and deceived ourselves into thinking that law — especially written law — has a reality, a fixed and certain character which it does not. There is implicit in the notion of positive law a constancy, a permanence and a certainty which is not justified. The notion of positive law arises from a European tradition which only knows law as recorded in texts. By texts, here, I mean written and eventually printed texts: black letter law. These texts have often given scholars and legal theorists a sense of certainty and confidence that may not be fully justified by the nature of the printed text.[18] My colleague *Sanford Levinson* has said of a written source of law, 'To view it as a genuine source of guidance is naive, however heartbreaking this realization might be.'[19] India's tradition treated texts differently than we do. I believe that the ancient Indians intuitively held the view that no legal writing was ever intended to be valid in and of itself, but only as it was understood by those members of society who were trustworthy. The trustworthiness of these individuals was determined by their intimacy with the Veda. These were the arbiters of custom and, hence, of law.

These worthies knew that dharma — like justice — is context sensitive. The application of all law is context sensitive. It is a delusion to think that the law can be proclaimed for all time and in every circumstance. The authors of the *dharma* literature understood this context sensitivity of *dharma*. It was never their intention to exhaustively record and codify all law applicable for all time.[20] It was their intention to pro-

Footnote from p. 100, continued
David G. Mandelbaum, Society in India, vol. 1, Berkeley 1972, pp. 310-311.

[16] Uniform application of the law is a fiction in any society claiming such application. One need only look at the legal escapades of Richard Nixon, Edward Kennedy, and Ronald Reagan, and the grotesque disproportion of African-Americans sentenced to death for capital crimes to see sad but eloquent testimony to the lack of uniform applicability of laws in the United States.

[17] For an eloquent articulation of the religion of the U.S. Constitution and of the American state, see *Sidney E. Mead,* The Lively Experiment, New York 1963, especially chapter 5, 'Abraham Lincoln's 'Last, Best Hope of Earth': The American Dream of Destiny and Democracy.'

[18] There is a plethora of literature assailing the certainty of texts. See, for example, *Stanley Fish*: Is there a Text in This Class?, Cambridge (Mass.) 1980 and Doing what comes naturally: change, rhetoric, and the practice of theory in literary and legal studies, Durham (North Carolina) 1989.

[19] *Sanford Levinson,* 'Law as Literature' in: The Texas Law Review 60 (1982) p. 378.

[20] Gautamadharmasūtra ends (28.49) with the statement that in cases where no specific rule has been given, then the matter should be decided by a properly constituted assembly. *Derrett*

vide a means whereby law could be 'discovered' in each specific context. In an Indian context there was never the idea that any two crimes or civil wrongs were identical, so there was no reason to be concerned with precedent. Each dispute was unique and what was needed was a general set of guidelines for procedure and for classification of the dispute. This is what the *dharmaśāstra* provided for dispute settlers of ancient India.

What was the source for the guidelines and classifications provided by these texts? The fiction was that it was the Veda, but a closer examination indicates that the tradition itself recognized that the ultimate source of *dharma* in a legal sense was custom. There are frequent acknowledgements of this in the *dharma* literature. Āpastambadharmasūtra (1.7.20.6-7) has said:

na dharmādharmau carata āvaṃ sva iti na devagandharvā na pitara ity ācakṣate 'yaṃ dharmo 'yam adharma iti. yat tv āryāḥ kriyamāṇaṃ praśaṃsanti sa dharmo yad garhante so 'dharmaḥ

'*Dharma* and *Adharma* do not go about saying, 'Here we are.' Nor do gods, gandharvas, or pitṛs say, 'This is *dharma.* This is *adharma.*' [So there is nothing for it but to define] *dharma* [as] 'That which honorable men praise, [and] *adharma* [as] that which they condemn.'

