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# THROUGH WORDS AND PRACTICES: THE TRANSMISSION OF THE KNOWLEDGE OF *DHARMA* IN THE HINDU LEGAL TRADITION

## *Introduction: traditions and the transmission of rules*

In this paper I will focus on the relationship between *smṛti* and *sadācāra*. Considering that the interaction between these sources of *dharma* is one of the keys to understanding the functioning of Hindu law, this topic has been widely discussed and different views have been suggested, particularly dealing with the role of texts and customs in the making of the Hindu legal tradition [1]. However, I will address this topic from a specific perspective, which will allow me to deal with it within a broader theoretical framework. This perspective focuses on the process of transmission of knowledge within a culture.

The concept of *dharma*, as difficult to define as it may be, is more directly connected to macro- and micro-cosmic orders than to law meant as a ruler's command (Menski 2003). This is also shown from the fact that the sources of *dharma* are properly conceived as sources of the *knowledge* of *dharma*. This knowledge has nonetheless a normative character because it concerns what has to be done to sustain the order. The injunctive force of dharmic rules derives primarily from individual and social adherence to what could be called a legal cosmology (French 1995, and now also Davis 2006), which involves the

1. For an account of different views see Menski 2003, Davis 2004b and Olivelle 2005.

perception of multiple relations between different parts of the cosmos and requires that one ascertains the appropriate way to behave in this whole.

The fact that a dharmic rule could be also enforced by different social organizations, including the State, does not prevent us from considering a dharmic rule as basically a knowledge "unit" concerning the right model of behavior in a given context. In fact, there is nothing strange in the fact that an authority enforces some rules that have their origin elsewhere and that have been accepted on the basis of their being a reliable indication of what is appropriate conduct.

The ascertainment of dharmic rules, as a social and individual undertaking, cannot be the task of few persons or one generation. It is rather a cumulative effort of negotiation between different views, which leads to a selection of some rules of behavior while dismissing others. This knowledge is stored and transmitted to subsequent generations and becomes part of a culture. Generally speaking, every generation learns the accepted rules from the previous generation, just as it learns language and other important skills, techniques, and values. In addition, an expert tradition, a science, is usually developed to elaborate theoretical tools that organize this corpus of knowledge.

The transmission of knowledge is the basic feature of a tradition, in its etymological meaning of *traditio*, to hand down. In comparative legal studies the concept of tradition has always had a prominent place as a way to understand and analyze world legal diversity [2]. What needs to be further analyzed is how the transmission of knowledge works, particularly as it concerns rules of behavior and normative concepts. In this regard, I want to highlight that texts and customs can be considered as two different ways to transmit and disseminate rules of behavior that nevertheless should be considered in a unitary way. In the Hindu context, this means that *smṛti* texts and *sadācāras* may be seen as different ways to transmit the knowledge of *dharma*. In other words, this knowledge is handed down through words and practices.

This makes immediate sense with regard to the texts comprising the Dharmaśāstra. In this connection, Olivelle writes:

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2. On the concept of tradition, see Krygier 1986 and Glenn 2000.

> The term *śāstra*… may refer to a system or tradition of expert knowledge in a particular field, that is, to a science. It refers especially, however, to the *textualized* form of that science, that is, to an authoritative compendium of knowledge signaling a breakthrough achievement within the history of that tradition and serving as a point of reference to subsequent investigations within that tradition… A *śāstra* may present new material and present the material in new ways; but essentially it is a crystallization of a long tradition of *accumulated knowledge*. (2005: 41, italics added)

However, not all normative knowledge is textualized and, in my view, a crucial point is to understand how knowledge is transmitted from a generation to the following generation through non-textual means. This is particularly important if we consider factors connected to widespread illiteracy in ancient and even modern societies. Generally speaking, it is worth remarking that cultures present informal ways of transmitting of knowledge. For instance, in the Hindu tradition, the *Mahābhārata* or even dramatic works may be seen as effective ways to transmit the knowledge of *dharma*, because these texts can be represented and narrated and, then, are able to communicate knowledge to an audience with different levels of literacy. The same could be repeated for paintings, sculptures or architectural works.

As regards particularly customs and models of behaviour, these can be recorded in texts, but a large part of them remains unrecorded. Therefore, customary rules are transmitted independently from the medium of written words. In some cases, customary rules, although non-textualized, may be verbalized and communicated orally. In other cases, they are not even verbalized and are embodied in social practices. In any event, their authority does not depend on verbalization but on the fact that they are followed in social practice *as rules*.

