Abstract and Keywords

This chapter discusses the premise of dharma as a self-controlled ordering system. It is explored in a historical, diachronic setting that starts from the Vedic origins of Hindu law. The chapter shows that supposedly higher levels of organization, including the Hindu ruler as a final appellate authority, had to respect such self-controlled ordering processes. This meant that no purely secular rule system could develop. It also discusses the deconstruction of hegemonic modernist conceptions of Hindu law.

Keywords: dharma, ordering system, Vedic origins, Hindu law, Hindu ruler, final appellate authority, ordering processes, secular rule system, hegemonic modernist conceptions

The present chapter attempts to consider the history of Hindu law in order to examine why it is that certain perceptions of the origins and history of this important legal system have been so manifestly distorted that today’s lawyers can easily take the misguided view that Hindu law has become irrelevant. In an endeavour of this kind, it is necessary to
begin with theoretical considerations to explain the scholarly perspectives taken here, and to ground the enquiry in the fertile soil of indological scholarship, as well as the thick layer of legal writing and expertise that exists. However, a mere regurgitation of standard textbooks on Hindu law would not serve any useful purpose. The challenge here is to combine the present conceptual journey into the depths of traditional Hindu law with socio-historical research and recent theoretical work in legal philosophy and legal theory from around the world, in particular the instructive model of Chiba's (1986) ‘three-level structure of law’.

This chapter first provides a brief historical overview of Hindu law, offering a consolidated conceptual grounding for the more detailed examination of major technical terms and ideas throughout the remainder of the chapter. Starting from the concept of cosmic order in pre-classical Vedic law, major sections focus on the self-control model of dharma, the conceptualization of punishment as ‘assisted self-control’ in daṇḍa, and the limitations of political and legal domination by rulers through the concepts of rājadharma and vyavahāra. Finally, the conceptual examination is completed by a detailed analysis of the central role of custom in Hindu law, which leads to the conclusion that state law must remain conceptually inferior to the various Hindu assumptions and beliefs about what may be appropriate in certain situations. Throughout the classical period of Hindu law, absolutist superiority of state made law simply had no chance to dominate the field.1

As this chapter demonstrates in detail, however, this is not how modern scholarship has understood and portrayed the history and development of classical Hindu law. The many distortions produced by scholars, in particular by lawyers influenced through Anglo-Indian and Anglo-Hindu thought, have (p.72) led to a contaminated picture of the nature of classical Hindu law. Blowing away the cobwebs and clearing away much of the debris of Orientalist and modernist scholarship, this chapter aims to reinstate conceptual dimensions of Hindu law that exist in the (sub)consciousness of Hindus rather than on the pages of our textbooks.

Theoretical Considerations: Orientalist Constructions of Hindu Law

While one can indeed speak of ‘Hindu law’ as a collective term, this placative use raises many problems.2 Given that all legal systems are complex, culture-specific entities of a piecemeal nature (Moore 1978: 9), it is impossible to discuss details of Hindu law without reference to any particular time, locality, or situation. To reiterate, there is no such thing as one Hindu law, but rather many different manifestations of it. While this makes any attempt to study Hindu law extremely complex, the internal diversity of Hindu law is of such a magnitude that the general term needs to be supplemented with additional words to indicate what particular aspect or period of Hindu law one refers to. Specialist scholars have rightly claimed that Hindu law is ‘one of the most complicated in the world’ (Derrett 1957: 3) and there is agreement among most writers on this subject that Hindu law ‘is acknowledged as having one of the most ancient pedigrees of any known system of jurisprudence’.3

Taking a methodological approach similar to that of the historical school of jurisprudence,4 I envisage and present here a historically rooted analysis of Hindu law in which we find a
clearly manifested, earth-focused, and surprisingly rational progression of ‘legal’ philosophy that can be distilled from the ancient Sanskrit literature. Of course, that does not cover the totality of ancient Hindu law. Parallel to the conceptual debates in the ancient literature, we must assume, occurred a logical elaboration of normative orders and legal rule (p.73) systems; but for several good reasons these are not fully recorded in writing. Then as now, most of Hindu law was negotiated at the local level and remained unrecorded. Thus, there is no hope that we should ever be able to reconstruct directly from the original sources what ancient Hindu law actually was like in practice. Further, ancient Hindu law was not recorded in codified form, though many Hindu law textbooks assume that it was. None of the innumerable ancient Sanskrit texts are in the nature of law reports from which one could glean the state of the law at any point in time. In addition, the ancient texts cannot be reliably dated, and ‘exact chronology is defied by these traditional materials which had so long a working life’ (Derrett 1968a: 81).

This amounts to saying that we cannot fully reconstruct traditional Hindu law from the textual sources themselves. But, as I must show here in some detail, this is exactly what most scholarship on the subject has been engaged in, erecting in the process a more or less fictitious, hypothetical, and theoretical structure called ‘Hindu law’. These various assertions and inventions have influenced and distorted our understanding of what Hindu law is about, as a legal system as well as a conceptual entity. The resultant complex human construction of Hindu law has become a reality in its own right, even an officially recognized legal fact, and yet it involves a massive distortion of social reality. The internally self-contradictory (not to say schizophrenic) nature of such confused and confusing representations and the resulting manipulations can be shown, for example, through a close reading of the first two pages in one of the leading textbooks on Hindu law. In an important text originally published in 1958, Desai (1998: 1) starts with the recognition that ‘[l]aw as understood by the Hindus is a branch of Dharma’, which neatly reflects the internal Hindu perspective. But the lawyer then takes over from the Hindu when Desai (1998: 2) proceeds a little later with the assertion that Hindu law’s ‘basic structure was the law of the Smritis’, which was then developed further through ‘a number of explanatory and critical commentaries and digests [sic] ... which had the effect of enlarging and consolidating the law’ (id.). Within two sentences, thus, Hindu law’s cosmic basis has been refashioned into a legalistic, positivistic code. Most significantly, the ancient recognition that ‘law’ as a holistic entity is subject to a higher set of parameters has been rendered invisible by this shift towards legal centralism. By taking the view that law, and not any other force, regulates the world, an essentially secular legal scholarship has simply declared the conceptual underpinnings of traditional Hindu culture as legally irrelevant.

It seems that this critical distortion, of which many textual examples will be provided later, arose in three ways. First of all, there is evidence that Hindu authors, in particular, declared Hindu law to be based on divine revelation (p.74) when it is neither clear which god should be responsible for this, nor what that revelation precisely involved. Secondly, we find evidence of an Orientalist construction which has taken literary
statements as proof of social fact, overlooking Hindu social reality and the practical impact of the non-textual realm. This approach glorified texts, their translations, and later commentaries as fixed entities that somehow expressed cultural facts which were then taken as absolute truths. Thus, just as the label ‘Hindu’ was eventually constructed to encompass a plural reality that no single term could hope to capture, the deceptively simple label of ‘Hindu law’ emerged, suggesting uniformity and certainty where in reality there was very little of either.

Thirdly, in relation to legal scholarship, a unique type of Orientalist-cum-legal reconstruction of Hindu law took place, introducing its own obfuscations. Having created a discourse of Hinduness that tended to overlook and marginalize the internal diversity and complexity of the cosmic Hindu system as a whole, Orientalist legal scholarship simply presented dharma as law (Bühler 1975) and suggested thereby that Hindu legal rules could be found fixed in the type of codes familiar from Roman law and more recent legal codifications, such as the French Civil Code produced by Napoleon. Hence what was internally classified as dharmasāstra became a code of law, and texts like the Manusmriti could become the ‘Laws of Manu’. It is remarkable that such Orientalist distortions have so uncritically been adopted by modern feminists and other writers who should know better.

(p.75) Evidently, European Orientalist scholars and an emerging literate Hindu elite, who were glad to see themselves accepted as part of a literate tradition and more ‘civilised’ than other colonial subjects, colluded in this venture. Their writings brought about a massive distortion, embellishing the false scholarly assertion that dharma can be equated to law, which could then be applied in formal courts, first in late medieval India and later under British rule. While a certain formalization of dispute settlement processes is already evident from the post-classical Hindu law itself (see the section on vyavahāra etc., later in this chapter), the stultifying process of constructing Anglo-Hindu law was later undoubtedly quickened by the convenient equation of dharma (and also vyavahāra) with law. This allowed Orientalists to accept, in principle, that the Hindus had law, and thus pleased the emerging Hindu scholars as well, who liked the idea of their system being recognized as ‘legal’, and who saw growing professional prospects in its application. At the same time, having been relabelled ‘law’, the element of dharma lost—at least in the eyes of those who now sought to define it for legal practice—its inherent flexibility and situation-specificity. Above all, the official equation of dharma with law secularised the understanding of Hindu legal processes and marginalized the inherent link of all individual actions with the ‘cosmic’ system of righteousness as the ultimate arbiter of what was ‘the right thing to do’ at any given moment.

Once lawyers took hold of this system—first British officers of the East India Company, later servants of the Crown, but most importantly judges and practising lawyers with their growing band of Indian colleagues—Hindu law could simply be reconstructed further and was subsequently modelled into a ‘proper’ legal system which, to the British, meant some form of common law structure. In this new construct, the ground rules of law would be ascertained from new written sources, rather than the confusing ancient
texts which indeed turned out to be unworkable as codes. In this way, Hindu law and its formal administration were brought under increasing state control. Orientalist (p.76) scholarship and the professional concerns of practising lawyers thus colluded in a redefinition of Hindu law which ultimately excluded everything that was not subservient to positivist control, including most customs and local norms.

In terms of the methodological scheme suggested by the legal theorist Masaji Chiba (1986), with its tripartite division of official law, unofficial law, and legal postulates, 'Hindu law' was thus ultimately whittled down and redesignated to cover just official law, ignoring everything else as practically irrelevant and 'extra-legal'. The professional distortion of Hindu law presents an extremely chronic but entirely typical case of legal myopia, an instructive example of how legal centralism manipulates legal reality through taking the view that formal law dominates the world and is to be treated as the central element in human life. Such blurred images of the total reality of Hindu law then culminate, for example, in the poignant statement by Derrett (1968a: 83) that '[t]hus Hindu law has always been a book law', which reflects the distortion instead of opposing it. This is accompanied by much writing about the important role of 'jurists' (Derrett 1968a: 83–84), 'Hindu jurisprudentes' (Desai 1998: 3), or 'juristheologians' (ibid.: 9) and is liberally mixed with assertions to the effect that '[t]he shrewd practical insight of the Hindu Rishis who were both sages and virtually lawmakers left very little that was undefined' (ibid.), as though the strength of traditional Hindu law depended on legal certainty and the avoidance of gaps in the law.

Within the grotesque picture of such formalized representations of Hindu law, it appears that a purely secular ruler could now preside over his subjects and effectively rule them through his law, instead of helping to ascertain appropriate solutions with a view to supporting the pre-existing Hindu notions of cosmic order. The gradual secularization and resulting transposition of Hindu law into a positivist legal construct eventually left only one option for modernist reform, namely legislative intervention with consequent further marginalization and ultimate abolition of the 'Hindu' element in Hindu law. By the time of India's independence in 1947, further legislation and de-Hinduization were, within this twisted logic, presented as the only viable method of modernizing Hindu law.

However, such multiple distortions of the nature and concepts of Hindu law and the resulting discourses, as real and manifest as they may be in the (p.77) existing body of legal 'knowledge', are all highly fictitious constructs in themselves. They do not reflect the totality of Hindu law and its methods, nor the social reality of Hindu beliefs and ways of life. We must therefore note that, even today, Hindu law is much more than the alleged book law of the shastras, the opinions of pandits, case reports which claim to be more or less authoritative precedents, and the words of modern statutes.

Given the outrightly contradictory perspectives that the above discussion has identified, nobody should be surprised that India and her people have continued to defy the predictions of experts. The constructs with which the various experts operate are simply not the same as the structures which underpin traditional as well as contemporary Hindu law and Indian society. Officially underwritten expertise in Hindu law, thus, looks more
like deliberate ignorance of, and prudent non-involvement in, those areas of knowledge that are not easily susceptible to scholarly research techniques. In other words, Orientalist scholarship on Hindu law, in intimate collusion with legal specialists and the legal profession, has redefined the field of study to make it digestible for lawyers rather than to bring out the central Hindu legal concern for appropriateness. Such scholarship has thereby gradually built up a funeral pyre for itself and for the notion of Hindu law.

Analysing Hindu Legal History

The foregoing discussion should have cleared at least some of the cobwebs around the Orientalist constructions of Hindu law which have thoroughly misled non-lawyers. Having shown that there is much more to study than legal (p.78) textbooks indicate and admit, we must now proceed towards an analysis of traditional Hindu legal concepts and their socio-legal contexts in the light of the published discourse on Hindu law, which is being challenged here.

We know from the textual sources themselves that the complex human construct which was later called ‘Hindu law’ emerged first, in distant antiquity, from the self-controlled ‘religious’ orders of rita or rta (pre-existent macrocosmic order) and later dharma (self-controlled microcosmic order). Such foundational conceptualizations led more or less directly to the more explicitly legal concept of ‘assisted self-control’ by threats of retribution with the ruler’s punishing rod (daṇḍa), and processes of negotiation or dispute settlement (vyavahāra) to extract the thorns of disagreement. These interlinked central concepts of the ‘classical’ or ‘traditional’ Hindu law are discussed in turn in the various subsections below, followed by an examination of the role of custom.

Unlike the standard textbook treatment of Hindu law, found for example in Desai (1998: 1–68), my analysis does not divide the history of Hindu law into textual periods, but emphasizes the critical importance of conceptual developments in Hindu law. Relying on either method creates its own problems, since neither the complex Hindu key concepts nor the mass of classical texts can be neatly sorted into strict sequences. Textual layers overlap and interact, and so do the key concepts in their floating historical settings. But there is some internal logic in the genesis of central conceptualizations, while it remains totally impossible to establish firm chronologies for the ancient Hindu texts, which are often collections of material from quite different times and localities. Dealing with concepts also has the advantage, in my view, that the key stages of the interlinked conceptual developments within Hindu law can be made more evident through an analytical, rather than descriptive, approach.

To demystify the confusing diversity within Hindu law, it is useful and in fact necessary to divide the ‘traditional’ or ‘classical’ era itself into various periods. These are not so much historical sequences as a number of overlapping building blocks, a series of conceptual steps towards the mature growth of a (p.79) coherent traditional Hindu legal framework in its gradual transition from dharma to law, as Lingat (1973) saw it. The totality of ‘traditional’ Hindu law is therefore presented here as an interlinked and chronologically overlapping sequence of sub-systems, a method which emphasizes the
inherent dynamisms and dialectics within the various stages of traditional Hindu law and its seemingly unlimited scope for flexibility and internal reform. There is certainly no stuffy stagnant traditionalism here, but an open and vibrant atmosphere of debate, reflection, and gradual emergence of a consensus in favour of virtually unlimited diversity and plurality.

Hindu law, it must always be remembered, had no definite starting point in any doctrinally central event or theory, despite assertions by lawyers and others of the divine revelation of the Vedas. As a chthonic system, Hindu law just began somewhere in the distant past, which has posed huge philosophical questions and given rise to various dogmatized beliefs and religiously tinged myths. Over time, Hindu law inevitably turned into a collection of legal systems, held together by little more than its basic concepts and, perhaps, the ‘ethnic’ awareness that oneself and one’s group are not outsiders to this tradition. At the same time, the internal plurality of Hindu law subjects many insider perspectives to the scrutiny of rival views, turning them into challenged positions that must fight for recognition as proper ‘Hindu’ perceptions. The tendency for upper-caste or Brahmin views to prevail, and to be presented as dominant, criticized elaborately by Guha (1982; 1997), can only partly be explained by the fact that the textual sources have been composed by a literary élite. Later commentators, including Western scholars, have added their own glosses on the strength and authority of particular views and have thus played a crucial partisan role in the reconstruction and eventual distortion of the nature of ‘Hindu law’.

The conceptual history of Hindu law firmly suggests that no one textual statement in the ancient sources can represent ‘the law’. The Hindu legal system is not built on codified statements by a human legal authority, to which factual situations are then related, nor is it based on a fixed revelation, which came down from heaven one day and binds all adherents. I suggest, therefore, that in Hindu law the principal conceptual starting point is provided by the somewhat unquestionable awareness of a pre-existent entity, the observable order (and occasional disorder) of nature, conceptually embodied in the rta/dharma complex. This concept of macrocosmic order, beyond direct human reach, militates against any form of positivistic human law-making. Any questions about human order are therefore first addressed in relation to this pre-existing larger order, and not with primary reference to some human edict. Thus, life and death are primarily seen as cosmically linked, rather than being medically examined—a sign not so much of primitiveness, but of an implied early recognition that ultimate truths will forever remain outside the realm of human knowledge. In other words, what occurs is not some blind belief in certain religious doctrines, but an acceptance that there is something higher than all forms of human rule-making or volition, something that cannot be defined with certainty. Hindus have always been free to speculate as to which god or what power may be ‘in charge’, or if indeed any one power needs to be seen in this way. Denying that kind of higher power altogether is (as for Muslims) not a conceptual suggestion that makes sense to Hindus, who will therefore tend to maintain some kind of sceptical distance to the secularizing axioms of modernity (see Nandy 1990).
Since the many textual rules about what may be in accordance with ṛta and dharma are only a methodological tool in the search for appropriateness, or the justice of the situation, it should be clear that they cannot in themselves be treated as the primary source of law—there is always a higher entity, not manifest in writing but seen to exist in the natural environment. A radical postmodern interrogation of Hindu law, therefore, cannot give the ancient texts themselves primacy of place, but must acknowledge the superiority, in theory and in practice, of their conceptual underpinnings. If the texts themselves cannot be ‘the law’, they are at best sources of law, potential guidance in solving a problem, but not binding legal rules in the Austinian sense.28

While there is clearly no such thing as one codified Hindu law embodied in the ancient texts, the idea of a common sociocultural and ultimately legal tradition cannot be denied. What scholars are vigorously arguing about is the extent to which this common core may bind every Hindu. It should be obvious by now that scholarly assumptions about ‘prescriptive’ legal texts and binding Hindu dogmatics merely reflect what Nandy (1983: xi) incisively refers to as ‘colonization of the mind’. Challenging such deeply engrained historical processes of knowledge production, we must always return in the present analysis to niggling general questions about concepts of ‘law’ and about the nature of Hindu law. This is certainly not the same as ‘essentializing’, since for the Hindu case it is critical to understand that such fixations on essentials must still reckon with unlimited plurality of internal perspectives. In a sense, Hindu law itself denies the theoretical possibility of a Hindu essentialism that is so often stipulated. All that scholars seem to be doing is to construct and reconstruct their own perceptions of ‘Hindu’, which are often only remotely related to what many other and perhaps more ‘real’ Hindus have historically thought and done.