Then there is the well-known concept of the four feet of legal procedure articulated in Nārada (1.10-11): dharma, legal procedure, custom, and the king's decree are the four bases of legal procedure. According to the understandings of this verse recorded by commentators, custom is the overriding source of rules of conduct which the king must enforce.[21]

This is not to say that custom did not accommodate itself to the texts — it certainly must have — Sanskritization cannot be a wholly modern phenomenon.[22] Nor do I mean to state that there is no distortion or sanitizing in the brāhmaṇas' recording of custom — there certainly was. The utter absence of any temporal reference and the fog of the fictional Vedic source are clear indicators that they are doctoring the record. In general, however, the brāhmaṇa *dharmaśāstra* writers were constrained by the burden placed on them as recorders and synthesizers of customary practice. They were obliged by the interested constituencies, by the king, and by considerations of social and poli-

Footnote from p. 101, continued
recognizes this as well, 'Law thus did not depend on texts, but upon how texts were used.' (*Derrett, Sontheimer, Smith,* Beiträge zum Indischen Rechtsdenken, Wiesbaden 1979, p. 108.)

[21] See *Robert Lingat,* Les 'quatres pieds du procès' in: Journal Asiatique 250 (1962) pp. 489-503.

[22] It is a concept that extends back to Śivājī, certainly, inasmuch as he worked diligently to expunge the Persian influence from the language and government of his empire. See *Benoy Kumar Sarkar,* The Positive Background of Hindu Sociology, Delhi 1985 (reprint of 1937), p. 507-508. That *Sarkar* was actually the first to use the term Sanskritization (15 years before *M.N. Srinivas* in his Religion and Society Among the Coorgs) has been pointed out by *Pabitrakumar Gupta* in 'Acharya Benoykumar Sarkar on Sanskritization' in: Ācārya Binaykumār Sarkār, edited by *Pradyot Ghosh,* Maldah 1988, pp. A-E. I am grateful to my colleague, Dr. *Rahul Peter Das,* for bringing this article to my attention. *Derrett* (Beiträge, p. 108) holds a similar view of the mutual influence of custom and *śāstra,* although he denies that *śāstra* was law 'it became evident that *śāstra* was not law, but one of the means whereby law occurred. The *śāstra* in fact reflected selected customs, some of which it systematized in an intellectual sense and in the direction of righteousness; and in due course customs began to move in time with the *śāstra,* but unevenly and unpredictably.'

tical harmony to record the practice as they found it. They were also obliged to explain how these customs fit with the tradition, and it is in these 'explanations' that we may find the most outré flights of brāhmaṇa imagination. In the notion of mixed castes, for example, we are told that the plethora of castes came from admixture of the original four castes recorded in the eternal Veda[23]. This sort of explanation is where brāhmaṇa authors become inventive and paint the data with their unique perspective. Still, this very brahminical explanation affirms the existence of the many castes and their relative autonomy, and the deference with which the king is obliged to treat the customs of these castes establishes their customs as legally binding.

Similarly, the response of the commentators and digest writers to the Nāradasmṛti's provision for the remarriage of widows and other women who have entered into unsuitable marriages is an example of how the brāhmaṇa authors explained rather than dictated custom. Nāradasmṛti 12.97 says:

naṣṭe mṛte pravrajite klībe ca patite patau |
pañcasv āpatsu nārīṇāṃ patir anyo vidhīyate ‖ [24]

'There are five catastrophes in which women are required to take another husband: if the husband disappears, dies, or becomes a world-renouncer, a eunuch, or an outcaste.' Commentators such as Medhātithi are not very comfortable with this provision. Their explanations reflect a definite disagreement with this blanket admonition to remarry. Medhātithi in commenting on Manu 9.76 flatly rejects this view altogether and says it is wrong. Mādhavācārya commenting on Parāśaradharmasaṃhitā 4.30 says that this is a rule applicable only in previous yugas (*yugāntaraviṣaya*). Bhavasvāmin limits the applicability of this rule only to virgin women (*akṣatayoni*), and even then the rules of *niyoga* apply. Bālambhaṭṭa (p. 685) on Yājñavalkya 2.127 says that this only applies in those cases where there has been a verbal commitment of marriage but the actual *saṃskāra* itself has not been completed. Maskarin commenting on Gautama 18.4 intimates that the verse quoted above is to be understood as advocating *niyoga* — the sole motive for the remarriage should be the birth of offspring.[25]

In spite of the fact that this Nāradasmṛtivacana is unambiguous in its admonition to remarry, the commentators don't like it.[26] They struggle with it and use their considerable hermeneutical skills to interpret it in such a way as to minimize its applicability.

[23] For a thorough discussion of the various mixed caste systems and the explanations thereof, see *Horst Brinkhaus,* Die altindischen Mischkastensysteme, Wiesbaden 1978.

[24] This verse is also found in Parāśaradharmasaṃhitā 4.30 and attributed to Bṛhaspati by the Maskaribhāṣya on Gautamadharmasūtra 18.4.

[25] There are many such 'problems' that confront the interpreters of the *smṛti* tradition including the explanation of such well known institutions as the *āśrama* system, and *niyoga,* the levirate marriage which is first praised and then condemned all within five verses of the same chapter of Manu (9.59 and 9.64). For a first rate, comprehensive account of how the *āśrama* system — which we take so much for granted — evolved, and how the textual accounts differ from the 'standard' understanding of the institutions, see *Patrick Olivelle's* The Āśrama System: the History and Hermeneutics of a Religious Institution, Oxford University Press, New York 1993.

[26] For a more complete discussion of the implications of and reactions to this verse see *R.W. Lariviere,* 'Matrimonial Remedies for Women in Classical Indian Law: Alternatives to Divorce,' in: Rules and Remedies in Classical Indian Law, ed. *Julia Leslie,* Leiden 1991, pp. 37-45; and *Paul Thieme,* 'Jungfrauengatte' in: Kleine Schriften, Wiesbaden 1984, pp. 426-513.

Yet, the verse survives. Why? If the provision really applies to a previous *yuga,* why should it be preserved and passed on to contemporary students? The tradition knows well the idea of 'editing' texts for use in different eras of human development,[27] so why not do a little editing here? The reasons are no doubt many and complex, but have to do with the fundamentally conservative nature of the *smṛti* tradition.[28] Nevertheless, I believe that in many cases the compilers of *smṛti* texts were confronted with practices that they did not approve of, but that were commonly accepted either in other sectors of society or in other villages or regions.[29] Sometimes these practices were dismissed with claims that they applied to another yuga as above, sometimes they were dismissed as the practice of depraved classes,[30] and at other times they registered their uncertainty by attributing rules to 'others' or by introducing them with 'some say'.[31]

The point here is that the *smṛti* texts were the record of actual customs and practices found in classical India. These customs were recorded whether the compilers of *smṛtis* agreed with them or not because it was the purpose of these texts — on one level — to record the norms of those communities which accepted *dharma* as the the standard of behavior. In addition, it was the object of the recorders of these customs to integrate these practices into the brahminical/vedic *weltanschauung* the promotion of which was the basic motive for their recording the customs in the first place.[32] It is in their explanations of these customs that we find the 'pious wish[es]' and 'metaphysically minded, ceremonial ridden priestly promulga[tion]' that Govinda *Das* decried. The brāhmaṇas' peculiar understandings and strained explanations do not diminish the fact

[27] See, for example, the account of the transmission of the Manusmṛti found in the beginning of Mātṛkā 1 of the Nāradasmṛti.

[28] See the Introduction to my translation of the Nāradasmṛti, pp. xii-xiv.