My conceptual analysis now distinguishes four major stages of development within ‘traditional’ Hindu law, starting from the macrocosmic universal order system (ṛta) of the pre-classical or Vedic age.29 This gradually metamorphosed (but we do not quite know when) into the properly ‘classical’ Hindu law, the idealised system of self-controlled order (dharma), focused on microcosmic order and encompassing every Hindu individual. Third, because of the admitted limits of self-controlled order, we soon find the deterrence-based stage of punishment (daṇḍa), which is a typically Hindu form of ‘assisted self-control’, still relying on the individual’s sense of dharma, but now explicitly recognizing that some external pressure is necessary to ensure that cosmic order is being maintained as much as possible. Here we find evidence of greater importance given to the Hindu ruler (rājā) who operates at various levels, from head of family to clan chief, village head, and real king (Desai 1998: 35). Crucially, within the Hindu conceptual system all these ruler figures are not absolutist Napoleonic lawmakers, but guardians and in fact servants of dharma, which remains the unspoken, overriding core element of this idealistic self-maintained order system.

Fourth, the more or less formal methods of negotiation or dispute processing (vyavahāra) should in my view also be counted as a separate stage of Hindu legal development, still acknowledging the primacy and desirability of self-controlled order, but
now recognizing the scope for formal settlement of contested matters, which may culminate in a royal pronouncement as some kind of final word. That, however, is still not a manifestation of secular law, as most of Hindu legal scholarship has argued,\textsuperscript{30} but represents a further confirmation of the overriding concern for self-controlled order. A Hindu royal edict does not represent positive law, but constitutes a visible manifestation of the superiority of the \textit{ṛta}/\textit{dharma} complex, according to which the Hindu ruler is supposed to position himself and his activities.

Orientalist and legal reconstruction activity is quite evident here, too: if the traditional ruler’s verdict merely settled a particular situational conflict in (p.82) view of dharmic considerations, how can one legitimately deduce that such decisions represented secular law-making and established a model or precedent that would thereafter have to be followed by others? Did a ruler’s verdict really lay down the law for all times to come? For a lawyer in the common law tradition, the image of ‘precedent’ suggests itself with great force, but we are analysing traditional Hindu law here, not some form of English law. Assuming the emergence of royal precedent or even legislation, therefore, appears to be another form of Orientalist-cum-legalist construction imported into India by outsiders in the light of their own experiences and assumptions, not based on study of Hindu concepts.

Rather than drowning in the fine details of internal Hindu self-regulation, and its genesis over time, the present analysis needs to focus on the critical interface between non-state law and state law.\textsuperscript{31} In this respect, the huge literature on ancient Hindu kings and rulers of all descriptions seems to become directly relevant.\textsuperscript{32} However, examining it in much detail may be a waste of time for the contemporary legal analyst, as one becomes embroiled in various specialist debates, such as the internal controversies between Brahmins and Kshatriyas (i.e. the head priests and rulers) over which of them is supreme. These two office bearers were having a familiar debate, therefore, not just over whether royal or priestly power is superior, but more profoundly over whether ‘law’ or ‘religion’ takes precedence. In other words, they were also contesting the possibility and extent of secularism. In typically Hindu fashion, involving another overlapping consensus, this debate remained inconclusive, in that both parties would maintain their claims to superiority over the other. However, the unspoken message is that above those two contestants, and all around them, there is still the superior element of cosmic interlinkedness, the basic Hindu ‘social cement’ (Derrett 1970: 2) that keeps the mass of outwardly conflicting positions and claims under one conceptual ‘religious’ and ‘legal’ roof.

Thus, while one may learn much from the ancient Hindu literature generally, and more specifically from the later texts that appear to focus on law and governance, such as the famous Arthaśāstra, the interpretation of this body of literature as a source of legal rules must remain contested. Reading such (p.83) material through the blinkered secularized lenses of modernity, even leading Hindu writers have been tempted to assign Austinian law-making powers to the ancient Hindu rulers and, as noted before, have imagined ancient learned men such as the mythical Manu as powerful lawmakers. Today the
argument appears to be that if Hindus themselves have imbibed such interpretations and understandings, whether or not they are myths, they must be representative of ‘the law’.

All of this is deeply problematic. Such interpretations forget or purposely ignore one of the most basic constituents of Hindu law, namely that the cosmic world order in the form of *ṛta* or dharma is always present, even if not explicitly mentioned. Thus, even if a text purports to discuss what looks like ‘worldly’ affairs, such as marriage, making a contract, or ruling a kingdom, the conceptual level of the superhuman Hindu cosmos is still there, exerting its own invisible influence. The dutiful Hindu ruler will therefore be aware of the limits on his law-making powers, while the unwary analyst or reader risks focusing only on the secular, political element of royal power. It is another matter that a Hindu ruler may in practice choose to ignore such higher concepts and dictate what he wants, not what seems best in terms of dharma for the situation in hand. This possibility cannot serve as proof that the underlying Hindu conceptual framework is absent or defunct, it merely confirms that despite all idealism, ancient Hindus had bad and corrupt rulers, too. In this respect, again, Hindu law is no different from other legal systems.

Historians have long tended to focus on ‘big’ men and their impact and this trend has markedly influenced the perspectives of those specialists who wrote about Hindu law. All along, however, while largely inaccessible to the scholarly grasp, Hindu law has also remained the ‘living law’ of hundreds of millions of people who never had any contact with the official norm-producing agencies that may have existed, following instead what they assumed to be and knew as their own versions of Hindu law. The complex tensions between textually fixed and locally determined Hindu legal concepts and orders were partly overcome through awareness of the fact that both of these arenas for the development of Hindu normative orders were interlinked by knowledge of, and more or less strict adherence to, the same Hindu concepts. Thus *ṛta*, dharma, *danḍa* and *vyavahāra* may not have been technical terms that every Hindu was and is expressly familiar with, but the impact of these foundational concepts appears to have been all-pervasive, in the same way as those concepts have remained present, whether at a conscious or subconscious level, among Hindus today. Guha’s (1997) subaltern analysis clearly confirms the huge scope for internal oppositions to dominant Hindu models.

Within our conceptual analysis we must therefore note the explicit, abundantly recorded recognition in the ancient shastras that people’s customs and local ways of doing things must in principle be allowed to prevail, irrespective of what certain texts may be stating. There is no one religious, moral, or legal code that binds all Hindus together as a matter of dogmatic belief. This undisputable fact underpins an axiomatic rule that cannot please positivist lawyers (or modern feminists) but will make sense to legal pluralists and adherents of the various historical schools of jurisprudence: Hinduism as a religious tradition has always allowed its followers to pick and choose elements from ‘the tradition’ for themselves. Thus all individuals are empowered, obviously not without sociocultural limits in most cases, to construct their own personal system of belief and practice within the parameters of this cosmically interlinked system. While this was
certainly not a matter of totally free and autonomous choice for all Hindus, there is neither a central religious nor legal authority that could determine for all times what the universally binding rules of Hinduism are. There is simply no room in this conceptualization for a Hindu Pope, nor for a central authority that ‘lays down the law’ for all Hindus. This does not exclude the possibility of strongly held beliefs and firmly stated convictions, but they are always relativized by awareness that there is a form of higher truth, which encompasses more than any individual could think, believe, or do. Ancient and modern Hindus know or simply accept this, and analysts ignore it at their peril—or are indeed on the road to various forms of Orientalist and legal distortions of Hindu law.

Unquestionably, therefore, this rather sketchy and necessarily broad summary of the essential systemic openness of Hindu belief and practice is of immense and direct relevance to any analysis of Hindu law. The inherent flexibility of Hinduism presents itself in harmonious accordance with the basic Hindu expectation that all beings should be empowered to fulfill their very own and personal dharma, whatever that may be. This axiom, universal in (p.85) theory and yet totally individualistic in practice, evidently undermines any form of binding uniform legal regulation imposed on individuals and groups of people from outside or from above. Theoretically speaking, as well as in practice, this stops any Hindu rule-maker from imposing his will absolutely on ‘his’ people—everyone knows that even the highest ruler is never fully autonomous. A Hindu lawmaker may suggest or recommend certain rules or solutions, but they do not bind others in the same way as positive law.

If the basic Hindu conceptual rule was and is that every individual is unique and different, and that every situational context has its peculiar features, requiring a situation-specific response and solution, an appropriate law must of necessity be something different from positivist state laws that prescribe how all people must act in certain situations. Ancient Hindu conceptualisations are certainly not unaware of the power and potential of legal positivism, but have subjected law-making, as everything else, to the overriding authority of dharmonic relativism. Thus, a dutiful dharma-conscious Hindu ruler could not prohibit prostitution, the slaughter of animals for human consumption, or highway robbery, but should seek to monitor such activities in terms of whether everyone concerned followed their dharmonic duty properly. It is for these reasons, above all, that my approach to the analysis of Hindu law prefers the techniques of the historical school to those of legal positivism.

Seen from this perspective, Hindu law could never become a uniform codified edifice that one might encapsulate in the few words of a statute or code and that would then determine the actions of large numbers of individuals because it was ‘the law’. The label ‘Hindu law’ does not signify uniformity, it covers almost limitless plurality. Law, within the Hindu conceptual context, would have to be determined from case to case, from situation to situation, and it would also vary at different times, as the post-classical concept of the eras of human existence (yugas) demonstrates. In short, the conceptual underpinnings of traditional Hindu law and of legal positivism are like chalk and cheese. The methods of the
analytical school of jurisprudence are plainly unsuitable for a reality-conscious analysis of Hindu law.

Choosing to follow the historical school of jurisprudence, as well as a conceptual approach for the analysis of Hindu law, takes fuller account of the tremendous internal dynamism within the Hindu legal system than a mainly chronological approach would allow for. It enables us to record more of the distant, ancient conversations, conflicts and tensions that occurred in the long history of Hindu law, because there is an internal logic to the development of the key Hindu concepts which legal analysis must not ignore. Rather than bringing in external perspectives all the time, as Desai (1998: 1–68) clearly does, the present approach therefore claims to reach deeper layers of internal analysis.

Seen in this light, current attempts to portray Hinduism and Hindu law as uniform bodies of concepts and rules appear politically motivated and therefore quite misguided, even mischievous. In particular, efforts to rewrite Hindu ‘scriptures’ are doomed to dismal failure. Designed, as were some earlier efforts (see in the colonial context Kane 1968–1977), to show that Hinduism (p.86) and Hindu law are not inferior, today’s ambitious Hindu law scholarship again feeds on revivalist political undertones of Hindu superiority in reaction to the many derogatory comments about Hindus, Hinduism, and Hindu law (Jois 1990a; 1990b; more so Jois 2000). These are distractions from the real task, making Hindu law intelligible to Hindus themselves and to outsiders, in the light of today’s knowledge and contemporary concerns. But rewriting the past will never undo it. Simply asserting superiority points to ignorance of deeper concepts in one’s own traditions and those of others. Claiming that any legal system automatically offers ‘justice’ simply will not do.37 The politicized environment of current debates about the place of Hindu law, as well as the extent of disagreement, confirms that the Orientalist distortions of Hindu law and various other constructs—often produced by Hindus themselves—have added further spice to an ancient debate whose subject remains alive and well.

The Concept of Cosmic Order (ṛta) in Pre-Classical Vedic Law

The Vedic age of Hindu civilization (c. 1500 BC to c. 800 BC) is an era which some older European scholars have declared to be of a different culture and religion,38 while Hindu scholars claim that their civilisation is much older and extends as far as 6000 years back.39 For the present legal analysis, such ongoing controversies are fruitless. No useful purpose, apart from politicoreligious power games, is served in fixing a starting date for an ancient cultural tradition that refuses to be pressed into a dogmatic pattern of belief in a certain origin. It is undisputed that Hindu law has an ancient chthonic base and that, as a religious system, it is not based on a specific divine revelation at a specified, fixed time, notwithstanding general references to divine revelation through the concept of śruti.

Examining the conceptual framework from within Hindu traditions,40 we must above all take account of the basic ancient concept of ṛta which later (p.87) transformed into dharma.41 This old Vedic conceptualization reflects and signifies the early awareness of people, who only later came to be known as Hindus,42 that there is a superhuman, macrocosmic form of order in the world which is not directly subject to human influence,
but to which mankind in its quest for a good life should relate and, to an extent, submit. This submission of the individual is not as strictly conceived as in Islam, i.e. having to believe in the identity of one particular God, who alone governs and regulates everything. Hindus, it is well known, agreed to disagree over the identity of ‘the Absolute’ a very long time ago. Consequently, they split over time into numerous groups and sects, creating the impression that Hinduism is merely a constructed term, perhaps a kind of phantom, little else than a loosely connected grouping of sectarian orientations, confused about the nature of God and the universe.

Hindu reality, viewed from within, is far from confused, but it presents an extremely diverse picture for the outsider, offering many points of challenge. The ruminations of anti-religious, anti-Indian, and ultimately anti-Hindu observers have more or less deliberately ignored the deeper layers of Hinduism that only a few authors seem to have been able to articulate. The most ancient conceptual strands of Hinduism, having been overlaid by numerous other factors, are ultimately just modified and updated versions of the same basic truth, namely that humankind does not know what keeps the world going and can only believe in one or another version of what we call ‘religion’. Hindus as a collective appear to assume that one cannot expect one particular named superior God to take care of everything, thus all individual beings—gods, humans, and others—should try their best to partake in this superhuman Order, contributing as much as possible to its sustainability. Hinduism is therefore far more than a technique for personal salvation; it also involves an obligation to live in a particular way for an ultimately indefinable but common good.

We have evidence of Hindu cultural texts, dated at least from c. 1500 BC onwards, in which such basic concepts are not so much debated as put into practice through hugely complex Vedic rituals which were apparently believed (p.88) to have the potential to support and sustain cosmic order. The large Vedic literature provides much detail about this distant period but contains very little material about the actual legal systems at the time. The Vedas, therefore, as legal authors confirm, were treated as divine revelation, but did by no means ‘lay down the law’, as some scholars with positivist inclinations have been tempted to assert. While the Vedas have a special place and authority in terms of Hindu religion and as a source of the concepts underlying Hindu law, they could not really serve as a direct source of legal rules, and certainly not as a legal code. However, the major legal textbooks on Hindu law tend to confuse readers, especially since some authors introduced grand assertions and engaged in outright myth-making. Mayne’s old text (Kuppuswami 1986: 14) contains a fairly sober and concise passage on the Vedas:

The Sruti (that which has been heard) is in theory the primary and paramount source of Hindu law and is believed to be the language of divine Revelation ... The Sruti, however, has little, or no legal value. It contains no statements of law as such, though its statements of facts are occasionally referred to in the Smritis and the commentaries as conclusive evidence of legal usage.

Desai (1998: 3–4) also highlights the basic Hindu belief in revelation, on the one hand, and
the practical irrelevance of the Vedas for positive law-making on the other:

It was an article of belief with the ancient Hindu, that his law was revelation, immutable and eternal. Shruti which strictly means the Vedas was in theory the root and original source of Dharma. It was the fountainhead of his law. Shruti means, literally, that which was heard. It was supreme to the early Hindu like the Decalogue to the later Christian. The Vedas, however, do not contain much that alludes to positive or municipal law. The few statements of law that are to be found in the Vedas are mostly incidental.

Pathak (1986: 1) states that two views are generally advanced on the question of origin of Hindu law. The orthodox view is that it is based on revelation and hence asserts divine origin for Hindu law, while the European view is rather that Hindu law relies on immemorial custom. More recent writing has embellished the former. Thus, Diwan and Diwan (1993: 27–8) at once claim divine status for Hindu law and then portray the story of revelation in outrightly monotheistic fashion:

Hindu law is considered to be divine law, a revealed law. The theory is that some of the Hindu sages had attained great spiritual heights, so much so that they could be in direct communion with God. At some such time the sacred law was revealed to them by God Himself. This revelation is contained in Sruti or Vedas. The word Sruti literally means “what was heard”. (p.89) The Vedas, thus, contain the divine revelation ... Since the Vedas are said to contain the voice of God, they are considered to be the fundamental or the primary source of law. The Vedas are said to be the source of all knowledge. In that view the entire body of Hindu law has emanated from the Vedas. And since it has emanated from Vedas, Hindu law is divine law, a divine revelation. Thus, in theory, the Sruti is considered to be the fundamental source of Hindu law.

Significantly, such circular arguments about Hindu theory play with the word ‘law’ when dharma is meant. Turning to proper ‘law’, the next sentence from the quote (at p. 28) seems to take everything back; the ensuing discussion questions the relevance of the Vedas in practice without explaining properly what kind of law is meant:

However, its importance as a source of positive law is doubtful. One view is that the Vedas contain practically no law and are of little value.47 ... The other view is that though rules of law are not enumerated in any systematic manner in the Vedas and they are to be gathered from its entire body, yet it would be wrong to say that the Vedas are totally devoid of law.

In fact, the Vedas are primarily sacrificial hymns, invocations to the pantheon of Vedic gods, and as such contain little evidence of any legal rules other than by coincidence.48 These difficult Sanskrit texts do not primarily reflect what actually happened. They are not anthropological field reports by participant observers or field researchers. Some portions of these texts are in the nature of mythological account and fiction, while some later parts might constitute a ritual manual, with selective references to real life. Overall, this early literature gives a reasonably clear picture of the world views of the Vedic Hindus, of their ideas about man’s place in the world, in particular of the Hindu conceptualization of
ṛta as macrocosmic order (see in detail Miller 1985). Herein, then, lies the importance of the Vedas as a source of ‘law’ or rather of dharma. They elucidate the early conceptual underpinnings of Hindu law which are absolutely central for understanding the emerging legal system as a whole. The central point appears to be that ‘law’ is an entity beyond direct human control. It exists, and yet does not claim institutional loyalty, as a state legal system would do.

The early key concept of ṛta metamorphosed gradually into dharma (microcosmic order or duty), the central Hindu legal term, which in one form or another underlies and suffuses all the later texts. Dharma became clearly the core concept of Hinduism, and thus of Hindu law. Its relevance in legal terms (p.90) can be explained quite simply in that life is seen as a complex experience, in which everybody and everything has a role to play and is visibly and invisibly interconnected in a giant systemic network of cosmic dimensions, a kind of universal spider’s web. Individual roles and obligations are, of necessity, quite disparate for different people; they depend on contextual factors like gender, age, or place in society. Dharma as a uniform, central concept thus suggests unlimited plurality at the level of social reality within a Hindu systems theory that defies rational deconstruction.

The ideal is envisaged as a fluid ordered universe, in macrocosmic as well as microcosmic dimensions, in which every element of that giant cosmic order simply does what is most appropriate. In other words, the Hindu idealization of order reflects a kind of ecologically sound symbiosis in which every component part plays its proper role. But this is merely the theoretical ideal: real life is a never-ending chain of contradictions, role conflicts, and processes to ascertain specific duties. It can also be viewed as a struggle to find one’s path, especially later in the more individualistic contexts of salvation-centred beliefs.49

More pointedly for a legal analysis, awareness of ṛta (or later dharma) involved every Hindu in a continuous process of harmonizing individual expectations with concern for the common good, a constant obligation to ascertain the appropriate balance between I and we, good and bad, right and wrong, the permissible and the prohibited. Hindu law, in other words, is from the start based on a complex and continuous dialectic process (Derrett 1970: 2–3). Much of this remains invisible and internalized, a truth later brought out forcefully in the dramatic illustrations of the great Hindu epics, which can be seen as ancient tools for teaching ‘order’ in every sense of the word.50

The major Vedic concept involved here, ṛta, cosmic ‘order’ or ‘truth’ (see in detail Lüders 1959; Day 1982: 27–41), has unknown origins, with underlying rules that are not known to man but resemble culture-specific elements of natural law (see also Desai 1998: 5). Vedic Hindus respected the limits of human knowledge and, probably observing the regularities of nature, like sunrise and sunset and different seasons, as well as the sudden force of disaster, came up with an understanding of invisible mechanisms for the maintenance of this superhuman order that involved gods, demons, men, and all created beings.51 Mankind’s major duty was at first to invoke the benign influence of (p.91) various gods and other forces through elaborate and solemn Vedic sacrifices.52

Elaborated in those early Vedic texts, these rituals illustrate and seek to recreate the
assumed patterns of cosmic interlinkedness.