[29] Another interesting example is the apparent acknowledgement of the existence of testamentary disposition of paternal property — a will — in classical Hindu Law. Nāradasmṛti 13.15 says

pitraiva tu vibhaktā ye hīnādhikasamair dhanaiḥ |
teṣāṃ sa eva dharmaḥ syāt sarvasya hi pitā prabhuḥ ‖

'The partition done by the father is legally binding on the coparceners whether the shares are equal or not, because the father is the master of everything.' This flies in the face of the normal rules of inheritance, and the commentators are uneasy about it. The Dāyabhāga 53 and the Smṛticandrikā Vyavahārakāṇḍa 609-610, both stipulate that this can only apply to property acquired by the testator — not to ancestral property. The Parāśaramādhavīya 414 says that this disposition is sanctioned by *smṛti,* but since it violates common practice (*lokaviruddha*) and scripture (*śrutiviruddha*) it is better to divide the property equally. In opposition to this view Bhavasvāmin 153 in his commentary on the Nāradīyamanusaṃhitā says that whatever the father wishes in such a case is what must be done, and there can be no second-guessing even an inequitable division: what's done, is done. The Vyavahāramayukha 99 flatly states that this provision of Nārada's applies to a different *yuga.* There is an apparent reference to a will in the Gilgit manuscripts (*patrābhilekhya* and *patrābhilikhita*), see: Gilgit Manuscripts vol. III part 2 edited by *Nalinaksha Dutt,* Bibliotheca Indo-Buddhica 17, Srinagar 1942, p. 140. I am grateful to *Gregory Schopen* for this reference, who discusses it in an unpublished article, 'The Monks' Obligation to Make Merit for Deceased Donors: A Buddhist Parallel to Monastic Practice in the Medieval West.'

[30] As in the discussion of a husband's liability for a woman's debt at Nāradasmṛti 1.16.

[31] See *Olivelle, loc.cit.,* section 3.1.1 and 3.2.1.1.

[32] *Ibid., passim,* makes clear that much of the history of what we have come to call the *āśrama* system can rightly be seen as attempting to theologically synthesize a wide range of practices.

that custom is the source of dharma. There is much made of the Vedic source, but ultimately, the immediate source is custom.

The legal texts themselves tell us this in very clear terms. All custom is binding. The commentators, the *nibandhakāras*, and the *mīmāṃsakas* went to great lengths to establish that *śiṣṭācāra* (the practices of learned brāhmaṇas) was binding as was established custom for all others. The elevation of *śiṣṭācāra* in the hierarchy of sources of *dharma* is theologically possible because these practices are based on some lost or forgotten Vedic passage. As for the inclusion of the established customs of others as 'legally' binding, this also has a theological motive, namely to include those communities which are not under the immediate sway of the brahminical influence within the vedic world — to Sanskritize them in reverse.

This has the effect of sanctifying custom and generously granting the status of *dharma* to local practice. A reading of the *holakādhikaraṇa* of the Mīmāṃsāsūtras (1.3.15-18) and the commentaries and subcommentaries thereon reveals the liberality with which custom is treated — anything goes as long as it is the practice of those persons the community holds to be virtuous. This principle is carried to the most extreme lengths by Mitramiśra who says that the customs of Śūdras are *dharma* for Śūdras[33] even though they obviously cannot be based on any Śūdra elders' familiarity with the Veda. There is clearly a greater value and esteem placed on the practices of the ideal brāhmaṇa, but his practices are *dharma* for the brāhmaṇa, not for anyone else. The *dharmaśāstra* writers would like for all readers to come away with the notion that brāhmaṇas are the best, most worthy, most important elements of society, and that their lives are exemplary and at the very peak of the normative heap. This may have been true in some settings, and that the brāhmaṇas wished this to be so is almost certain. Whether it was the universal norm is doubtful, and one piece of evidence is the the persistence with which unpopular provisions in the *dharmaśāstras* survive: there must have been large segments of classical Indian society, just as there are large segments of modern Indian society, for whom brāhmaṇas are of little social or political consequence.

From the standpoint of a scholar outside of the tradition, what we are seeing in this liberal acceptance of local practice is a device which assures the inclusion of dominant local custom within the mainstream of Hindu orthodoxy. This means that the local consensus concerning norms of behavior is the real source of dharma, and that the validation of that local practice by tying it to some long forgotten Vedic text is a fiction which serves to provide an umbrella of orthodoxy for all of Bhāratavarṣa. It is the acceptance of this fiction which is the real test of Hindu orthodoxy — not any particular practice or theology.[34]

This has consequences, of course, for how we, as scholars, approach these texts in our attempts to reconstruct the social and legal history of classical India. *J. D. M. Derrett's 'Dharmaśāstra* and Juridical Literature' is a case in point. This important, laconic, and sometimes brilliant little book introduces an interpretive category to the world of *dharmaśāstra* scholarship. In his discussion of the *dharma* literature he divides texts into two categories: those which are 'genuine' and those which are not. Now, the notion of

[33] *Vīramitrodaya-paribhāṣaprakāśa* p. 9.

[34] It is possible that social change — perhaps the effects of the urbanization of the mid-1st millenium B. C. — diminished the capacity of a brāhmaṇa class to influence the practices.

a genuine *dharma* text is not a difficult one. However, the idea that some of these texts were 'apocryphal,'[35] or 'bogus,'[36] or 'supposititious'[37] requires some explanation. Unfortunately, he does not provide us with any explanation of his criteria for categorizing such texts. He uses these terms in a general manner and rarely gives specific textual examples. Even when he refers to specific texts[38] he does not explain why these texts are spurious or apocryphal. His style is to simply toss out these words without elaboration: 'In the end an apocryphal *smṛti* says that ancestral customs are more important than any rule in the *śāstras*'[39] . . . The *Parāśarasmṛti* . . . is an ancient *smṛti*, . . . not to be confused with the supposititious *smṛtis* which arose during the period of the commentators.[40] . . . The wave of 'bogus' *smṛti* writing, which may have extended into the seventeenth century, was not juridical in inspiration.'[41]

In only one instance does he give any explanation for the use of these adjectives: 'Texts appearing once only and attributed to named authors may in fact be apocryphal.'[42] This general statement is unsupported by any further argumentation. What he seems to mean from the context is that when a verse is only cited once in the tradition then it should be suspect. By this he does not mean if a verse is found cited once and in only one manuscript then it should be rejected. He means to say that if a verse is found in only one place in the commentaries and *nibandhas* then it is apocryphal.

This standard for judging a verse to be 'bogus' is unacceptable. First, it is not the place of scholars to make this judgement. We can identify texts as chronologically recent, theologically innovative, more or less effective in articulating a position, but if a writer puts forth an opinion it is not within a scholar's province to label it apocryphal. This is a judgement that can only be made by the tradition itself, and even then a text's apocryphal status is only one group's opinion. No Gnostic ever called the Book of John 'The Apocryphon of John,'[43] but if a Christian theologian views it in this way, then we may adopt his category as a descriptive one, but we may not adopt the evaluative, normative judgement implicit in that Christian theologian's usage. In *Derrett's* usage of the terms apocryphal, etc. one has the clear impression that the verses so described have been judged by him to be wrong or incorrect in some way. This is not historical scholarship.

Second, to characterize a text on this basis is to ignore the role of custom and the manner in which texts are transmitted. There is no ecclesiastical body in the Hindu tradition which is empowered to adjudicate on the canonicity of verses or even whole texts. The ultimate test of the verity of a text is whether or not it is acceptable to successive generations of *śiṣṭas*. These are the vectors for the transmission of any text. If the *śiṣṭas* determined that a verse or whole text was bogus, apocryphal, etc. then they

[35] *Derrett, Dharmaśāstra*, p. 41.
[36] *Ibid.*, p. 40.
[37] *Ibid.*, p. 39.
[38] For example, *ibid.*, p. 36 note 184 where he simply cites 'Kāty. 37-51, 225, 884a.'
[39] *Ibid.*, p. 39, Sumantu quoted in the *Smṛticandrikā, Saṃskārakāṇḍa*, p. 9.
[40] *Ibid.*, p. 39.
[41] *Ibid.*, p. 40.
[42] *Ibid.*, p. 40-41.
[43] See *Hans Jonas*, The Gnostic Religion, Boston 1963, p. 177.

would not have bothered to transmit it. The methods of transmission — by teaching a text to students and by having a manuscript copied — ensured that there was an informed, vigilant, and conservative audience which would be able to detect a fraud quickly.