Here, then, lies the key to a fuller understanding of Hinduism as well as Hindu law (Menski 1993b; 1996a). While a sense of personalized individuality is not unknown, from a vaguely shared Hindu perspective all individuals are perceived as interlinked in many ways, to family members, one’s clan, neighbours, the village, society as a whole, and ultimately the universe. Derrett (1970: 2) portrayed dharma as ‘a social cement which ties permanently communities with nothing else in common but their domicile in the subcontinent and their millennia-old committal to living together in competitive co-existence in a multi-cultural super-society’. Nobody expected there to be uniform standards or one Hindu view of any matter. This is radical pluralism in action, but under the cosmic umbrella of the rta/dharma complex and the ‘Hindu’ label.53

Instead of concentrating on individual religiosity and ‘salvation’, early and classical Hinduism and Hindu law focused on duties related to the overriding demands and expectations of an ordered universe. As we saw above, in the imagined cosmic spider’s web of Hindu systems theory, gods and men, animals and other beings all have their place due to some invisible ordering force to which everyone, by necessity, must relate.54 It can be argued that there is no choice in this matter, a perspective which underpins the universalistic cosmic claims of Hindu concepts and can so easily be exploited today in communalistic and hindutva fashion. Thus Hindu law in its dharmic form went far beyond the immediate socio-political sphere, emphasizing the ultimate human link to cosmic dimensions and perspectives.

It appears from this kind of imaging and its Vedic ritualization that mankind as a whole was never perceived as governing this world, but always remained subject to this higher invisible order. Any human law would always be conceptually inferior. Humans, thus, needed to cooperate and coordinate with the other spheres of existence, both visible and invisible. Vedic people (p.92) sought to sustain and influence the course of the world, as well as events in their own lives, through sacrifices to those gods that are seen as upholders of rta, prominently through fire rituals and sacrifices to Agni, the god of fire.55 Hymns addressed to various gods indicate that people might pray for rain or victory in battle, but also for a hundred sons and long life.56

We cannot be absolutely sure, but it seems that at this stage not every Hindu took a direct, active part in the ritual maintenance of cosmic order. The major religious activities appear restricted to a small elite class of literate ritual performers and functionaries, mainly Brahmin priests. Such ritual experts presumably acted as representatives of a particular section of the people: families, clans, a village, even a whole kingdom. The involvement of more or less powerful rulers in such rituals gradually strengthened the concept of representation of mankind as a whole. But the continued political fragmentation of ancient India, in contrast to China, quite apparently prevented the institution of Indian kingship from asserting claims to become an important determiner of religious ritual and, through royal patronage and legitimation, of legal rules.57 In a sense, rulers came after the pre-existent basic rules, and remained subservient to them, so a particular legal pattern was set before such power claims could arise. The ancient texts quite clearly
assume that any human ruler remains at all times subservient to the all-pervasive macrocosmic force. Thus no king, however powerful, could ever become the master of cosmic order. During this phase of development it is ritual action, and more specifically ritually correct action, that is seen as most conducive to the maintenance and support of macrocosmic order.

Apart from ritual detail, we know quite a lot about the social and political organization of the Vedic people (Ghurye 1979; Kosambi 1992). Ancient Indian societies were mainly organized on patriarchal principles, but matriarchal elements are also strongly in evidence. Whether one should speak of ‘primitive communism’ or early despotism of the Roman paterfamilias type remains unclear. It is evident that law must have been developing more or less informally and was applied locally. This, too, works against any hope of ever tracing recorded legal evidence from such ancient antiquity.

According to various schools of thought, the Veda is eternal, self-existent and of absolute authority (Kane 1968–77, III: 1269). The mīmāṃsā school of Hindu philosophy, especially, later sought to uphold the supremacy of the Vedas as a source of law, but this has remained a minority view (see Derrett 1968b; Desai 1998: 39–42). The existing Vedic literature does not really discuss legal questions, nor the nature of man-made law. While it is thus not legal literature (Lingat 1973: xii), but focuses on aspects of cosmic law, it is certainly not irrelevant here. The pre-classical stage of Hindu law manifestly provides important insights into the basic conceptual underpinnings for the entirety of what is later called ‘Hindu law’.

The envisaged basic human task, namely to establish ritual linkages to the various potent forces, is strongly reflected in the nature of the Vedas as sacrificial manuals, premised on the idea that appropriate rituals and sacrifice will yield desirable results. It seems that this quite simplistic view of ritual efficacy partly explains the gradual demise of the ancient sacrificial system. It is a fact that the hugely complex rituals of the Vedic period fell into virtual oblivion later and were replaced by simpler, more popular forms to make them more accessible to the common person. Thus Vedic society learnt, probably quite fast, that relying on sacrifice alone for the maintenance of Order/order was not good enough; something else may be needed, not only proper ritual action, but appropriate individual action at any point in life. This reasoning leads directly to dharma as the emerging key concept of classical Hindu law.

The result, well reflected in the body of ancient Sanskrit literature, was the emergence of two parallel strands of new ritual literature. One section developed and updated the ancient Vedic rituals, based on śruti, and is therefore properly classified as śrauta texts.58 Vedic knowledge, with less clearly defined borders in later Vedic literature, was apparently faithfully preserved and propagated by descendants and pupils of the original sages, partly because the ritual performances were premised on precision. The second, new type of literature began to develop the concept of dharma as a matter of daily domestic practice for Hindus. The technical term ghṛyasūtra for this category of literature signifies new guidance on ‘house rituals’ and now seeks to incorporate the daily actions of all Hindus into the ancient conceptual framework of reference. The attempted
Hinduization of daily practice is reflected in these works of great interest to socio-legal studies, as well as in the dharmasūtras (Olivelle 2000). Hindu law becomes, in this way, more focused on the microcosmic sphere of the individual and thus properly centred on dharma, the key concept of classical Hindu law.

**Dharma and Classical Hindu Law**

It remains impossible to give clearly defined dates for the transition between Vedic and classical Hindu law because there was no sudden change, but a process of deconstruction and reconfiguration over a long time. One may suggest dates between roughly 800 BC to about 200 AD for the classical period of Hindu law.\(^5^9\) Within this experimenting and consolidating process, leading to the emergence of full-fledged classical Hindu law, there will have been various stages.\(^6^0\)

Classical Hindu law built on the conceptual foundations of the Vedic period by developing a number of interrelated ideas into a coherent system of obligations centred around the more individualized concept of dharma. In principle, Hindus were now put under an obligation to contribute to cosmic order through their way of life, including rituals. Dharma is, thus, universalistic in the extreme, and yet it is not an absolute notion of ‘good’, nor is adharma the equivalent of ‘bad’. In certain situations, as illustrated by the famous scene in the epic poem *Bhagavadgītā*, when Lord Krishna explains to the warriorhoero Arjuna that he must, however reluctantly, kill his relatives in battle to fulfill his dharma, we are shown that Hindu law, quite realistically, refuses to emphasize generally applicable rules like ‘Thou shalt not kill’ or an absolute prohibition on lying. Clearly, following dharma may demand killing or lying in certain situations. One-sided emphasis on certain notions, like non-violence (*ahiṃsā*), has distorted the picture of Hindus as soft pacifists without the will to fight.\(^5^1\) Arjuna’s dramatic battle of conscience, and communal violence in modern India, forcefully disprove such notions. At the same time, violence without justification, or untruthfulness per se, are clearly not condoned by dharma. As confirmed in the rich Hindu fable literature, it is the lion’s dharma to kill, but senseless murder violates even the predator’s code of conduct.

To understand this increasing complexity of expectations and their links with reality, it seems useful to make, first of all, an explicit conceptual distinction between the idealized ‘classical’ Hindu law proper and what I would call ‘late classical’ Hindu law, discussed in more detail in the next section. However, the two periods overlap to a large extent and the shastric literature draws no such chronological distinction in explicit terms. This literature is a mass of many different floating, originally oral components, only later put into written (p.95) form and collected into texts with specific labels to suggest a particular authorship. Since the material for both periods is found in the same texts, a text-based chronological analysis would not uncover the absolutely critical distinction between ‘self-control’ and ‘assisted self-control’.

It is instructive to draw this distinction between classical Hindu law proper and late classical Hindu law. The former is clearly based on the rather too idealistic assumption that cosmic order can be sustained simply by following dharma, i.e. through every individual’s self-controlled behaviour and conscious subordination of personal desires to
higher concerns. The latter approach, based on the more realistic observation that individuals are selfish or simply lazy and need to be reminded of their obligations, implies that some degree of deterrence or even punishment might help to strengthen or assist self-control. Both conceptualizations are, thus, premised on the supremacy of self-controlled action, which remains the hallmark of the classical Hindu law system, but there is a significant shift of emphasis within this paradigm. In social reality, it is recognised that self-controlled action expects too much and thus ‘assisted self-control’ is the dominant mode of social regulation.62

If we were to restrict our definition of classical Hindu law only to the period premised on idealistic, self-controlled order, we might find this a very short period indeed. In fact, the ideal of self-controlled order would not be maintainable in real life, since ‘the big fish’, as many shastric texts elaborate, would simply take advantage of their might. This sounds all too familiar as a characteristic of power imbalances within any human society (Dahrendorf 1969). In reality, thus, the conceptually sound ideal golden age of Hindu law, where everybody simply did their best to follow dharma, cannot have lasted for long, in fact it probably never existed. We should rather imagine a complex period of ‘classical’ Hindu law in which the basic idealistic principle of self-controlled order is found in constant need of support by various methods and grades of ‘assisted self-control’. It is for this reason, too, that the different categories of texts relating to this period constitute persuasive guidance rather than allowing us to read them as law books with rules for all Hindus, to be followed to the letter. As indicated in Chapter 2 earlier, the legal textbooks of today still fantasize over shastras as codified rule books.63 Orientalists and legal scholars together have colluded not only in distorting the Vedic roots, but have also managed to construct and sustain an image of classical Hindu law that is outrightly unreal and has itself created many problems.

(p.96) It is certain that already during the Vedic period concern over central domestic ritual events such as solemnization of marriage, birth, and death began to emerge in texts like Ṛgveda 10.85 and Atharvaveda 14, which contain concentrated evidence about early forms of Hindu marriage rituals and some other rites of passage, notably death rituals.64 Such clearly still macrocosm focused and thus Vedic beginnings in the ritual elaboration of the domestic sphere were later followed up and, through particular citation techniques, directly woven into the immensely rich class of literature called gṛhyasūtra.65 Such texts provide specific guidance for the Hindu householder and develop, in particular, elaborate ritual models for the celebration of various rites of passage (Pandey 1969). Simultaneously, we find the development of numerous dharmasūtras and the still more complex and detailed dharmaśāstra literature, amazingly detailed handbooks on dharma, among which the Manusmṛti is said to hold such an important place.

The early, but properly ‘classical’ development of Hindu law can be distinguished from the Vedic stage primarily by placing more emphasis on the individual actions of every Hindu,66 and by developing a more elaborate rule system which reinforces the processes of individualization and Hinduization. In terms of sacrifice, this would mean that every Hindu should now engage in the various sacrificial rituals as part of dharma,
but also that ritual action alone would not suffice to achieve positive cosmic reactions. Eventually, right action and appropriate behaviour at every point of one’s life became the core expectation of Hindu law, encapsulated in dharma.67

Thus, over time Hinduism has evolved and adapted. It has quite radically changed its gods, its forms of sacrifice, but not its conceptual basis in terms of Order/order, which has merely internalised the shift from macrocosmic to microcosmic emphasis. The basic concept of mutuality between the visible and (p.97) the invisible, between human sphere and universe, remains at the core. During the classical period, these linkages become further elaborated and illustrated with innumerable references to situations of daily life. The general shift from an earlier emphasis on ritual action to the expectation of righteous action at any point of one’s life is clearly manifest. Kane (1968–77, I.1: 3) has shown how dharma developed out of ṛta, which later fell into oblivion as a technical term:

The word dharma passed through several transitions of meaning and...ultimately its most prominent significance came to be “the privileges, duties and obligations of a man, his standard of conduct as a member of the Aryan community, as a member of one of the castes, as a person in a particular stage of life”.

This new emphasis is clearly reflected in the complex system of varṇāśramadharma, the understanding that at any one point one can circumscribe the individual’s ideal duty according to caste status (varna) and stage of life (āśrama). Linked to this, different kinds of specialized dharma, such as women’s duty (stridharma) or the ruler’s obligations (rājadharma) make an appearance, apart from the individual’s duty (svadharma). A new field of knowledge, the science of dharmaśāstra, developed at this stage, defining other main Hindu aims of life, worldly possessions (artha), sensual gratification (kāma) and ultimately salvation (mokṣa) in terms of (and in relation to) the key concept of dharma. By the time this comprehensive conceptualization of individual duty had been fully developed, it was apparently ready to slip into the Hindu subconscious and became anchored there as a key concept that Hindus seem to imbibe, to varying degrees, with their mother’s milk. This awareness of cosmic connection, however fuzzy and hazy it may be, critically marks the difference between Hindus and adherents to other religious traditions, and between Hindu law and other systems.68

Ultimately, all of this is a matter of culture-specific belief, as well as practice, hence the religious label and the roots of the subsequent Orientalist-cum-legalist assumption that ṛta and later dharma represented something like law. The various forms of Hindu ‘religious’ practice are basically expressions of the latent awareness of interlinkedness with cosmic levels of existence. This remains central to Hindu life and law. Whether one is trying to obtain favours through devotion or prayer, bargain with a deity for something desirable, protect oneself against evil and damage, or simply ask for enlightenment that will likely never come, the intricacies of Hindu religion are such that in the mass of detail the essence should not be lost. No central authority could tell Hindus how to follow dharma or could guide all Hindus in the same way as the Koran (p.98) would appear to do for all Muslims, for whom at least the identity of the highest authority would be a matter of firm belief.
Hence, despite its undoubtedly ancient roots, Hindu law is somehow rootless nevertheless; its basics are so flexible as to offer no binding guidance beyond the rule of righteousness.\textsuperscript{69} A Hindu who seeks guidance as to what is appropriate is at sea, so to say, floating on a bed of conceptual support structures that demand of every individual at all times to actively stay afloat by striving to do the right thing. There is no cosy life raft of simple prescriptions, no rope thrown from heaven that may just be grasped for salvation, no binding rule system that may just be applied more or less unthinkingly to stay afloat in the sea of life. Being a Hindu seems to be hard work, and is full of insecurities in terms of rewards for doing the right thing. But perhaps this is not what counts, anyway, since the key point of dharma is not so much the collection of brownie points for one’s own salvation,\textsuperscript{70} but awareness of cosmic interlinkage and the individual’s obligation towards the universe. This aspect was taken up by Robert Lingat (1973: 4):

\begin{quote}
In internal terms, \textit{dharma} signifies the obligation, binding upon every man who desires that his action should bear fruit, to submit himself to the laws which govern the universe and to direct his life in consequence. That obligation constitutes his duty: and that is a further sense of the word.
\end{quote}

Thus, dharma now covers the eternal order of the universe (the primary Vedic preserve of \textit{ṛta}) as well as order in any particular present life situation. It comprises all levels of existence, macrocosmic as well as microcosmic, and all gods, humans and other creatures. By thus placing everything into a complex network of cosmic interrelationships, the holistic conceptualization of dharma suggests that any human activity, including inaction, becomes perceived as having potentially wide-reaching consequences. This conceptualization is strengthened by elaborating the notion of action (karma) into ‘retribution as a result of action’, so that dharma and karma together establish a complex system of moral demands and retributional threats and promises, all designed to elicit ideal ‘appropriate’ behaviour.

In an integrated society, where the spheres of law, morality, and religion largely overlap (Allott 1980: 25), one may see dharma and its implications as religious, but it operates together with other forces and is neither simply law nor just religion. Lingat (1973: 4) thus wrote that dharma ‘is essentially social in (p.99) the sense that, in a social order visualised as one with the natural order, the individual who obeys its precepts performs a duty which is as much social as religious’. Lingat did not think so much of the common Hindu as of the ‘authors’ of texts, stipulating a degree of planned message from the cultural texts of ancient India which may have been quite elusive for the common person, but exercised a strong pull, indicated by Lingat (1973: 5):

\begin{quote}
It follows, as a matter of course that, for authors committed to the religious significance of action, society’s essential end is realisation of \textit{dharma}, when each individual can put his duties into effect. So their structure of law has \textit{dharma} as its axis.
\end{quote}

The above analysis, based primarily on internal conceptual categories of Hindu thought, yields an image of idealized self-controlled order which, as indicated, may never have
constituted a social reality. Before a more elaborate discussion of ‘assisted self-controlled order’, it is necessary to examine what sense the specialist literature on Hindu law has made of the idealistic smṛti literature and its legal relevance.

We saw earlier that the authors of Hindu law textbooks did not say much about the most ancient or Vedic layers of the Hindu conceptual framework and literature but supported the common assertion that the Vedas represented ‘law’ in some divinely grounded and revealed form. The classical body of knowledge, now referred to as smṛti or ‘remembered truth’, could also claim to possess great authority, but is no longer seen as revealed material. In the smṛti literature, divine inspiration and authority is not altogether absent, but is hidden behind, and eventually totally overshadowed by, the huge body of knowledge that was gradually amassed and extended by a small literate elite. The function of Indian cultural texts is clearly not that of law books, since these texts are handbooks on dharma and thus first of all cultural documents of a private nature, produced by male persons of a certain class in society. While these texts can at best be seen as an indirect source of classical Hindu law, the tempting conclusion for the authors of Hindu law books has been that the smṛti texts are manifestations of human law-making and are virtual (p.100) codifications of law. Kuppuswami (1986: 15) saw this as follows, before launching into a list of ‘lawgivers’:

Rules, as distinct from instances of conduct are, for the first time, embodied in the Smritis. The Smritis (what is recollected or remembered) are of human origin and refer to what is supposed to have been in the memory of the sages who were the repositories of the Revelation. They are the Dharmasastras.

Desai (1998: 6) relies on those textual statements from the Veda which appear to indicate that Manu was the source of all human law-making, building on the assumption of divine revelation as the primary source of Hindu law, further propounding the myth that Manu was the first Hindu lawmaker:

The Smritikars are agreed and common traditions have always accepted that the earliest exponent of law was Manu. The Smritis purport to embody one traditional law, namely the pronouncements of Manu. The Rig-Veda enjoins observance of the ancient rules of Manu.