The very notion of a fraudulent passage in a *smṛti* text requires some explanation. What can it mean? Why would anyone invent a verse in the first place? There can only be two general reasons for doing so: (1) for venal reasons a verse might be created in order to help one party or another in a dispute; and (2) to adapt the tradition to new social circumstances — when local custom has presented practices or circumstances which were not provided for in earlier texts. The venality of the first reason is guarded against by the presence of a large, informed community of experts in *dharma* who would be able to immediately detect a fraudulent verse created for the express purpose of promoting individual interests.[44]

The second reason for the creation of a verse — to adapt the tradition to new circumstances — was not fraud. This was the ongoing process that gave the tradition vitality and the ability to endure. Not only was the adaptation of the textual tradition to the changing needs of society implicit in the development of the *dharmaśāstra*, it was explicitly recognized within the tradition. *Derrett* opposes 'bogus' *smṛtis* with the category of 'genuine' *smṛtis* by 'known' authors (an interesting term in itself since we know almost nothing about these authors). By this he means those authors found in lists of authors of *smṛti* works within the textual tradition: thus Manu, Yājñavalkya, Nārada, etc. There can be no doubt that these texts have a universal appeal to all of the Hindu tradition. We are told very explicitly, for example, that Manu is the most authoritative of these authoritative texts.[45] Kumārila Bhaṭṭa in his commentary on the above mentioned *holakādhikaraṇa* of the Mimāṃsāsūtras also mentions the Manusmṛti (along with the *purāṇas* and *itihāsa*) as uniquely universal in their acceptance throughout the region of Bhāratavarṣa. But universal authority is not to be confused with genuineness.

Kumārila goes on to state that *all smṛti* texts, however limited in their geographical or social applicability, are authoritative for those people who recognize them as such. That is, as long as a practice is

1. time-honored,
2. not opposed to the express provisions of the Veda or of *smṛti*,

[44] There are relatively few surviving accounts of these disputes, but those that do survive give us an idea of their intensity. One example is found in Ānandānubhava's *Nyāyaratnadīpāvali* pp. 98-99 where he accuses an opponent of supporting a contrary view with fraudulent verses the opponent composed himself: *yas tu mandamatiḥ mukhyayatidveṣāt kāṃcit kathāṃ ślokāṃś ca 'prāpte kaliyuge' ityādīn hārītadattātreyādivacanatvenodāharati sma so 'timūḍhaḥ svaviraciteṣu doṣaṃ na paśyati. . . . prasiddhāśramanindāyām apy udīritapramāṇavirodhaṃ katham sa śocyo laṭakaḥ karṇāṭabaṭur na paśyati.* 'A fool motivated by excessive hatred of the principal type of renouncer, has cited some story or other and some verses claiming they are statements of Hārīta, Dattātreya, etc. which begin 'When the Kaliyuga arrives . . .' This man is a complete fool who does not see the flaw in these verses he composed himself! How can this miserable cad, this twerp from Karṇāṭaka, not see that he contradicts oft-quoted authorities when he castigates a well-known *āśrama*?'

[45] *Bṛhaspatismṛti*, *Saṃskārakāṇḍa* 1.13: *vedārthopanibaddhatvāt prādhānyaṃ hi manoḥ smṛtam | manvarthaviparītā tu yā smṛtiḥ sā na śasyate ‖*

3. regarded as obligatory by the *śiṣṭas,*
4. not immoral, and
5. *adṛṣṭārtha,*

it is considered to be authoritative. Custom, therefore, — even for the tradition itself — is the productive and vital source of rules found in the *dharmaśāstra.*

What *Derrett* seems to imply is that older texts are more authoritative than newer ones. Texts written for specific purposes which can be located in a specific region or time are 'bogus' or 'apocryphal.' But this is not an acceptable criterion. Let us look at one of the texts which he dismisses as 'apocryphal'. The *Devalasmṛti,* according to *Derrett,* is a text which was written to cope with the problem of Hindu women who were abducted into marriage or raped by invading Muslims in Sind. This makes it a very late text and one written for very specific purposes, therefore apocryphal, i.e., of dubious authenticity.