While Desai (id.) admits that ‘[t]he material of that period available to this day does not render much assistance in collating an authenticated account of that body of original law, traditionally accepted as Manu’s law, which indubitably existed’, the myth is nevertheless maintained. The discussion of this topic is then wrapped up at p. 7:

All that is known today is that there existed in the Vedic Epoch rules of Dharma traditionally regarded as promulgated by Manu and Sutraworks containing aphorisms on law. It would be a misnomer, therefore, to call this even a bare outline of the legal literature of that first epoch of Hindu law.

This surprising conclusion, still mixing dharma and law, merely reinforces the primacy of the Manu myth. The subsequent debate is highly instructive and needs to be recounted here. Desai (1998: 8) wrote on the nature of smṛtis that ‘Hindu jurisprudence regards
the Smritis ... as constituting the foundation and important source of law. The term 'sources of law' used in many legal treatises on Hindu law and in decisions of the Privy Council is somewhat ambiguous’. Explaining that the notion of sources of law may have been borrowed by the Privy Council from Roman law, Desai (id.) further discusses the nature of the dharmaśāstra literature:

... the principal Smritis blend religious, moral, social and legal duties. They contain some metaphysical speculations, matter sacramental and also ordain rules of legal rights and obligations. Ethico-religious obligations were regarded by these exponents of Dharma as more important than legal obligations. The Smritikars were not always punctilious about stressing a clear distinction between the positive or lawyers’ law and moral law, but this is not to suggest that they were unmindful of this distinction.

(p.101) The assertion that the ancient ‘authors’ of smṛti texts were somewhat careless in dealing with the distinction of law and dharma is evidently used to defend Hindu law against the claims of outsiders. Desai (1998: 9) writes:

The charge levelled by some Western scholars against the authors of the Smritis for a want of precision and discrimination between moral and legal maxim is unreasonable and unfounded but it is unnecessary now to take any serious notice of the same ... A clear perspective of Hindu law is not possible unless it is properly appreciated that the blending of religion and ethics with law by these juristheologians was in a large measure the natural result [sic] of a philosophy of life which laid emphasis on the supremacy of inward life over things external.

The interrelated nature of dharma and the reference to the Hindu philosophy of life is irrefutably clear, but precisely how do dharma and law relate? Desai’s debate manifestly assumes that the two coexisted as equal categories. This is where something has gone seriously wrong. Desai (1998: 9) continues from the previous quote above, arguing that ‘[t]he acceptance by a corporate society of the connotation of duty (Dharma) which associated religious and ethical concepts with secular matters was bound to be projected into its codes of positive law’. This introduction of the concept of ‘secularism’ and the assertion, once again, that we find ‘positive law’ here are evidently based on the author’s understanding of the term vyavahāra (dispute settlement or litigation), which he translates simply as ‘civil law’ (id.). Thus, Desai (id.) comes to the desirable conclusion that Hindus had ancient civil law that compares well with Roman law, in particular:

The later Smritikars mentioned above have treated rules of Vyavahara in separate sections (Prakaranas) and exhaustively considered rules of positive law and Narada and some Smritikars have compiled rules only of Vyavahara. The shrewd practical insight of the Hindu Rishis who were both sages and virtually lawmakers left very little that was undefined. At a very remote period they laid down rules of law both substantive and adjectival. Founders of their own jurisprudence these philosophical jurists enunciated and expounded a system of law which does not suffer in comparison with Roman law.

Unfortunately, in the rush to glorify and prove the standing of Hindu law in the world
community of legal systems through this impressive chain of argumentation, it was not taken into account that dharma would at all times remain superior to vyavahāra and that, from a Hindu perspective, the moral law of dharma could not be switched off or made irrelevant when it came to dispute settlement. The learned author, when thinking as a Hindu, was evidently aware of this, as the progress of his discussion demonstrates. Since Desai (1998: 9) continued to argue as a lawyer, he had to admit that Hindu law was not structured like Western law because according to the Austinian principles of jurisprudence or theories of Bentham much of the traditional law of ancient India would be termed as ‘morality’ (id).

Yet, the assertion that Hindu law is proper law was not to be defeated by the undoubted and admitted fact that the smṛtis were not codes in the Austinian sense. In a tour de force of jurisprudential creativity, Desai (1998: 9–10) managed to argue that Hindu law is nevertheless ‘law’ because it depends, ultimately, on a divine author. The first step of the argument contains the admission that smṛti texts are not law (id). However, the second limb of the argument claims a Hindu variant of the notion of sovereign command, which is really a hidden reference to the ṛta/dharma complex, emphasizing the place of a divine lawmaker: ‘What was accepted was the rule-dependent notion of what ought to be done as agreeable to good conscience and in conformity with the cherished article of belief that the fundamental rules of law had been derived from a divine author’ (ibid.:10).

Here, then, the circle of legalist distortion closes perfectly, and the argument has become that Hindu dharma can be accepted as law because the conceptual system of Hindu dharma itself depends on a divine lawmaker. I doubt whether this is a view of the matter which matches with common Hindu perceptions of the origins, nature, and application of dharma. What we are being offered here is a lawyers’ Hindu law, shorn of the inherent social fluidity and flexibility of the indigenous normative order of dharma and its critical element of situation-specificity. Without a doubt, Desai’s positivist reinterpretation of Hindu law shows how the door could be widely opened for subsequent distortions of traditional Hindu law and its eventual reconstruction as a case-based legal system. In fact, Desai’s representation of Hindu law relies to such a large extent on early positions taken in the Privy Council that the original voice of Hindu law is not allowed to come through.

Other textbooks are similarly marred by the constant confusion of internal Hindu perspectives and categories and the official legal views that crystallized over time into dogmatic statements on Hindu law. Discussing the early smṛti literature, Diwan and Diwan (1993: 29) first of all emphasise the importance of custom law in the period after the Vedas and the complexity of the early written material. Typical for Indian lawyers, this is summed up by reference to the promulgation of the original law (as dharma) by the mythical Manu. But then the lawyers swing into action and come to their proper subject asserting that the smritis ushered in the era of the systematic exposition of the rules and principles of law. This is known as the golden age of the Hindus (ibid.: 30):

In theory the Smritis are based on the memory of the sages who were the repositories of the sacred Revelation ... What has happened seems to be thus:
Immediately after the Vedic period the need of expounding the meaning contained in the Vedas arose. The Vedas were to be understood in the light of the new needs of the society which had made further progress from agro-pastoral society.

The stipulated close links between social and textual development suggested here are not followed up, but the theme recurs when Diwan and Diwan (1993: 30–38) examine the various texts in detail. At p. 30, it is said that ‘[t]he Dharmasūtras deal with the duties of men in their various relations’ and are composed by human authors, ‘based on the teaching of the Vedas, on the decision of those who were acquainted with law, and on the customs of the Aryans’. The text continues (id.):

Nobody can doubt for a moment that they are manuals written by the teachers of the Vedic schools for the guidance of their pupils, that at first they were held to be authoritative in restricted circles, and that later on they were acknowledged as sources of the sacred law. Composed in different parts of the country and at different times, they did not present any anomaly, but tended to slide into each other. Most of the Dharmaśastras mingled religious and moral precepts with secular law.

The last sentence of this quote again confirms the confusion among legal scholars over how to read the ancient Hindu texts. Diwan and Diwan (1993: 32) also indicate their understanding that the later dharmaśāstras were dealing with civil law. Again, vyavahāra is thus simply perceived as formal ‘civil law’, rather than flexible dispute resolution management.

On the Manusmriti, Diwan and Diwan (1993: 32–33) present a complex and quite self-contradictory picture. While they simply assert that this text ‘has been all along considered to be supreme authority in the entire country’ (p. 32), they also admit that the identity of the Manusmriti’s author is not known, while the supreme position of Manu was emphasized even in the Vedas (id.). With reference to Kane, they then admit that the ancient mythical Manu could not have composed the text and stipulate that an unknown author must have declared his work to be that of Manu (p. 33). While such reliance on indological (p.104) scholarship leads to the correct finding that the Manusmriti was not authored by the mythical Manu himself, the lawyers’ perspective again rapidly asserts legal centralist thinking, expressed in terms of an urgent need for a code of Hindu law (id.):

The Manusmriti supplied a long-felt need of a legal treatise which could be a compendium of law ... It is a systematic and cogent collection of rules of law. It is the most authoritative reservoir of law. It recasts in a systematic and easily accessible manner the whole of traditional law which was lying scattered ... The Manusmriti is a landmark in the legal history of India .... The Manusmriti also gives a vivid idea of the customs of the then society and social and religious observances of the people.

Thus, these authors have redesignated this smṛti text as a virtual code of law as well as a handbook on ancient Hindu customs, when in fact it was neither. The Manusmriti is first of
all a guidebook on dharma, not a code of law, and whether it really provides evidence of customs is a widely debated matter taken up again in a later section in this chapter. However, having presented this text as a code of law, Diwan and Diwan (1993: 33) proceed to argue that the ancient Hindu ruler acquired virtually divine functions under this new law and had the power to rule, embodied in the concept of danda, which is also seen as a secular instrument of rule (see section an assisted self-control, etc. later in this chapter). Recent authors who might provide brief summaries of the ancient law as a preface to discussing questions of modern law, particularly relating to Hindu personal law, have sometimes managed to distil the essence quite well. 78 Pathak (1986: 1) summarizes:

Law as understood by the Hindu is a branch of Dharma. Its ancient framework is the law of the Smritis .... As the Hindu Law was influenced by the theological tenets of the Vedic Aryans and their philosophical theories, therefore, we find in the whole system a mingling of religious and ethical principles with legal precepts. In the system of Hindu Law, it is very difficult to differentiate secular and religious matters because certain questions, as for instance, marriage and adoption had the aspect of both. Therefore, if any punctilious attempt is made to segregate any secular matter from the religious adjuncts, it will cloud the comprehensive idea or proper perspective of the true juridical concepts of Hindu Law ...

Similarly, on the nature of Hindu law, Pathak (1986: 2) emphasizes its religious underpinnings, in that ‘Hindu law is not the command of the sovereign, nor of a political community which is binding on that community but it is the command of the Supreme Being, which is binding on the sovereign, as well as his subjects’. Thus here, too, the assertion that Hindu law is based on divine authority is maintained.

(p.105) In a radical re-examination of Hindu law that identifies many of the inconsistencies in the literature, 79 but still remains confused about the role of dharma in relation to law, Bhattacharjee (1994) has asserted that the Vedas neither are nor ever were, properly speaking, a source of Hindu law. Highlighting the contradiction between Hindu beliefs about the eternal nature of the Vedas and the absence of legal rules in the Vedic texts, he sought to demolish the argument that Hindu law is based on religious sources, emphasizing instead the secular, legal element of vyavahāra, for which he expresses staunch admiration (p. 3). Bhattacharjee (1994: 14 and 17) further argues that the old Hindu law of the smṛtis was later superseded by commentaries and digests, and thus claimed, in essence, that the assertions of a divine nature and basis for Hindu law cannot be maintained in the light of the history of Hindu law.

While I would agree with much in this analysis, Bhattacharjee’s study commits one critical conceptual blunder that ruins his arguments. Like so many other authors, he claims that the Hindu system of jurisprudence represents a system of positive law, ‘a law having the oldest pedigree of any known system of jurisprudence, but yet to have surprisingly modern visions’ (p. 3). Envisaging ancient codes, Bhattacharjee (1994: 5) simply introduces positivist fictions and thus distorts our view of the reality of ancient Hindu law in his desire to claim exalted status for it:
I am yet to know of a set of Law Codes, the Lex Scripta whereof started governing people more than 2000 years ago and are governing them still today. This irresistible demonstration and irrefutable proof of the unparalleled vitality of the Laws of the Dharmashastras have made them unique in the world of Laws.

Phrases used in the learned author’s further analysis, such as ‘the written texts of the Law Codes’ (p. 6) reinforce this confusion. Outright contradictions are found in statements that '[t]he Vedas and the Smritis are obviously neither legislations nor precedents nor agreements’ (p. 14) and that ‘there can be no doubt that the Smritis contain rules of civil law or Vyavahara’ (p. 17), while at p. 19 it is stated that ‘these Smritikars never pretended or professed to be makers or givers of the law contained therein’. The absence of a detailed discussion on the underlying conceptual foundations of Hindu law as a system of ordering, replaced by the mere assertion that Hindu law represents an ancient form of positive law, leads the reader astray, although the conclusion (Bhattacharjee 1994: 39) seems appropriate:

It would, therefore, be entirely wrong to say, as has been said by almost all the leading authorities, that the Srutis or the Smritis or the Nibandhas are the sources of the Hindu Law. And if the expression “legal sources” means, as it does according to Salmond and other authorities, something which makes, creates, originates or generates the laws, then these Srutis, Smritis (p.106) and even the Nibandhas were not also such sources of law but, only were the evidence and records thereof and, as such, the sources of our knowledge of law.

Such formalistic arguments rely on formal legal criteria, so that by the standards of legal positivism, the ancient sources of Hindu law cannot be seen as proper legal sources. But what has happened to the author’s argument that the ancient texts represented codes and that the later commentaries became the real source of Hindu law? And what about recognition of the fact that Hindu law was from the beginning more than a positivist construct? Bhattacharjee’s efforts are undoubtedly intellectually interesting, but this study does not manage to portray the conceptual embeddedness of Hindu law in the āta/dharma complex.

Even the most recent writing produced by modernist and feminist scholars displays and reflects an understanding of classical Hindu law that seems too uncritically based on such confused distortions as the old indologists and British lawyers together produced at some time in the past. Agnes (2000) interrogates the prevailing picture and image of a strictly patriarchal Hindu normative order, dominated by Manu, portrayed as ‘the arch law giver of the Hindu religion’ (p. 11), setting out to explore whether ‘within these strict dictates, the Hindu law permitted any space for negotiating women’s rights’ (id.). Emphasising the internal plurality of Hindu law and the diversity of its sources, Agnes indicates that there may be huge scope for asserting women’s rights under the amorphous and wide ‘Hindu’ umbrella, but her critique does not go much beyond the flat observation that the key term ‘Hindu’ is ‘more a legal fiction than a religious entity or a social reality’ (p. 26).

Thus we find a familiar phenomenon in the literature on Hindu law: Law and legal
scholarship seem inherently focused on tangible sources, primarily on written material, while the less tangible conceptual, religious, and anthropological aspects of legal study and their evidence in real life situations have received comparatively less attention from lawyers and legal scholars. It has been easier for lawyers to study texts than to conduct fieldwork or enter into philosophical or philological debates about complex basic concepts of rights and duties. Non-lawyers, as indicated, simply tend to use certain fragments of the legalistic images of Hindu law and leave the rest to the specialists, with the result that insufficient progress appears to have been made, and old stereotypes of Hindu law continue to be repeated also in the most recent editions of leading textbooks.

All of this reflects badly on the study of Hindu law, but certain deficiencies cannot be easily remedied. First of all, fieldwork on classical Hindu law can obviously not be conducted and our sources on litigation only take us back to courtroom situations in the 17th century (Derrett 1968b; Smith and Derrett 1975). Further, the numerous smṛti texts do not cover the actual or ‘living law’; at best, they propose ideal models which may or may not have been followed in social reality. Simultaneously—because the texts focus on dharma even if they do not say so—they are important, in their totality and as individual pieces of evidence, to our understanding of classical Hindu law concepts, since they indicate what was considered appropriate in certain situations (Larivière 1993). While an individual text did not create a fixed rule or model, it offered a suggested solution at a particular point of time in a specific situation, no more and no less. In the properly ‘classical’ period of Hindu law with its emphasis on self-controlled order, there was simply no conceptual legitimation for any positivist law-making and the texts therefore must have been guidebooks on dharma but certainly not codes of Hindu law. As the subsequent section on the role of custom discusses in more detail, the focus of self-controlled ordering ultimately fell on the individual within his or her social environment. Since classical Hindu law proceeded methodologically bottom-up, not top-down, there was only very peripheral scope for external law-making. At the fluid end of the classical period of Hindu law, therefore, with the impending transition to ‘assisted self-controlled order’, the stage is set for more active involvement by forces outside the individual.

Assisted Self-Control and DaṇḍA in Late Classical Hindu Law

Within the ṛta/dharma complex, the demand on every Hindu to strive for the ideals of self-controlled order simply restricts the state as a rule-maker and does not totally legitimate political and legal interference in the daily life of Hindus. The conceptual expectation of self-controlled order in classical Hindu law would have empowered, in principle if not in practice, all Hindus to determine for themselves, as individuals subject to the highest order, what they should be doing. A ruler’s claim to make what Hart (1961) called ‘primary rules’ could never have developed in such a conceptual climate, since in the classical Hindu system such basic rules were to be cultivated in the social sphere and should then be implemented locally and individually in self-controlled fashion. Thus, according to the ideals of classical Hindu law, there is simply no direct need for state law. Only the limited sphere of law-making that comprises Hart’s ‘secondary rules’, dealing with procedures, methods of hearing evidence and so on, could be made subject to the ruler’s law-making authority as a matter of good governance.
Later in the classical period, perhaps more at its tail end, this idealized vision of individualistic ordering through self-control processes appears to have given way to the assumption that self-control is ultimately not effective enough in safeguarding dharma. The reasoning advanced for this prominently blames people for being simply too weak and selfish to exercise philanthropic (p.108) self-control. Many texts speak of an early golden age, the imagined ideal age of self-controlled order, in which the bull of dharma still had four strong feet. Now, however, in the kaliyuga, the era of depravity and decay, dharma only has one foot, and clearly needs outside support (Manusmriti 1.81–82). The need for ‘law’ seems to be expressed in texts like Nāradasmṛti 1.1–2, which explains why vyavahāra, dispute settlement as well as the threat of punishment, is now considered necessary:

When mortals were bent on doing nothing but their duty and were habitually veracious, there existed neither lawsuits nor hatred nor selfishness.

Now that the practice of duty has died out among mankind, vyavahāra has been introduced; and the king has been appointed to decide suits, because he has the authority to punish.

While statements of this kind are often found there is, to my knowledge, nowhere in the ancient literature an argument that state law is needed because without a state and its positive law there would be anarchy. Interestingly, the recent translation of the above-cited Nāradasmṛti verses by Larivière (1989, II: 3) emphasizes the need for legal procedure, rather than litigation as such, hence offering a sophisticated explanation for the focus in that text on procedural rules. In his introduction, Larivière (ibid.: ix) repeats the familiar claim that ‘[t]he Nāradasmṛti is unique in the corpus of Sanskrit legal literature. It is the only original collection of legal maxims (mūlasmṛti) which is purely juridical in nature’. All of this is well and good, but the claim that this text is purely secular goes in my view too far, since it ignores the wider social context within which the compiler(s) of this text operated. All that such ancient texts are saying, even if they appear to focus on secular procedure, is that self-controlled order was eventually found insufficient by itself. From this, it seems, lawyers have a little too rapidly drawn the convenient conclusion that positive law is a necessity in itself and that legal procedure will be needed.

In the ideal world of ancient, classical Hindu law, there was no such conceptual justification for legal intervention. The leading expectation remained that all individuals should follow their specific dharma in self-controlled manner. Thus a constant balance of symbiotic coexistence would be sustained, rather like a stable ecosystem. But the dialectics of balance involve imbalance and constant rebalancing and are thus unstable and ambivalent. Further, the invisible rules of this symbiotic interaction model are not known to mankind, (p.109) so that rituals must forever remain a form of speculative ‘hoping for the best’. There must have been a realization that the ideal of self-controlled order required support mechanisms apart from appropriate ritual action; it was simply not a sustainable theory. May (1985: 94) emphasizes in this regard:
Already the early smṛtis envisaged that the promotion of dharma depended to a great extent on the efficacy of certain provisions addressed to a rājā (ruler, king) in order to exercise an all-pervading influence on his behaviour. Neither did the smṛtis rely on an ideal promotion of dharma nor did they pretend ‘abstract’ or superior wisdom and sufficiency, yet on the contrary, they attempted to be as realistic and practical as possible with regard to their task.

Thus, the centre of activity in maintaining order shifted still more explicitly from heaven to earth and now began to involve a public agent rather than simply individual self-control. While the individual Hindu still carries major responsibility for the maintenance of dharma, the figurehead of the Hindu ruler would now appear to gain greater prominence as a guardian of dharma. This development is reflected by stressing the supervisory function of rulers in various ways. Ideally, like in ancient China or traditional Islamic law, the ruler should not be called into action, as self-control was supposed to work effectively. Yet where this breaks down, the ruler is to step in through deterrence in the form of harsh and potentially quite gruesome punishments (Day 1982; Menski 1992a; Menski 2000a). These are often elaborated in later texts but really appear everywhere in the smṛti texts. Such elements clearly belong, conceptually, to the late classical period of Hindu law.

As various texts candidly admit, human selfishness and greed could play havoc with the ideal of self-controlled order and bring about a state of anarchy.83 In such circumstances, individuals need to be reminded of their duty to follow dharma. This argument introduces a new concept, the punishing rod (daṇḍa), which should be seen as a symbol of ‘assisted self-control’, not necessarily evidence of actual punishment, but a deterrent threat designed to encourage individuals to follow dharma of their own accord.84 It would be quite wrong to assume that the traditional, classical reliance on individual and situational self-control was completely abandoned. How this process occurred is again impossible to trace with historical certainty, but the conceptual analysis (p.110) tells its own story. Day (1982: 17) rightly begins his important study with the telling observation that concerning the Indian understanding of punishment itself, ‘[n]owhere is this conception formally defined, as if knowledge of its nature and structure had always been assumed’. Day (1985: 99) suggested:

Protection does not come about ‘eo ipso’, it requires due attention to internal and external affairs. Appropriate activities are to be executed as rājadharma by means of daṇḍa (literally: stick, punishment), in a wider sense to be comprehended (and so used in our sources) as imposing ‘acknowledged’ secular disadvantage on somebody in situations resulting from ‘contradharmic’ activities.

Day (1985: 99-100) emphasised the inescapable nature of daṇḍa, at least in theory, and correctly pointed out, at p. 100, that punishment for transgressions is not merely a secular activity and that the principle of karma still operates as well:

Protection by means of daṇḍa, however, includes the ruler’s care for man’s secular and religious prosperity, demanding the expiation of a sin and the punishment of an unwanted or forbidden behaviour, since an adharmic behaviour
having the quality of a ‘crime’ simultaneously pertains to a sin and a punishable ‘crime’. Hence to escape the ruler’s danda may be not difficult, and is often successfully achieved, “but not that of the eternal law of karma”.

This demonstrates that danda also became associated with the power to punish various transgressions which were originally treated as sins, but might now be seen as a form of crime. Such threats of punishment are not purely secular, therefore, as most legal commentators have assumed. In other words, transgressions of dharma are also seen as sins, which require penance and/or attract posthumous consequences. But quite where sin ends and crime begins could never be fully determined, and so the obvious happened in terms of positivist legal scholarship, in that specialist legal authors have largely ignored the religious elements of danda theories and seem to envisage merely a secular mode of legal regulation. Diwan and Diwan (1993: 33) again emphasized the role of Manu and wrote, still muddling dharma and law:

When the Manusmriti was compiled, the Hindu concept of law was that ‘law is the king of kings’. Manu also subscribes to the notion that the king is subordinate to law and that the king is merely a law-enforcer. But he tries to clothe the king with the divine authority and seems to support the theory of divine right of kings ... With a view to strengthening the hands of the king, the Manusmriti tends to endow the king with the divine authority .... As a natural corollary to the strengthening of king’s position, Manu, while dealing with the duties of the king, emphasizes the importance of danda, the secular instrument in the hands of the king for enforcement of law ... Danda connotes the secular power of punishment, which the king, as (p.111) enforcer of law, possesses to prevent breach of law and to inflict punishment on the wrongdoers. Thus the punitive element behind the enforcement of law is emphasised.

This passage is worded in such a way that the culturally aware reader may read ‘law’ as either positive law or dharma. In a legal textbook of this nature, the trend among readers will be to pick up only the legal message. The dharmic dimension of the concept has thus been lost. It is also not transparent in Desai (1998: 20), where danda is merely portrayed as ‘the sanction behind the power of the king [to] restrain transgressions of law and to inflict punishment on offenders’. While Kuppuswami (1986) does not discuss danda separately, other more recent texts also fail to highlight the complex nature of ‘assisted self-control’ and engage in purely positivism-centred legalistic discussions. Surprisingly, claiming to discuss ancient Indian jurisprudence, Jois (2000: 53) argues as if dharma as self-controlled order is an irrelevant consideration, claiming that the object of rājadharma ‘can be achieved only by having laws regulating the conduct of individuals and their enforcement through the officers and servants of the State’. This is the price one pays for arguing that the ancient Hindus had everything in place, well before Western civilizations.

It appears that only a few Indological scholars who have managed to retain some link with legal material, particularly Day (1982) and May (1985), have remained capable of addressing and exploring the interlinkages between dharma, danda and law. Day (1982:
clearly emphasizes in his conclusion that it is not adequate to take a narrow, legal perspective:

A statement that judges ought to punish wrongdoers is not simply a statement about law but also a statement about the nature and the importance of justice and of civil order and of dutifulness in judges as divine concerns related to Order as an ultimate value.

Hindu law scholarship in this field is found in a deeply confused state, not only because of its defective understanding of concepts of Hindu self-controlled order, but also due to the strong positivist notion that criminal law is a matter for the state alone. Textbooks on Hindu law have, therefore, significantly failed to make any sensible contribution to a deeper understanding of Hindu conceptions of punishment and have abandoned this aspect of law more or less entirely to secular considerations.

(p.112) VyavahāRa and Informal Dispute Settlement
Late classical Hindu law displays certain conceptual characteristics that warrant still further separate treatment. During the late classical period of Hindu law, another aspect of a more legally technical orientation developed within Hindu law, relating to the more or less formal negotiation or settlement of disputes. Two key terms arise in this context, vyavahāra (‘litigation’ or dispute settlement), and (probably later) the term rājaśāsana, which has been translated as ‘royal edict’ or more generally as the ruler’s verdict on a disputed matter, thus constituting more a judicial statement than legislative authority. It will no longer be surprising to find that both terms have been significantly misrepresented by many legal scholars, who again underplayed or totally ignored the ṛta/dharma continuity and imagined formal Western-style legal criteria rather than considering Hindu concepts.

The present section focuses on the assumption that formal litigation processes (vyavahāra), developing perhaps a growing authority of their own, became seen as a necessary means to uphold dharmic order. Self-regulated ordering processes would not always take place without some discussion and negotiation, which might be mostly informal, but could involve formal methods of dispute settlement. References to the need for dispute processing strengthen the claims of agents of the formal law, whether rulers, judges, or other functionaries, to increased authority in terms of ascertaining dharma, but still not with regard to law-making in a positivist sense.

In terms of literary evidence, especially the important later smṛti texts of Nārada, Brhaspati and Kātyāyana, developing earlier concepts and building on the classical foundations, clearly continue to retain the dharmic context, as May (1985: 109ff.) strongly emphasizes. Significantly, however, Hindu lawyers have been blind to this and have only seen secular legal rules about dispute settlement where an Indologist sees much more. In a climate in which the Manusmṛti has already been unambiguously declared the most authoritative code of Hindu law (see Desai 1998: 19–20), these texts have persistently been presented to legal readers as law books.
The texts in question mainly provide indications of an increased perception of the need for dispute settlement, as we saw in the earlier section from Nāradasmṛti 1.1–2, and it is doubtful that these are immediately references to formal ‘lawsuits’. Similarly, Brhaspatismṛti 1.1 declares that ‘[i]n former times people were strictly virtuous and devoid of mischievous inclinations. Now that avarice and malice have taken possession of them, judicial proceedings have been established’ (Jolly 1977: 277). Such texts consistently reflect perceptions about the decline and inefficiency of self-control mechanisms in late classical Hindu law. At the same time, they suggest a potential strengthening of the position of Hindu rulers as administrators of justice and indicate that experts in the shastra now possibly moving into positions as legal advisers, assessors, and even judges, might have become increasingly involved in the administration of justice, which at that time still meant ascertaining dharma, not obedience to the state’s legal rules. All of this appears to increase the importance of texts and of textual knowledge as a source of Hindu law, but it does not mean that the centre of gravity has now shifted to rule making by the state.93 The state-centredness of scholarship is also reflected in unthinking translation of rājā as ‘ruler’; he could also be a family head or the manager (kartā) of a Hindu joint family.

According to the shastric texts, rulers were not infrequently called upon to settle disputes, as well as to punish criminals. The former was the case in disputes between individuals or social groups based on conflicting claims, the latter presumably when grave violations of dharma had occurred. However, it cannot have been the severity of a transgression alone which determined whether a case was dealt with by a ruler. Local fora in India to this day claim and exercise the right to devise appropriate punishments, including the death penalty (Baxi 1986a; Chowdhry 2000). In principle, during the late classical period, order was still maintained at the local level, with the ruler exercising at best a supervisory function. Thus, he remained unlikely to be aware of most disputes unless they affected his rule, or occurred in the capital, where access to the superior court was less difficult. Still, rulers would not want to be involved in trivial matters unless they were corrupt and saw administration of ‘justice’ as (p.114) a means of exploitation. While this cannot be excluded as a realistic possibility, there are clear indications from many texts that vexatious litigation and litigiousness, in general, were not at all favoured.

The concept of vyavahāra is often circumscribed as ‘removal of doubts’, visualized as the extraction of a thorn or a dart (Nāradasmṛti 1.3.17; Manusmriti 8.12). Investigation and critical evaluation of evidence become, in this context, a new area of interest for the smṛti authors, so that legal scholars, centuries later, again saw further growth of technical legal subjects and expertise. Indeed, and remarkably parallel to early Islamic law, one finds here an important development in procedural rules, particularly an impressive body of rules concerning evidence. Such detailed technical rules may only have limited practical value, however. Many later texts introduce innumerable classifications and hair-splitting distinctions for the sake of completeness (see further later). The overriding concern in practice must have continued to be compliance with the expectations of dharma and the equity of the situation, rather than legal niceties of a theoretical nature. Some texts, indeed, warn against placing adherence to technicalities above concern for justice.94
The literary sources from the late classical period begin to contain more evidence of a formalization of processes of ascertaining dharma, but these have been reconstructed and are presented by legal textbook authors simply as formal legal processes. Abundant evidence from the texts illustrates such distortions. For example, Kuppuswami (1986: 20) writes:

The Code of Manu declares the eighteen heads of legal proceedings which were followed by Yajnavalkya, Narada and Brihaspati. These divisions and their order make no pretensions to a scientific system; they were probably due to the practical needs of society and testify to the greater frequency and intricacy of some kinds of disputes than of others.

Early rulers like the Buddhist king Aśoka (c. 274–232 BC) issued edicts that were clearly moralistic guidelines, phrased in idealistic terms of following dharmic concerns about appropriate behaviour, rather than obeying the ruler’s laws (Nikam and McKeon 1962). Later Hindu rulers, it was assumed, felt authorised to stipulate harsher penalties to improve self-control processes, while there will also have been abuses of such power. Contemplating punishment (p. 115) as a tool of governance, the temptation to lay down fixed rules for everyone may have increased. Indeed, in a supposedly later layer of texts, classified as arthaśāstra (guidelines on the science of acquisition of wealth and power) or nītiśāstra (handbooks on the science of guiding others) we seem to be told at times that an efficient Hindu ruler should behave like an absolutist monarch and should ruthlessly enforce his will on his people. However, it seems to go beyond credibility, and reflects positivist presuppositions, when it is asserted by Kuppuswami (1986: 21) that ‘[a]ccording to Narada, laws were proclaimed by Kings, and royal ordinances or proclamations could overrule the Smriti law’. In my view, such statements in the ancient texts have been overinterpreted and have been widely misread by legal scholars, who then introduced their own positivist assumptions of how a legal system grows over time. Some insight into how Indian lawyers have argued this matter is provided by Diwan and Diwan (1993: 24):

It has been seen earlier that the theory was that our king did not make law; he merely enforced law. Yet we find that the king’s power to make law—though to a limited extent—by edicts or ordinances—was recognised. It is not clear at what stage of development of law the Rajyashasana became important. Yajnavalkya mentions it. Narada clearly states that the king-made law overrides the sacred law and custom. Kautilya is also to the same effect. According to him dharma, vyavahara, charitra, and edicts of the king are the four legs of law. Of these four in order, the latter is superior to the one previously named.

While this smṛti needs to be further examined, Diwan and Diwan (1993: 24–25) attach to this kind of textual evidence their own political arguments for why ancient Hindu kings should need to make laws:

Kautilya’s period is the glorious period of Hindu history: the Maurya dynasty came to be established. Ashoka ruled over a vast Empire. One powerful king after another succeeded. At this period of glory and in the need of the governance of the...
vast empire it was but natural for a king to make laws. In response to the need of the time the king-made law was given overriding effect over sacred law. Narada observed: ‘As the king has obtained lordship, he has to be obeyed. Polity depends upon him’. The king as the administrator of justice had, by the compulsion of social needs of time which witnessed remarkable political economic and social progress, to be given power to make law ... within the framework of Shastras or even in transgression of them, (when need arose or situation demanded) the king could make law. The king-made law was given overriding effect both over custom and sacred law.

It seems that Diwan and Diwan, writing not for a largely Western readership untutored in the finer concepts of Hindu culture, but for Indian law students, import outrightly positivist notions into their text. Their discussion echoes the same debate found in Desai (1998: 33–4) where it is suggested, quite wrongly in my view, that the Arthaśāstra ‘was written at a period in the history of India (p.116) during which law and politics were not accepted as wholly and strictly controlled by ancient rules of Dharma but as matters to be dealt with severally and freed from religious domination’. Thus it could eventually become a purported reality that Hindus had rulers like Western states had Napoleon and other great men, who would habitually lay down the law for their subjects. Such familiar images arose prominently among the early British administrators in the growing Indian Empire, but are manifestly also reflected today in the leading Hindu law textbooks. Indian lawyers, as this problematic scenario confirms, have evidently become keen pupils and eager followers of colonial legal and cultural indoctrination.

In late classical Hindu law, a dutiful Hindu ruler would at all times, in theory, have remained subject to the overarching conceptual demands of dharma, also in his pursuit of wealth and power, and he could never permit himself to act as a secular absolutist ruler without knowingly violating rājadharma. The development of rājadharma, as a specialized branch of the science of duties, offered further scope for positivist conceptual invasions and distortions. From a political science perspective, it is not illogical that a ruler figure should have some concern for, and control over, what ‘his people’ could and should not do. The texts do not engage in debates on the comparative virtues of democracy or Maine’s patriarchal despotism, on which controversy remains alive (Menski 1995a), but emphasize that the ideal Hindu ruler would now take on the functional characteristics of Varuṇa, the divine Vedic guardian of ṛta (RV 10.85; Manusmriti 9.245). Rājadharma thus becomes an important topic in its own right, but is understood as a manifestation of the old ṛta/dharma complex. Consequently, when Hindu rulers, their judicial deputies and various other functionaries are depicted in litigation situations in much of the epic and dramatic literature in Sanskrit and various Prakrit languages, they are still acting within the confines of dharma, but they are also visibly engaged in processes of making law.

But the critical question is what kind of law is thus produced. If a ruler makes a declaration or decides a case, this is an attempt to relate particular facts to the perceived needs of dharma, not a purely secular legal action of ‘laying down the law’. In other
words, this is not legislation, but the conclusion of a process of ascertaining dharma, valid only for this particular situation. It is similar to judge-made law, but not in the sense of binding precedent, as in the British common law tradition. It is evident that Indian legal scholarship on Hindu law has been thoroughly influenced and virtually derailed by colonial concepts of legal administration.

While rulers and their representatives appear to be given guidance in smṛti texts about how best to secure dharma, all Hindus are still taught about the need for self-regulated action through such literature. The ruler’s main role, in the classical Hindu law context, is therefore still not to produce or enforce his own law, but to enable everyone to follow their own respective dharma as far as possible. This basic rule confirms that there was not yet an operative concept (p.117) of positive law or state law in late classical India. While the ruler might act as a facilitator of justice, he was not primarily the creator of the legal rules.

However, if Hindu rulers also acted in more and more cases as an arbiter over competing claims, thereby contributing to the development of more formal litigation patterns, then more explicitly legal, procedural patterns of state law might indeed have developed. It is therefore precisely in the arena of dispute settlement that further important evidence for the conceptual development of Hindu law might be found. Gradually, the functions of ruling and watching over self-controlled order are linked to settling disputes in a variety of local forms, culminating in the ruler’s supreme function as final arbiter in disputes. While the ruler’s judicial functions were probably often delegated to learned Brahmins and later ‘legal’ specialists, familiar patterns of society’s regulation by the state might begin to emerge. It must also be noted again that later British interventions, familiar with the concept of judge-made ‘common law’, could effortlessly link into such formal patterns.

The leading legal textbooks send confused signals about the extent of any conceptual development in this field but assert, as shown above, a historical growth of positivist Hindu law. In this context, two types of statements from the classical Sanskrit texts have given rise to further discussions about the extent of state control in dispute settlement processes, and particularly about the degree of authority of any royal declaration or verdict that might conclude a dispute.

Various texts elaborate the four stages of plaint, answer, examination of evidence, and finally judgment, though there is little harmony between individual texts on points of detail (see for example Bṛhaspatismṛti 3.1ff.). As texts were increasingly arranged by subject, the topic of ‘titles of law’ (which are also still aspects of dharma) became more prominent. All major texts contain such a list comprising up to eighteen different titles. While Manusmṛti 8.4–7 merely listed them in one place, the Nāradasmṛti, for example, treated the eighteen subjects in considerable detail, focusing in turn on (1) debt; (2) deposits; (3) partnership; (4) resumption of gifts; (5) breach of a contract of service; (6) non-payment of wages; (7) sales affected by another than the rightful owner; (8) non-delivery of a sold chattel; (9) rescission of purchase; (10) transgression of a compact; (11) boundary disputes; (12) mutual duties of husband and wife; (13) law of inheritance; (14) heinous
Increasing formalization of legal rules and processes in the administration of justice at the highest level seems reflected in verses that appear to give the Hindu ruler the last word in deciding disputes, thus establishing a hierarchy of sources of law (or rather, dharma) that is markedly different from Manusmriti 2.6 and 2.12 as discussed in the next section. Such verses suggest an advanced (p.118) form of discussion about the sources of dharma. There appears to be much confusion over their meaning.\textsuperscript{97} As a sample, Nāradasmṛti 1.10 (Jolly 1977: 7) is useful:

\begin{quote}
Virtue [dharma], a judicial proceeding [vyavahāra], documentary evidence [caritra], and an edict from the king [rājaśāsana] are the four feet of a lawsuit. Each following one is superior to the one previously named.
\end{quote}

In the translation offered by Larivière (1989, II: 5) the same verse reads: ‘The four feet of legal procedure are dharma, legal procedure,\textsuperscript{98} custom and the king’s decree; each latter one overrules the former’. Jolly (1977: 7) had earlier tried to explain the meaning of this verse, especially the four-fold hierarchy, which seems premised on the expectation that self-controlled order should remain the norm. Larivière (1989, II: 5–6) helpfully points out the underlying assumption that a final appeal lies to the king. But that does not mean that the ruler’s verdict always overrules everything else.