The *Devalasmṛti* does contain enough geographical information that it is safe to conclude that it was composed in northwestern India and at a relatively late date. The *mlecchas* mentioned were probably invading Muslims. The penances mentioned are for forcible abduction. *Derrett* is correct in his assessment of the purpose and intention of the *Devalasmṛti,* but by what criterion could we possibly call this text apocryphal. It is attempting to provide specific remedies for a situation which that society had not previously encountered — wholesale abduction of its women by members of a hostile and heterodox religious tradition. The *prāyaścittas* mentioned are intended to expunge the taint inherent in this situation. The mere fact that the text has been passed on for generations through the work of copyists is enough to validate its claim to authoritativeness within the tradition. These penances meet all of the criteria mentioned above for acceptance within the tradition:

1. time-honored,
2. not opposed to the express provisions of the Veda or of *smṛti,*
3. regarded as obligatory by the *śiṣṭas,*
4. not immoral, and
5. *adṛṣṭārtha.*

The mere fact that these provisions have not been formulated in exactly this way in earlier *smṛtis*, or that these penances have not before been mentioned as being applicable to women who have suffered the specific insults described in this text is not enough to render them apocryphal or bogus. This is just an example of the tradition continuing to adapt itself to the changing needs of society.

The categories of apocryphal and supposititious have no place in the discussion of the surviving Sanskrit *dharma* literature. The works which we have may be of limited geographical or chronological applicability. They may represent various strata in the evolution of the *dharmaśāstra*, but every provision found in every text can and must be viewed as a codification of practice or of norms accepted by some part of the society. They are not fraudulent or venal attempts at deception. To characterize them as such is to distort the tradition and to misunderstand the nature of the corpus of *dharma* literature.

To return to the three representative views of the nature of *dharmaśāstra* with which we began this essay, I distinguish my view from that found in *Mayne*'s Treatise in that

we must understand that the *dharmaśāstras* were not composed as literary templates to be applied *in toto* to every situation and every dispute without differentiation. They were collections of aphorisms, guidelines, and advice which could be drawn upon when required to inform and validate a judge's, or a guru's, or a king's opinion. In this way they are indeed concerned with the practical administration of law, but they are not in a modern, western sense 'codes.' Thus Govinda *Das* was right to point out the error of treating them as codes of law.[46] The contents of the *dharmaśāstra* were, however, much more than 'pious wishes' and represent a definite 'reality' that must have been rigidly enforced by contemporary political authorities. *Rocher's* view that the commentaries and digests did not represent the law of the land must be modified to some extent.[47] The rationalizations, the explanations, and the justifications for certain views must fall in the category of 'panditic' reasoning, but the 'authoritative texts' were just that, and the laws found in these texts remained of importance, and, if very late *jayapattras* are valid testimony, remained applicable.[48] It seems reasonable to conclude, then, that *dharmaśāstra* does represent 'law' in a very real sense; that the practices recorded in *dharmaśāstra* did represent the law of the land and are of very real value in constructing the history of Indian society since these texts tell us how — alas, not where and when — people actually lived.

[46] In this he was preceded by the neglected *James H. Nelson*, see *J. D. M. Derrett*, J.H. Nelson: a forgotten administrator-historian of India, in: Essays in Classical and Modern Hindu Law, 2, Leiden 1977, pp. 404-423.

[47] In an even more recent statement of his views, in a 1992 address to the American Philosophical Society, *Rocher* has said, 'The composers of the *dharmaśāstras* compiled treatises on *dharma*, on anything they considered worthy of being recorded as *dharma* with some people, somewhere. They gathered that information in books, in the language of the learned, Sanskrit.'

[48] See *Richard W. Lariviere*, A Sanskrit *Jayapattra* from Eighteenth Century Mithilā, in: Studies in *Dharmaśāstra*, Calcutta 1984, pp. 49-80.

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