Derrett (1968b: 148ff.) took the equivalent text of the Kātyāyanaśāstra as a basis for his own discussion of this hierarchy. He argued, firstly, that when both parties to a dispute act truthfully and the wrongdoer admits his misdeed, the decision or outcome is achieved through dharma (Derrett 1968b: 149), clearly a reference to self-controlled ordering (see also Jolly 1977: 7). This might imply informal extra-judicial dispute settlement, perhaps after admission of the objectionable act by the wrongdoer. Such settlement of a dispute ‘before trial’ would strongly confirm the continuing relevance of self-control mechanisms in real life. In this particular sense, dharma itself would then continue to be a source of dharma. It is rightly placed in the primary position, since the present hierarchy of four sources is given in a realistic chronological order, beginning with the least authoritative but most frequently applied source.

Continuing this dual image of sources of dharma and methods of dispute settlement, the second level in this hierarchy, vyavahāra, would imply a slightly more formal process of dispute settlement. The contested ascertaining of dharma makes sense here, particularly in view of the corrupted ideal of post-classical Hindu law. In the bad kaliyuga, self-control has largely broken down and other mechanisms for dispute settlement would need to be pursued. In this regard, Kātyāyana’s view is that vyavahāra involves the settling of disputes by recourse to smṛti rules (Derrett 1968b: 149), while Nāradasmṛti 1.11 suggests that ‘a judicial proceeding (rests) on the statements of the witnesses’ (Jolly 1977: 7), which led the translator to comment that either party to a dispute may have lied and witnesses may have had to be called.

\textit{(p.119)} All of this shows that formal methods of dispute settlement do not by necessity
involve or demand recourse to shastric texts. Indeed, Derrett (1968b: 149) indicates that the authors of the ancient texts may here be conducting ‘a self-conscious and tendentious debate’ among themselves. Less concerned to explain how dharma is determined, they might rather wish to emphasize their own importance in view of the obvious social fact that textual authority remained a subsidiary source of dharma, needed to be adduced by experts and was probably not that popular, given the many textual statements from which one might choose. It is possible that the authors of smṛti texts might have argued for an increased role of these texts, hardly a surprise in a morally corrupt era such as the kaliyuga, in which self-interest is supposed to prevail. Another explanation might be that recourse to texts here means reliance on the new rules about evidence rather than older shastric sources. Both arguments lead to the same conclusion: The vyavahāra experts are seen to be effectively advertising themselves and their products. Here is a further potential growth point for legal business.

The third element in this scheme is caritra, a colourful term which can mean many different things, just as ācāra or sadācāra in the classical scheme of Hindu law. Derrett (1968b: 149) translates from Kātyāyana that ‘whatever a person practises, whether it be in accord with dharma or not, is declared to be caritra because it is the invariable usage of the country’. At first sight, this means that appropriate behaviour in itself serves as a source of dharma, requiring no further intervention from anywhere, in which case it should be the same as the first category, self-controlled dharma, and one must wonder why it should be listed here separately. If we view caritra as a method of dispute settlement, however, it could refer to documentary evidence of what is right and proper (Jolly 1977: 7). Again, this does not need to imply recourse to smṛti texts but could be written or orally documented confirmation of particular local or caste practices, which would have evidentiary value. The precise meaning of this element needs to be investigated further. Surely it must be wrong, at this stage, to think of highly technical notarized affidavit procedures, but caritra probably involves more than just plain ‘custom’; it is perhaps rather ‘proof of custom’.

Lastly, and most important for the present debate, the ruler’s verdict must also be seen in this dual fashion. As a source of dharma, it could be subsumed under the classical sadācāra, based on the personal and institutional authority of the leader figure. As a method of dispute settlement, it makes sense to envisage the ruler as an institution and a final arbiter, indeed a final court of appeal. But how would a ruler reach a decision? It could be the result of patriarchal despotism and brazen force, but this is not what the still somewhat idealistic texts appear to have in mind. While Jolly (1977: 8) thought of ‘the pleasure of the king’, Kātyāyana seems to indicate that recourse to texts would play an important role in ascertaining ‘relative appropriateness’ (Derrett 1968b: 150). This reference makes sense if we envisage that a conscientious ruler should consult experts in the shastric texts. This could again be read as evidence of (p.120) cunning self-advertisement by experts, this time towards rulers, but it certainly does not mean that the ruler’s verdict necessarily becomes the ‘law of the land’. While the ruler appears to have the last word, he must consider a variety of factors within the dharmic context in
order to fulfill his own dharma. Moreover, the end result is a resolved dispute, not a piece of legislation.

All of this shows clearly that late classical Hindu law, too, does not allow the ruler to make law as he pleases, but keeps him firmly within the framework of relativities. The fact that the ruler increasingly delegated his judicial functions to experts (Derrett 1968b: 183; Derrett et al. 1979: 65ff.), some of whom we may now call judges and/or jurists, had some influence on the consideration of these relativities, but case law and statute would not appear to become a source of Hindu law until British intervention many centuries later. Speaking of these two sources within the realm of traditional Hindu law itself reflects infections of the writer’s pen by legal positivist notions. Quite inconsistently, Desai (1998: 35) concludes that ‘[t]here is no reference to any centralised judicial system and there seems to have been little interference by the king with the traditional local tribunals which functioned in matters of local importance including dispensation of justice’.

Late classical Hindu law, thus, represents an important conceptual shift in emphasis from internalized processes of ascertaining dharma to more visibly negotiated attempts at finding the right balance in conflicts or disputes. This happened probably through recourse to texts and various human agents who took their authority primarily from knowledge of those texts, and not in the first instance from secular political power. In real life, there can be no doubt that the majority of such conflict situations continued to be dealt with locally, and by more or less informal processes of dispute settlement, in which local customary laws remained in all likelihood the most important yardstick for ascertaining dharma. The increasingly detailed evidence of legal rules, especially in the later smṛti texts, and the concept of vyavahāra itself, should therefore not mislead anyone into imagining a highly formalized stage of late classical Hindu law and litigation. Most of Hindu law at this time remained informal, unrecorded and inaccessible to formal legal analysis and positivist control. Whatever the present leading Hindu law textbooks may say, in the light of the present analysis it appears that the traditional Hindu legal system as a whole remained firmly based on the primacy of self-controlled order and individual action, not on outside intervention through law-making authorities.

**The Role of Custom in Classical Hindu Law**

The late classical pre-eminence of localized, self-controlled order within the ambit of the rta/dharma complex is powerfully reinforced by considerable evidence that the shastric texts themselves continued to accord huge importance to customary laws. For this reason, too, something is seriously wrong with the prominent perception, propounded by legal textbooks, that ancient Hindu rulers or shastric authors, as judges or simply as ‘lawmakers’, could in positivist fashion determine or lay down the law. The supremacy of customary laws in daily social reality is further underlined by frequent statements to the effect that a valid custom need not be in accordance with smṛti rules. Diwan (1984: 4) seems to go further when he argues that ‘the Punjab customary law throughout remained a secular law’, a view which reflects that author’s modernity, but not, I would argue, the perspective of the people concerned. Against this, the viewpoint of Roy (1911: 12–13) is to be preferred, indicating that under customary law, ‘a person aggrieved
complains not of an individual wrong but of the disturbance of the order of the entire little society’. While this could still be interpreted as a secular matter, the various degrees of awareness of Hindu interconnectedness would not exclude the realm of custom. While custom has secular elements, no doubt, its operation in the social context also clothes it with religious elements. Measuring such degrees may be beyond the capacity of lawyers, but an outright declaration that such customs were either secular or religious cannot be justified on any count.

The recognition that custom in derogation of smṛti rules can be perfectly valid in Hindu law and would be given effect in a dispute settlement process or even a formal court of law has many conceptual consequences. Such statements illustrate, more than anything else, the fact that ‘Hindu law’ is indeed only a label and governs many people who, on strict criteria, might not qualify as ‘Hindu’. Undoubtedly with an eye towards some Indian Muslim communities who continue to apply Hindu customary laws, Mahmood (1981: xxxviii) complained:

The expression ‘Hindu law’, which may once have been most appropriate, is now, surely, a term of convenience, if not a misnomer. At present the law described as ‘Hindu law’ is applicable, or may be applied, to a heterogeneous section of the Indian citizenry, many groups in which are certainly not ‘Hindu’ by religion. So, ‘Hindu law’ is not the ‘law of the Hindus’. ‘Hindus’ are only one of those communities who are governed by this law.

(p.122) While this statement describes the situation in today’s India, the many people of ancient times who were more or less incompletely Hinduized, or who lived on the thick fringes of Hindu society, or indeed somewhere in its midst, would be governed by their own localized social norms and would not normally seek guidance from the lawmakers of ancient India which textbook writers seem to imagine. The ancient texts themselves make it quite apparent that local notions of appropriateness, and thus local customary laws, remained the inherently flexible major source of law in social reality.¹⁰³ A ruler who wanted to follow his own dharma would have to respect such customs and was enjoined to give them effect, thereby following his own rājadharma, as Manusmṛti 8.41–2 illustrates:

A ruler who knows (his duties according to) dharma must inquire into the customary laws of castes, of districts, of guilds, and of families, and thus settle the law peculiar to each. For men who follow their respective occupations and who abide by their respective duties become dear to people, even though they may live at a distance.

Arthaśāstra 3.7.40 directs the ruler that ‘[w]hatever be the customary law of a region, a caste, a corporation or a village, in accordance with that alone shall he administer the law of inheritance’. Even when a new territory has been conquered, there should be no superimposition of the new ruler’s law, as Manusmṛti 7.203 clearly indicates:

Let him make authoritative the customary laws (of the inhabitants of that territory), just as they are stated to be, and let him honour (his representative) and his chief servants with precious gifts.
While such textual statements may not be taken as proof of their direct practical application, we find so many of them that even the positivism-focused Indian textbook writers have not been able to suppress such messages. Hence they have incorporated custom, thereby further contradicting their other legalistic claims, in particular the assertion that Hindu law is based on divine revelation and/or that it should ultimately be determined by the authoritative verdicts of rulers or the law codes of ancient law givers.

The leading text of Mayne’s *Hindu Law* (Kuppuswami 1986: 14) starts off by accepting that custom is the third major source of Hindu law after the *smṛtis* or *dharmaśāstras* and the commentaries and digests. This is evidently a general view of the legal position which is coloured by Anglo-Hindu legal concepts. Thereafter, this text does not pay any further attention to the role of custom in interaction with the numerous *smṛti* texts and concentrates on (p.123) legalistic concepts rather than the place of local custom. In contrast, Desai (1998: 2) is quite specific on the important role of custom:

The ancient law promulgated in the Smritis was essentially traditional and the injunction was that time-honoured institutions and immemorial customs should be preserved intact. The law was not to be found merely in the texts of the Smritis but also in the practices and usage which had prevailed under it. The traditional law was itself grounded on immemorial custom and provided for inclusion of proved custom that is practices and usages that from time to time might come to be followed and accepted by the people. The importance attached to the law-creating efficacy of custom in Hindu jurisprudence was so great that the exponents of law were unanimous in accepting custom as a constituent part of law.

Taking the view that customary law was an important element of the sources of Hindu law in its own right, and had over time also become incorporated into the early texts, Desai (1998: 13) also claims that the authors of the *dharmaśāstras* took the law from earlier *smṛti* texts and customs which had grown up bit by bit, reducing them to some sort of order, a process that became more intricate still in the production of the *dharmaśāstras*. Desai (1998: 16) explains that the importance of these texts lies in the concepts of jurisprudence that they reflect and ‘the reference that is traceable in them to previously unrecorded custom, and crystallisation in the form of precepts of usages and practices and the transformation of these into constituent law’. In this envisaged process of lawmaking through texts, the author sees a self-reinforcing pattern of reliance on various ancient customs. Desai (1998: 17) even appears to go as far as claiming that the ancient texts (rather than being expressions of private opinion) might represent the views of the ancient communities themselves:

... these Sutrakars primarily sought to express the *communis sententia* of the Indo-Aryans and were unanimous in their appeal to customary law. This adherence to the doctrine of accepted usage and the enjoined duty of the interpreter of law to see that customs, practices and family usages prevailed and were preserved is one of the outstanding features of Hindu jurisprudence.

Over time, thus, a process of harmonization of text and custom was envisaged by Desai (1998: 19) who emphasizes dynamic elements in the growth of the ancient texts,
'supplementing, altering and gradually moulding the ancient traditional law into [a] system. This evolution was going on for many centuries ...'. Desai (1998: 20) treats the Manusmṛti not only as a code, but as 'a landmark in the history of Hindu law' in which ancient customs have been recorded and (p.124) legally sanctioned. Roy (1911: 13) stated that '[t]he Code of Manu was by far the earliest attempt at a compilation of the then prevalent customs and usages, though it contained but a very small body of such customs and usages'. Desai (1998: 20) claims further that '[t]he Code records many genuine observances of the ancient Hindu and gives a vivid idea of the customs of the society then extant. The ordinance of Manu is based on ancient usages'. A similar approach is taken (ibid.: 25) when discussing the smṛti assigned to Nārada, who is said to be 'categorical and emphatic in his statement that custom is powerful' and agrees that custom overrides any textual statement. Diwan and Diwan (1993: 24) similarly emphasize the unique position of custom in Hindu law and confirm that '[c]ustom not merely supplemented law but it prevailed over sacred law'. They also assert that '[t]o a great extent the Dharmashastras were themselves based on custom'. Mahmood (1981: xli) identifies different historical stages:

Hindu jurisprudence has always had an extremely respectable place for custom and usage. No legal philosophy has perhaps given so much importance to custom as it received at the hands of the Hindu doctors of law. These doctors had, of course, begun with the concept of sadachara. It was after a long time that sadachara came to be regarded as a synonym of what is now known in English as custom or usage.

The fact remains that custom and usage (whether they are the same as sadachara or not), which once were constituents of Hindu law, became its strong opponents in the course of time. Followers of Hindu law came to have a choice between the written law of their religion and the prevailing usage of the locality, class, caste or family; and the ancient jurists accepted it. This established juristic position got full recognition by the judiciary in British India ...

In socio-political reality, as in other early societies, various forms of social organization, from small family groupings and acephalous societies to centrally structured large kingdoms, would have maintained order at the local level. Due to the interaction of various spheres of the visible and the invisible worlds, customary rules will have been closely linked with culture-specific and local concepts of magic and chthonic religious elements, such as worship of the earth, trees, and rivers. To what extent such practices and accompanying rules were 'Hindu' in nature will be impossible to ascertain, but it seems safe to assume a gradual process of Hinduization, parallel to the transition from ṛta to dharma. While dharmic perspectives became more prominent, customary diversity prevailed and is explicitly referred to in the dharma texts. The coexistence of local practice and textual model is regularly referred to in the context of marriage rituals (Derrett 1968b: 159), with the former clearly supreme. Thus, Āśvalāyanagrhyasūtra 1.7.1–2 begins its treatment of marriage rituals with an important reservation about textual authority, indicating that such texts cannot be read as binding codes that laid down the law for all Hindus:

(p.125) Very diverse, indeed, are the customary practices of different countries and villages; one should follow those in marriages. What, however, is common to all
or most shall be declared here.\textsuperscript{107}

Important questions must have arisen about the hierarchy of the various local and family customs and the \textit{smrti} rules, really about the relationship between customary flexibility and dharmaic obligation, at a deeper level between individual discretion and divine order. But there is no contradiction here, since the dharmic system is not a uniform code of obligations but rather a situationspecific and context-sensitive method of expecting the best possible results in what may often have been quite auspicious circumstances. This is why classical Hindu law cannot be essentialized. The \textit{smrti} texts do not provide much discussion of how individual obligations and cosmic expectations are to be matched in practice and were content to list a hierarchy of the sources of dharma. The practical application of such concepts was presumably familiar to those who produced or collated such texts. I suggest that this invisible but acknowledged element points us again to the \textit{ṛta}/dharma complex, which may of course be defined as local normative orders with fairly little or even no concern for the cosmic dimension that the texts would stipulate as the norm. There is no jurisprudential debate over such questions in the old sources and \textit{Manusmṛiti} 2.6 and 2.12, respectively, simply state the basic rule as follows:

\begin{quote}
2.6: The whole Veda is the first source of dharma, next \textit{smrti} and the virtuous conduct of those who know (the scriptures well), also the example of good people, and finally the individual's conscience.
\end{quote}

\begin{quote}
2.12: The Veda, \textit{smrti}, the customs of good people, and one's own satisfaction they declare to be visibly the fourfold means of defining dharma.
\end{quote}

Such statements establish an obvious and sensible hierarchy of sources of dharma, starting from the divinely inspired and reaching down to the Hindu individual's intuitive discretion, a very personal sense of what is right. However, this top-down hierarchy does not make sense in daily practice. Hindus would not ascertain their dharma by looking up rules in Vedic texts first, they would proceed in reverse order and would initially examine their individual conscience. It is essential to understand this before one can appreciate how much this genre of textual material was also distorted by positivist legal scholarship.

In practical terms, common Hindus would never have looked first to \textit{śruti} and then to \textit{smrti} for ascertaining dharma, even though these are the highest sources. The texts indicate a hierarchy of authority, but do not purport to guide us on the practicalities of ascertaining that authority. Since these texts do not disclose how Hindus would gauge the dharmic needs of a particular situation, it is useful to turn to social reality. Common sense suggests that the textual (p.126) statements about the hierarchy of sources of dharma must be read in reverse order to retrace the methodology of finding the actual sources of dharma. The sequence of sources of dharma must therefore be examined in reverse, so that individual satisfaction about ‘doing the right thing in the right way at the right time’, individually experienced and socially sanctioned, is in fact chronologically the first source of dharma. This connotes with the statements in the immediately preceding section about the primacy of self-controlled order in processes of \textit{vyavahāra} or dispute.
settlement. In other words, these texts are consistent with other statements of ‘legal’ hierarchy and make it quite clear that self-controlled ordering is the first and foremost method of ‘finding’ dharma, i.e. ascertaining the relevant Hindu law. This method, which results primarily in the invisible process of internal self-examination of one’s conscience, may well settle nearly all disputes or situations of insecurity. It is a mental process, imperceptible to others, and thus of no interest and concern to lawyers. For this reason, and writing as a continental civil lawyer studying Hindu law, Lingat (1973: 6) did not find it proper to give a voice to the common Hindu in lawmaking, claiming that ‘if “inner contentment”—we should prefer to say the approval of one’s conscience—really is a source of dharma, it does not strike us as quite properly placed here, following upon sources which possess an authority exterior to man’.

To Lingat, ‘law’ is clearly something imposed on people from outside, and self-controlled ordering as a mental process does not qualify as a legal factor. This legalistic, negative scholar reaction not only marginalizes the Hindu individual’s rights to participate in the rule-ascertaining process, it excludes every Hindu from the most basic processes of law-finding to which he/she should in fact aspire according to the expectations of the rta/dharma complex. Typically, in view of positivist lawyers’ denial of the role of society as a lawcreating and rule-ascertaining agent, it appears that Lingat misunderstood what the textual sources attempt to say. Here again, it transpires that the positivist approach, brought by so many legal scholars to the study of Hindu law, is inadequate for the task in hand, namely to analyse a social situation in which the rules of the normative order are not found in legal codifications, but are internalized in the minds of those who live within that tradition and practise what they see as its norms.

The above conclusion, reinforcing the practical pre-eminence of ātmanastuṣṭi, the Hindu individual’s self-satisfaction, does not automatically mean that individual conscience is therefore the most authoritative source of dharma in Hindu social reality. No doubt it has a very important place as the first and most immediate and intimate instance of decision making, but how autonomous is the agent of that decision, the individual mind? While it is probably no coincidence that most of the shastric texts mentioned only three sources (p.127) of dharma and left out the individual conscience altogether, the fact that it is mentioned, even in the Manusmriti which is constantly represented to the world as a code of law, should have given rise to deeper analysis.

Obviously, Lingat’s interpretation of these verses reflects elitist thinking and feeds on the positivism of the civil law traditions with their binding norms as codified by the state. The conceptual mismatch becomes still more obvious if we consider briefly the meaning of sadācāra, ‘model behaviour’, the third source of dharma as indicated in the above verses. Here again, the ancient Indian authors—as well as Western scholarship—have been more than happy to allocate authority to learned men (and thus indirectly to dharma texts) rather than to common people. This is caused by redefining sadācāra as sīṣṭācāra, referring to the behaviour of ‘the great and the good’, more specifically learned men, as many comments on the ancient verses signify. But sadācāra, in social reality, is first of all what an individual’s peers consider right and proper. It could be what a young person’s
parents or grandparents might advocate as right or wrong, sage advice of the family elders or, from a different perspective, individual self-subjugation to the authority of the family. Whichever way one views this matter, sadācāra clearly does not depend on the advice or guidance of learned men, let alone on a ‘holy man’ of some description, nor need it rely on scriptural authority. The concept of sadācāra involves constructive recognition of local social realities and individual circumstances.\textsuperscript{110} It does not mean that ‘anything goes’, since from the viewpoint of the smṛti texts, local normative orders have been put under pressure to conform to Hindu ideals of good behaviour. These are neither fully defined nor unchanging, as Datta (1979) showed through her fascinating examination of clashes over sexual morality. Also, the texts themselves contain different layers of provisions which reflect social change.

Overstating the roles of scriptural authority and its representatives in the form of learned men, the interpretations of Lingat and many others have once again overlooked social reality and have thus constructed another legal fiction. In the real life circumstances of a late classical Hindu, recourse to scriptural guidance was clearly a matter of secondary importance and a strategy of last resort. In other words, the ancient texts remained mostly a remote, residual source of law. To speak of the formal legal application of codes of Hindu law to every conflict situation does considerable injustice to the understanding of Hindu law as a whole. This significant element of distortion needs further debate, because in this way, too, the widespread schizophrenia of Hindu legal scholarship is amply illustrated. It cannot be conceptually harmonised that, on the one hand, we are asked to imagine ancient, divinely revealed codes of law, while on the other hand the very same authors who glorify such codes also (p.128) suggest that custom remains the most critical source of Hindu law. After all, in indigenous terminology, custom is nothing else but sadācāra.

Modernists will say that here precisely is the proof that ancient Hindu law was bad for justice and human rights, and that adherence to the cultural ṛta/dharma complex disempowers individuals. But we found earlier that in the vast majority of cases, a split-second decision may be made by the individual himself or herself to ascertain what should be done, so the individual is not totally disempowered and actually retains enormous discretion.\textsuperscript{111} When a Hindu individual cannot reach a decision without consultation with others, we find the element of sadācāra in operation. This again need not be a visible process, since one may simply observe others, or listen silently to guidance, not giving away (not even being aware, perhaps) that one is in fact ascertaining dharma. Of course, these are a matter of psychology, not law, but these processes are legally relevant. Lingat (1973: 6) protested rightly that from his perspective, such processes of ascertaining legal rules did not strike him as sui generis with law. But that is not the end of the matter.

Of course, the intangible processes of ascertaining dharma may be formalized, but unless they involve recourse to a source of guidance based on textual authority or knowledge, texts still do not appear as a source of legal authority, so that smṛtis and especially the more remote of the śruti texts could only ever be residual sources in this context. Given
rural actualities, even to imagine shastric guidance in every formal dispute takes legal positivism too far. Derrett (1968b: 156–7) rightly considered sadācāra to be of prime importance, and reported this in many different ways, emphasizing the informal nature of the processes involved.\footnote{112}

While there is no disagreement that sadācāra refers in various ways to custom, it is perhaps better seen as ‘good’ custom, in view of the Hindusing efforts that needed to be undertaken all the time. As Derrett (1968b: 206) perceptively put it, customary law ‘moved towards the sāstra’ in various ways. Manusmṛti 8.46 seems to recognize this explicitly when it advises the ruler to find an appropriate balance between the various local customary norms and the customs of high-caste Hindus:

What may have been practised by the virtuous, by such twice-born people who are devoted to dharma, that he shall establish as the rule, unless it is opposed to the customs of countries, families and castes.

The inherent tensions between allowing every individual to decide for himself or herself and binding everyone into a more shastric network of obligations will have been felt in most situations of real life. The relationships of the various (p.129) custom laws and the smṛti texts show that customs, in principle even in derogation of textual rules, would be valid (Menski 1992b). Relying on other texts quoted above, Pathak (1986: 6) states that in this regard, ‘Narada is categorical and emphatic in his statement that custom is powerful and overrides any text of sacred law’, thus accepting the principal supremacy of custom as a source of dharma. This is summarised it seems, in texts such as Manusmṛti 8.14–15, reiterating the supremacy of the ṛta/dharma complex itself, with no attempt to universalize any law for all Hindus. Significantly, Bühler’s (1975: 255) old translation of the verses renders dharma as ‘justice’, thus creating the impression that the verse relates to dispute settlement alone, while in fact it contains a much broader, general message. This translation runs as follows:

8.14. Where justice is destroyed by injustice, or truth by falsehood, while the judges look on, there they shall also be destroyed.

8.15. Justice, being violated, destroys; justice, being preserved, preserves; therefore justice must not be violated, lest violated justice destroy us.

My own translation differs from the court-centred image of the above interpretation, using ‘righteousness’ for dharma instead of the law-centred ‘justice’, and emphasizes the general social nature of the common Sanskrit term sabhāsad, against a specialist legal meaning.\footnote{113} This wording clearly brings out the need for vigilance about righteousness throughout Hindu society, not just in courts of law and I would translate:

8.14. Where righteousness is destroyed by selfishness (adharma), or truth by untruth, while members of society look on, they too shall be destroyed.

8.15. Righteousness which is being violated, destroys (in turn); righteousness which is preserved, preserves (in turn); therefore righteousness should not be violated, since violated righteousness indeed destroys.\footnote{114}
In my interpretation, these two verses from the chapter on ‘civil law’ that lawyers have imagined in this part of the Manusmriti, make a general statement about the need to protect dharma at all times, thus alluding to the idealized self-controlled order system. In the late classical period, this is assumed to require the protective support of vigilant rulers. Whether we imagine only a restricted legal meaning for these two verses, or a wider connotation, the message is invariably to the effect that there exists something beyond the immediate grasp of the human sphere that must be protected at all times. Whether we should really call this ‘justice’ is debatable, since the term in the Sanskrit text is dharma, and the holistic ‘justice of a specific situation’ is perhaps not quite the same as ‘justice’ in its supposedly modern sense of a rationally ascertainable legal outcome. Of course, we shall never get round the problem that dharma is polysemic (Nakano 1935) and poses a special challenge to the translator (Olivelle 2000: xvi).

Looking back at the official positivist non-recognition of the Hindu individual’s role as the ultimate arbiter of dharma, and linking this to the present debate, I conclude that there is a deeper problem which requires further analysis. Apart from ideological opposition to the religious foundations of Hindu law, it seems, positivist thinking among lawyers and other scholarly commentators has systematically sought to deprive all Hindu individuals of their ultimate voice and agency in the never-ending process of ascertaining what is ‘appropriate’, i.e. in the law-making process itself. Scholarship and legal doctrine have formally divested Hindu society, and ultimately every individual, of their critical ancient role in ascertaining righteousness. Both anti-religious and anti-traditionalist modernism as well as the ‘anti-people effects’ of legal positivism have therefore conspired to pacify Hindus, on the one hand, by lip service to divine revelations of the Hindu legal foundations, while ripping apart those very foundations that empowered Hindus to define for themselves what is appropriate in any particular situation. I do not think that this complex conspiracy took place before the end of the late classical period. What we have seen above are manifestations of modernist, legalist distortions of what classical Hindu law was really about.

Thus, at the theoretical and conceptual level, it remains a fact that late classical Hindu law, as in the Vedic period, continues to be focused on maintenance of the pre-existing order, encompassing gods, men, and all creatures alike. However, there appears to be a shift of emphasis in the later periods, not only placing a duty on every individual to contribute to the maintenance of order, but now emphasizing the need for supervision of the all too flexible element of self-control and the added control mechanism of dispute settlement. This fluid diversity, together with strong evidence of the pre-eminence of customary laws and individual discretion, as recorded even in the supposedly leading smṛti text, continues to haunt and taunt the positivist images created by some Orientalists and most lawyers. If ātmanastuṣṭi and sadācāra are indeed so manifestly the major criteria for measuring what is ‘right’ and ‘wrong’, and for achieving justice in every situation, then there is no conceptual space for Manu’s alleged code of universally binding Hindu law, for the law-making of absolutist traditional Hindu rulers or judges, or for the positivist distortions of classical Hindu law by legal writing many centuries later. We must ask, therefore, to what extent certain post-classical distortions may have prepared the ground
for later massive colonial intervention in this arena.

Notes:

(1) Of course there will have been abuses of power, rather than an imagined golden age of total harmony, but that does not prove that the system as a whole allowed dictatorship and militated against any form of democracy. Hindu law is, in fact, amazingly candid about the need to kill an unjust ruler.

(2) On the definition of ‘Hindu’ for legal purposes see Derrett (1963b: 18–21). Agnes (2000: 26) argues that the construction of a ‘Hindu’ entity ‘was an attempt to impose an alien and higher caste system of law upon a pluralistic society’. Significantly, the fact that the introduction of a uniform civil code in India would have a similar effect, imposing elite concepts, is not often acknowledged by modernist writers, but is discussed in Sheth and Nandy (1996) and other works by Ashis Nandy.

(3) Satyajeet A. Desai in the preface to the seventeenth edition of Mulla’s Principles of Hindu Law (Desai 1998). His grandfather, Sunderlal T. Desai, in the introduction to the twelfth edition of the same book, written in 1958, asserted at p. 1 that ‘Hindu law, as it is now generally agreed, has the most ancient pedigree of any known system of jurisprudence’. Early indological scholarship still wrestled with the ‘hopeless uncertainty which characterised the earlier speculations of European scholars concerning the origin of the so-called Indian codes of law’ (Bühler 1975: xx).

(4) On details of this school, which in a nutshell emphasizes the organic growth of legal systems and views them as socio-legal entities rather than a rule system imposed by the state, see Cotterrell (1989) and Menski (2000a: 99–110).

(5) On the critical importance of customary law see the heading ‘The role of custom in classical Hindu law’ in a later section in this chapter.

(6) A modified form of legal centralism is subtly introduced by Derrett (1963b: 2), arguing that the dharmaśāstra is, ‘in so far as it deals with law, no less characteristically jurisprudential than its coevals, the Roman and the Jewish law; and it would be a great mistake to suppose that it was founded or rooted in theology or philosophy’.

(7) See the misleading claim by Diwan and Diwan (1993:18–19) that ‘Hindus consider their law as a revealed law’ (p. 18) and that the great rishis received it ‘in direct communion with God’ (p. 19).


(9) See for example Keith (1993: 404). While Desai’s general statement, as discussed earlier, is not Orientalist, and Desai (1998: 2) also reflects the role of customary law quite well, many authors have been far less careful. A simple example, critically relevant for Ch. 11 later, is the classic statement that traditional Hindu law does not permit divorce, while everyone knows that divorce, albeit a serious deviation from the shastric ideal, was
indeed possible in practice, was mentioned in some texts, and was certainly allowed in many local customary Hindu law systems.

(10) The construction of Hinduism has been widely debated. See Bowen (1998: 1–10) with reference to other authors. The volume of conference papers by Sontheimer and Kulke (1989) is considered a major milestone in this field. Jenkins (2001: 113) notes that ‘[c]haracterized by historian Robert Frykenberg as “[t]his soft concept, this jumble of inner contradictions”, Hinduism is particularly susceptible to open interpretations and porous boundaries’.

(11) Roy (1995: 11) simply describes the Manusmriti as ‘amongst the most wellknown prescriptive texts of early India’, thus assuming that such texts ‘prescribed’ models or forms of behaviour when in reality they merely suggested various options. Hence, while Roy rightly questions the construction of a unified and uniform Vedic-centred past (ibid.: 12), her rhetoric is not matched by culture-sensitive analysis, and she still falls into the same methodological traps of uniforming and law-centred distortion as many other writers.

(12) Madan (1996: 249) highlights Western scholars’ unwillingness to accept that ancient Africans might have possessed cosmological knowledge prior to contact with the West. In his seminal analysis of colonialism of the mind, Nandy (1983: 17) notes that ‘[n]ewly-discovered Africa, with its strong emphasis on the folk, the oral and the rural could be more easily written off as savage. It was more difficult to do so for India and China ...’.

(13) The pervasive hidden influence of English concepts of law in this process should be brought out more clearly in future research by historians. In addition, it is not often noted that many Scottish people were exceptionally active in the field of law, most significantly Macaulay, the author of the Indian Penal Code (IPC) of 1860. Thus, Anglo-Indian law became a curious amalgam and was most certainly not just ‘common law’, as is routinely assumed, nor was English law the only influence. On the French handling of law in Pondicherry, frequently disrupted by the British, see now in detail Bonnan (1999).

(14) The earlier attempts by the British to commission ‘authoritative’ collections of law from Hindu experts illustrate the belief that Hindu law could be fixed on paper. For details see Chapter 4 of this book and Bhattacharyya-Panda (1995).

(15) May (1985: 54) stresses that the shastric texts are ‘by no means a specimen of book-law’.

(16) Desai (1998: 32) is ambiguously worded and takes the Arthaśāstra as ‘dealing with matters worldly as distinguished from religious’. Diwan and Diwan (1993: 24) suggest that Hindu rulers had the power to make law and take daṇḍa as a form of secular punishment (ibid.: 25 and 33). Desai (1998: 3) assumed that ‘[t]he minutest rules were laid down for the guidance of the king’. Later, at pp. 33–4, the assertion that the ruler can make law, albeit within limits, and that the ruler’s law is supreme is at least presented as a matter of controversy, which shows that the learned author did not entirely ignore the internal
Hindu perspective.

(17) Derrett (1978: ix) candidly acknowledges that in her study of divorce, Rama Mehta (1975) was wise not to venture into the legal realm of the rural majority, who ‘are governed largely by customs and traditional mores’ and are thus declared unsuitable for analysis.

(18) Legal knowledge of African law, which is built on ancient and almost exclusively oral traditions, was even more openly redefined to suit legal scholars, so that the definition of African law became enlarged to include the modern statutory laws (Menski 2000a: 329) and expertise in African laws could henceforth be measured without reference to traditional laws, cultures, and languages.

(19) Non-lawyers, looking for ‘proper law’, are found to complain that the lawyers have not provided suitable material for them. Baxi (1986b: 5) reports on such criticism by Veena Das, phrased in terms of expecting to see a *corpus iuris*. Leading lawyers remain content to criticize and challenge society and its biases and lack of civilizational standards (Anand 2002).

(20) Numerous examples from older and recent writing could be given. For example, Flood (1998: 30) simply accepts the brahmanical view of Hindu morality, ‘thought to be based on the revelation (*śruti*) of the Veda, articulated in various law books, the *Dharmaśastras*, and describes the *Manusmriti* as ‘[t]he famous Hindu law book’ (ibid.: 32). Friedrich (1993) depicts the *Āpastamba-Dharmasūtra* as one of the oldest Indian legal texts.


(22) We have neither a fully documented chronology of the ancient writings, nor definite evidence about the identity of the ‘authors’ of such ancient texts, often compilations produced over a long period of time and available in many variant readings, which are normally not mistakes, but meaningful in themselves. On details of the history of ancient Indian literature see Winternitz (1968; 1985), Keith (1993), as well as a series of studies, entitled *A History of Indian Literature*, under the editorship of Jan Gonda, especially Gonda (1975). The monumental work of Kane (1968–77) also contains a detailed description of all major textual sources.

(23) Larivière (1989, II: xx) rightly depicts a ‘chronological house of cards’.


(25) Again, this is a matter of overlapping consensus. The belief in divine revelation exists, but this does not mean that therefore everything was laid down once and for all by one central authority. It appears that all religious traditions face the same problem in principle, albeit in quite different terms.
(26) On this see Derrett (1968a: 80). Virtually all Hindu law textbooks have sections dealing with the complex question of the applicability of Hindu law. Derrett (1963b: 21) suggested that ‘[p]erhaps the best test is whether people claim to be Hindus and are acknowledged as Hindus by their immediate contiguous society’.

(27) While not asserting, as most legal writers constantly do, that ancient Hindu law is divinely revealed, Keith (1993: 494) suggests that ‘another early development within the Vedic period was the building up of schools of Law in the wide sense of that term which includes religious and civil and criminal law’. The same passage refers later to ‘professional schools’ after the time of Manu and claims that ‘[o]nly slowly and imperfectly within these schools was there developed a separation, never complete, of religious and secular law’ (id.).

(28) This is where my analysis differs from the secularized view presented by Bhattcharjee (1994), discussed in a later section on dharma and classical Hindu law.

(29) Until recently (Menski 2000a: 165–9), I envisaged only three stages of classical Hindu law, but it appears to make sense to separate the post-classical developments further on the basis of the two key concepts of daṇḍa and vyavahāra.

(30) Desai (1998: 33–4) points to a lively controversy on this issue. Even most recent scholarship takes a legalistic approach (Olivelle 2000; Rocher 2002).

(31) This might well be the subject of a separate study, but such scholarship faces enormous hurdles in terms of lack of evidence. It remains impossible to determine whether a particular shastric rule was or was not followed in practice, because no records were kept until much later (Smith and Derrett 1975). Thus, we are simply not able to conduct such research for the older periods.

(32) The early leading study by Altekar (1958) seems to have been superseded by much recent work. Kulke (1997) provides a useful conceptual overview for the study of the state in pre-modern India and contains a detailed bibliography. In the same volume, Stein (1997: 135) explains that earlier historical studies were too focused on centralized structures, thus challenging similar positivist assumptions as the present study. There is much writing on this subject by German authors, e.g. Kulke and Rothermund (1998) and the earlier work of Wilhelm Rau (1957).

(33) This certainly goes for the understanding of Hindu law in South-east Asia, which is rather too strongly based on positivist elements taken from late classical Hindu law (see Huxley 1996). These are necessarily divorced from the Vedic and classical Hindu conceptual framework because of Buddhist influence, which reworked such ideational foundations without totally rejecting them.

(34) Recent feminist writing has begun to note, but does not fully incorporate, the realization that ‘[p]lurality of laws and customs and non-state legal structure were the essential characteristics of the ancient Indian communities’ (Agnes 2000: 12). In the
context of female property rights, S. Basu (2001: 10) refers to ‘pockets of equity that have seldom been utilized by Hindu women’.

(35) Newspapers and magazines all over the world peddle the notion of ‘Hindu pontiffs’, a varying number of which are given, often four. But see Menski (1996a: 7) on the point that no ultimate moral or legal authority can be exercised by any Hindu authority figure. Hindus need to realize that Muslims, too, despite many assertions to the contrary, have no such living persons of absolute religious authority either. Thus, Hindus and Muslims actually share many dilemmas of law-finding and ascertaining dharma or sharia.

(36) Common people in South Asia seem acutely aware of this, more so than scholars. The former are experiencing this plurality in their everyday lives, while Nandy (1990: 69) critiques scholarly language and especially ‘secularism’ as ‘a cover for the complicity of the modern intellectuals and the modernizing middle classes of South Asia in the new forms of religious violence’.

(37) I hope to have said enough about this particular issue here to oppose and discard the notion that ancient Hindu law was focused on what we now call ‘justice’ in an egalitarian, human rights sense. Ancient Hindu law necessarily concerned itself with myriads of situational appropriateness, not some simplistic assumptions of equality before the law.

(38) Von Stietencron (1989: 23 n. 8) refers to the older work of Gonda (1960) and discusses the difficulties, indeed the impossibility, of finding a uniform definition of Hinduism.

(39) Diwan and Diwan (1993: 27) take the Vedic period back to about 4000 BC, while Desai (1998: 5) relies on Kane and other pioneers of research, arguing that ‘[i]t is possible that some Vedic hymns may have been composed at a period earlier than 4000 BC’.

(40) Diwan and Diwan (1993: 11) take a similar approach, emphasizing generally that ‘[t]he concept of Hindu law is deeply rooted in Hindu philosophy and Hindu religion’.


(42) On Hindus as a Persian term denoting the people living on the other side of the river Sindhu, or ‘the Indus people’, see von Stietencron (1989: 11–12).

(43) See in detail von Stietencron (1989), especially his much-cited assertion that not one of the so-called fundamentals of Hinduism, namely recognition of Vedas, belief in reincarnation and the caste system ‘applies to all religions in Hinduism’ (p. 15).

(44) See in particular Miller (1985), Menski (1996a), and Menski (2000a: Ch. 3).

(45) That assumption is exaggerated by Diwan and Diwan (1993: 15), who claim that ‘throughout the existence of Hinduism, the central theme has been the attainment of
The fact that this whole system of Vedic rituals has virtually disappeared does not mean that this tradition died. It was reformed and remodelled into various Hindu ritual practices, observed everywhere today, partly revived by reference to ‘Vedic’ origins, even where none can be proven.

This position relies on a section from Mayne’s Hindu law book (Kuppuswami 1986: 14, as quoted on the previous page). No authority is given for the second proposition. Most other Hindu law textbooks are too brief on the subject to warrant specific mention here.

Bowen (1998: 5) argues that ‘the Veda is not a credal system of propositions to be believed, but is above all else a text used in ritual which legitimates brahmanical socio-ritual traditions. Vedic mantras are used to this day in initiation rites, weddings, funerals, and for private or personal devotion’.

The Buddha defined all of this as suffering and taught about various methods to free oneself from the entanglement in this cosmic spider web. Hinduism, in turn, adopted certain Buddhist concepts into its own conceptual framework. Other anti-Hindu movements, such as Guha’s (1982) subalterns, would seek to assert their separate identities and reject ‘Hindu’ values, but could not make the Hindu concepts non-existent.

On conflicts concerning sexual morality and ethics, Datta (1979) presents a well-focused study.

Hence in Hindu belief, reincarnation can occur in divine form, or as an animal. Such beliefs then had significant impact on dietary rules, for example, and promoted various shades of vegetarianism.

Only later did appropriate action in every respect become the basic human duty, encapsulated in dharma.

This radical pluralism continues to be misrepresented by modernist authors as evidence of tradition-bound discrimination. Bose and Jalal (1998: 206), for example, distinguish formal and substantive democracy, and later produce an assessment of the alleged failure of the post-colonial Indian state to assure and implement equal citizenship rights (ibid.: 243), assuming silently that Western states have done much better.

This relation could be one of opposition. Individuals could opt out of this system, to some extent or altogether, not just by conversion to another religion, but within Hinduism through ways of life or a choice of lifestyles that deny the centrality of interlinkedness and might entirely focus on individual salvation. On relevant ancient concepts and various forms of renunciation see Sprockhoff (1976) and Olivelle (1993). On subaltern perspectives, see in detail Guha (1982; 1997).

The place of fire as a central medium of linking humankind with the cosmic sphere is
still evident today, even in Section 7(2) of the HMA 1955 which appears to expect that there should be a fire as part of the standard Hindu marriage ritual.

(56) Desai (1998: 5) appropriately emphasizes that the Vedic people were vigorous and full of life, concerned to prosper and develop. A useful summary of such arguments, with textual examples, is found in Kulke and Rothermund (1998: 33–7). This contrasts with constructions of later Hindus as salvation-focused escapists.

(57) Diwan and Diwan (1993: 35) suggest that a succession of powerful rulers after about AD 200 actually had the power to make law that ‘overrides even the sacred law and custom’. This is quite clearly a false interpretation, another example of how taking a secular approach and ignoring the continuous and overriding existence of dharma leads to misguided conclusions. This matter is further discussed in a later section in this chapter on the role of custom in classical Hindu law.

(58) Even recently, some indological pioneers have continued to work on new translations of these immensely complex texts. They are in my view not directly relevant to legal analysis but illustrate the continuing Hindu concern over human linkages to the superhuman sphere.

(59) Derrett (1968a: 81) wrote: ‘The fundamental rules of law and their spiritual supports are available in texts which are usually dated between 500 BC and AD 200. Exact chronology is defied by these traditional materials which had so long a working life’. Desai (1998: 17) suggests about 800 BC to 300 BC for the dharmaśāstra literature. Kuppuswami (1986: 15–21) also discusses chronology in some detail.

(60) There are also various shades of meaning of the key term or rather topos (May 1985: 9) of dharma, discussed in some depth by May (ibid.: 12ff).

(61) During the recent Hindu-Muslim atrocities in Gujarat, I heard expressions of surprise from Muslim victims that the supposedly vegetarian Hindus should have reacted with such brutal force (‘ye dal-sabzi khane wale bhi kamzor nahin hain’).

(62) The textual evidence on this is very clear and is documented in the next section.

(63) See for example Desai (1998: 19) with the claim that the author of the Manusmriti ‘appears to have compiled an exhaustive code binding on all’. The universal application of the Manusmriti is also asserted in Kuppuswami (1986: 15), reinforced by claims that this text is always paramount in case of conflicts between textual sources (ibid.: 18–19, 24). These are typical lawyers’ reasonings.

(64) These texts were examined and retranslated in my doctoral thesis (Menski 1984). On death rituals, see Firth (1997).

(65) Those texts often introduce a particular ritual action, which may be new, but is accompanied by citation of an ancient Vedic verse (mantra).
(66) Derrett (1970: 2) called this ‘an educational “suction” ... peculiar to India’ and explained, at p. 3, that the dharmasāstra “applied, as I said, suction, drawing upwards primitive, backward, semi-civilised, and often wild tribes into a society in which behaviour was organised and morality was cultivated”.

(67) The key concept of dharma is here linked with karma, which is probably more ancient than much of the literature assumes. It is the basic principle that every action, including therefore non-action, will have some effect. In this sense, karma reinforces the Vedic system of cosmic interlinkage and is now applied to extend this linking network to all individual Hindus. The use of the term in common parlance, speaking of ‘good karma’ or ‘bad karma’ seems more influenced by Buddhist notions of the possibility of building up positive or negative accounts with regard to individual salvation. The classical Hindu conceptualization of the term, in contrast, emphasizes the inevitable consequentiality of reaction to all human actions. For details see May (1985: 33–4).

(68) It is therefore entirely appropriate that a major collection of essays on Hindu law should start with the editors’ statement that ‘[w]e reject the notion held generally in Western legal thought for over 2000 years that law is something universal’ (Nanda and Sinha 1996: xi).

(69) This is reflected in statements like ‘Hindu law is the law of the Hindu way of life. Originally developed as “the way of righteousness” by the Brahmans on the basis of traditions reaching back to the Vedic age, it once was a complete system of law’ (Derrett and Iyer 1983: 80). Nanda and Sinha (1996: xii) also emphasize the ‘way of life’ approach and correctly state that ‘[a]tribution of precepts to a lawgiver, therefore, has no place here’.

(70) This is more a Buddhist (and later also Islamic) notion, which over time has influenced Hindu concepts. In Hinduism, the expectations of the cosmic realm would appear to override individual interest in personal salvation.

(71) The concept of smṛti is much less stringently defined than its functional equivalent in Islam. The sayings of the Holy Prophet, classed as Sunna and published in collections of Hadith, claim and hold a much more authoritative position because the Prophet is unique, at least according to Sunni theory, as the last human carrier of divine revelation.

(72) On smṛti see also May (1985: 46ff.), with a useful discussion on the role of experts at p. 54. The mass of smṛti literature is so diverse that specialization became more and more necessary. Following the Vedic tradition of ‘schools’, based on the various sacrificial specializations, more school traditions developed in this period. On the diversity of views and schools see Kuppuswami (1986: 15–16) and Diwan and Diwan (1993: 29).

(73) On this see the excellent introduction in Hoadley and Hooker (1981: 1–9); also Derrett (1968b: 148ff.).

(74) Such arguments reflect modernist thinking, as exemplified by Anderson (1991: 7) in
his discussion of how a nation is imagined, arguing that '[i]t is imagined as sovereign because the concept was born in an age in which Enlightenment and Revolution were destroying the legitimacy of the divinely-ordained, hierarchical dynastic realm'. Anderson's point, it should be noted, does not go as far as denying the realm of religion itself any relevance.

(75) The categorical superiority of dharma is in fact alluded to during this discussion in the statement (at p. 9) that '[t]he best rule was regarded as that which advanced Dharma'.

(76) The jurisprudential argument produced by Desai (1998: 10) illustrates the fixation of Indian legal authors on positivist theory. It is breathtakingly clever in using the terminology of legal positivism and twisting it to suit his argument. Desai could of course have followed a different school of jurisprudence, but that is manifestly not what Indian legal authors are willing or able to do.

(77) Here the text contains a footnote to Bühler's introduction to The Laws of Manu, demonstrating how Orientalist scholarship has continued to influence Indian legal writing.

(78) A very brief and perfunctory overview is given in Mahmood (1981: xli).

(79) Bhattacharjoo (1994: 12ff.) provides details on the arguments in earlier leading textbooks.

(80) This point is argued in detail further in a later section on the role of custom.

(81) It is even more difficult to give dates here, since the texts cover both the classical and the late classical periods. On scriptural continuity, see also Lingat (1973: 107). Much of the Manusmṛiti would seem to belong to the present period.

(82) Diwan and Diwan (1993: 24–25) reproduce the argument that in ancient India, ‘the theory was that our king did not make law; he merely enforced law’ (p. 24). But once one powerful ruler succeeded the other, they argue, ‘it was but natural for a king to make laws’ (id.) so that eventually, ‘[t]he king-made law was given overriding effect both over custom and sacred law’ (p. 25). Rudolph and Rudolph (2001: 40) note the correct position, to the effect that ‘Sanskrit law texts held that the king should oversee the self-regulating society rather than create laws for society’. Here, too, whether it is appropriate to speak of ‘law texts’ should at least be queried, rather than taken for granted.

(83) The classical Hindu image for this is ‘the rule of the big fish’, or ‘shark rule’ (mātsya-nyāya), where people can neither enjoy their property nor their wives. For details see May (1985: 106–107) with further references and Derrett (1968b).

(84) Guha (1997: 24–30) portrays danda too narrowly as a political tool of suppression, ‘central to ancient Indian polity, based in its classical form on monarchical absolutism, and it extends far beyond “punishment” ... to stand for all that is implied by dominance in that particular historical context’ (ibid.: 29). Day (1982: 125) indicates that certain punishments
may only be inflicted on repeat offenders, an issue that has also been debated in relation to the extremely strict hadd punishments under Islamic law.


(86) The same positivist colouring is evident from how Diwan and Diwan (1993: 34) discuss other texts in relation to the ruler’s power to use danda, here portrayed as ‘the power of danda that the king enjoys as the principal law-enforcer’, albeit without divine authority.

(87) This is no doubt reinforced by the fact that since 1860, the IPC has officially governed more or less the entire field. For a critical analysis of its limited effectiveness, with particular reference to women, see Dhagamwar (1992). The reality of village-based justice (with obvious question marks over ‘justice’) is captured well by Chowdhry (2000).

(88) May (1985: 109ff.) provides an overview of the various nuances of meanings that this term may be given. See also Kane (1968–77, III: 242ff).


(90) Some textbooks contain disputable claims about law-making in ancient India. Pathak (1986: 6) asserts that ‘[a] striking feature of the Naradasmriti is the fact that it is the first of the Dharmashastras to accept and record the principle that king-made laws could override any rule of law laid down in the smritis’. The related assertion is repeated at p. 7, a plainly too positivist interpretation of rājaśāsana or ‘the ruler’s decision’.


(92) Kuppuswami (1986: 21) states that ‘Narada ... is the first to give us a legal code unhampered by the religious and moral teaching, characteristic of the earlier Dharmashastras’. More recent efforts by Sanskritist legal scholars make no dent in the old distortions. Larivière (1989, II: ix) insists on treating the Nāradasmṛti as ‘purely juridical in nature’ and thus marginalizes the wider context within which dispute processing was and is perceived by Hindus.

(93) Derrett et al. (1979: 14) emphasize that the ancient literature neither supports a finding that ancient Hindu rulers legislated for their people, nor that they took any specific interest in the onerous task of dealing with disputes and hunting down criminals.

(94) Brhaspatismṛti 2.12 states that ‘[n]o sentence should be passed merely according to the letter of the law. If a decision is arrived at without considering the circumstances of the case, violation of justice will be the result’. This was quoted by the High Court of Kerala in Kunhikannan v State of Kerala 1968 KLT 19, at p. 23 to save an innocent victim
from police overzealousness.

(95) Guha (1997: 30), claims that relying on such Hindu traditions, ‘every landlord could indeed play “maharaj” to his tenants’. Further, ‘according to this principle, the use of violence by upper-caste elites against untouchables and adivasis or the instigation of sectarian strife by a dominant local group against the subaltern adherents of a faith other than its own, could pass as a meritorious act modeled on a sovereign’s defense of dharma’ (id.), and the same would go for the treatment of women.

(96) This list is found in Jolly (1977: vii—viii). The Brhaspatismṛti produces these topics in a slightly different order, but does not otherwise vary much from the Nāradasmṛti (ibid.: ix).

(97) Derrett (1968b: 148) indicates that this is a virtually unexplored issue. Lingat (1973) treated such verses as evidence of methods of dispute settlement or means of proof (see Derrett 1968b: 154–5).

(98) The translator notes on this duplication of terminology that this vyavahāra refers to the more general usage of the term as ‘a dispute at law’.

(99) On whether a legal profession existed in ancient India, the answer appears to be in the negative. See Kane (1968–77, III: 288ff.).

(100) I say this in view of the contrary statements by Desai (1998: 33–4) as cited above, and note his comment that by the time of the Arthaśāstra India was politically unified and there was consolidation of power in the hands of emperors ‘whose writ ran in the whole country’ (p. 36).

(101) See, e.g. Jolly (1975: 3–4). On the general recognition that custom is older than law, see Roy (1911: 1). On its place as people’s law see in detail Diwan (1984: ix), who is also trying to make the curious claim that the Punjab is the cradle of Indian customs.

(102) Diwan (1984: 11) correctly indicated that adherents of the analytical school of jurisprudence would have problems with the view that ancient custom was law.

(103) For details on the widespread toleration of custom at various levels see Derrett et al. (1979: 17–58).

(104) The same transpires from Mulla’s tenth edition (Ramesam 1946: 9), which briefly cites some of the leading texts on which British Indian courts would rely to recognize custom.

(105) Derrett et al. (1979) also discuss this in detail. Derrett (1963b: 2) portrayed the system of Hindu law as ‘a rationalized and systematized body of customary law and observances, a collection of (for the most part) carefully justified “oughts” and “should nots”’. 

Page 58 of 60
This is also clearly reflected in the late Vedic models for marriage solemnisation, as detailed in RV 10.85 and AV 14 (Menski 1984).

My translation. Other texts indicate that old women, rather than learned men, are to be seen as an authority on customs (Derrett 1968b: 159). This is still true today and may be observed in contemporary rituals (Menski 1987: 197).

Mahmood (1981: xli) overlooked the individual dimension and saw this concept as ‘not much different from the modern concept of “equity, justice and good conscience”’, thus offering another secularized, legalistic interpretation.

On ācāra and its various forms and meanings see May (1985: 58–9).

Conceptually, this comes close to the ‘living law’ perspective, which is such an integral part of the historical school of jurisprudence. See Ehrlich (1913) as analysed in Menski (2000a: 114–19).

In her analysis of women’s property rights, S. Basu (2001: 10) refers correctly to ‘the pockets of equity that have seldom been utilized by Hindu women’. Such recognition of women’s agency needs to be strengthened, for women as individuals have this power, but do not seem to use it often enough.

See in detail Derrett et al. (1979).

In the Sanskrit-English dictionary of Monier-Williams (1976: 1151), sabhā is clearly much more than just a courtroom, while sabhāsad is perhaps a little too narrowly interpreted as ‘an assistant at a meeting or assessor in a court of justice’. May (1985:16) noted that the sabhā was one of the institutions that limited the ruler’s power, rather than an instrument of his rule.

The general tone of the statement at the end is in my view reinforced by use of the little and innocuous Sanskrit word nah, which does not necessarily mean ‘us’ here, as it normally does. Thus I do not read at the end that ‘violated righteousness destroys us’, but suggest that the key message itself is being emphasized, to the effect that ‘violated righteousness indeed leads to destruction’.

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