From a theoretical point of view, a rule is conceptually different from the verbalization of that rule. A rule exists even if it is not verbalized and the same rule may be both verbalized and not verbalized. Moreover, the difference between a verbalized rule and a non-verbalized rule may be seen as immaterial, and, as a result, normative texts and normative practices are not that different. Particularly, considering *smṛti* texts and *sadācāras*, their object is basically the same, that is,

they are both dharmic rules of behavior. In one case, the rules are compiled and organized through a doctrinal effort, while, in the other, they are embodied in social practices, they are "*dharma* in practice" (Davis 2004b).

The fact that the rules that have been written down are not basically different from rules embodied in models of behavior makes possible multiple interactions between them. For instance, Olivelle observes that:

> At a philosophical level one may argue whether rules come before practice or rules before practice. Does grammar come before language or vice versa? The question, however, is not rules and practices but codified rules in *śāstras* and practice. From a historical point of view, it is evident that such codes are posterior to the practices from where the rules are derived. (2005: 64)

In a quite schematic way, we could say that (a) a rule may be verbalized in a Dharmaśāstra and followed in practice, or (b) it may be verbalized in a Dharmaśāstra and not followed in practice, or (c) it may be not verbalized in a Dharmaśāstra and followed in practice. In addition, there can be a conflict between a Dharmaśāstra rule and a *sadācāra* rule. In practical life, the focus is always on the rule to be followed and different sources of guidance can be taken into account. To ascertain a dharmic rule one could make recourse to an expert written tradition or look at what is done by others, particularly by qualified others, and at the reaction of the community to one's behavior.

As a preliminary conclusion, my point is that the distinction between texts and practices should not be represented as too neat. Generally speaking, this distinction has been dramatized in the modern age following a specific ideology of what law should be, as we shall see later on.

## Smṛti *texts and* sadācāras *in Medhātithi's commentary on Manu*

Interestingly, in some Sanskrit texts it is possible to find a perspicuous account of the role of texts and customs in the transmission of rules. In fact, Medhātithi claims a functional identity between *smṛti*

texts and *sadācāras*, because both are conceived as ways to transmit the knowledge of *dharma*. Of course, the opinion of a commentator, although a prominent one, should not be over-generalized. In any event, a quite similar mode of reasoning may be found in the *Tantravārttika* of Kumārila [3], which is one of the most important Mīmāṃsā works, and it could be suggested – and further investigated – that this view had a broad cultural diffusion and was probably implied in other works. On the other hand, the process I described above could be considered a real process independently from what is stated in texts [4].

Medhātithi deals with the authority of the four acknowledged sources of *dharma* in the commentary on Manu 2.6-12. The discussion concerning the authority of *sadācāras* is less developed than the discussion concerning the authority of *smṛti*. This may depend on the strict interpretive connection that Medhātithi establishes between the two sources, which makes the part devoted to *sadācāras* under Manu 2.6-12, although brief, particularly relevant for the comparison between those two sources of *dharma*.

The focus of Medhātithi's discussion on *sadācāras* is on the variability of dharmic practices and the claim that they are innumerable. In fact, Medhātithi points out that the appropriate model of behavior may change depending on different countries, circumstances, personal attitudes, and even states of mind [5]. Considering the diversity of circumstances and contexts which may be relevant for human action, dharmic action may assume endless forms, endless manifestations, which are

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3. See Jha 1998: 200.

4. Particularly when dealing with Sanskrit texts, one should avoid identifying what is written in texts with what actually happened. A basic tool of comparative legal method, as developed for instance by R. Sacco, is the distinction between operational rules and legal discourses (see Mattei and Monateri 1997; Gambaro and Sacco 2002). In legal history there are many theories that, while asserting to be descriptions, actually have a legitimating role. In the Indian context, the most famous example is probably the theory of the lost Veda, on which see Olivelle 1999.

5. See Jha 1999: 205-206. A simple but meaningful example is provided with reference to the way one should take care of guests. As a matter of fact, one could have the tendency to be continuously at the disposal of his guest, but this behavior could be very pleasing to one guest and annoying to another one, so that the way to behave should be determined on the basis of context.

nonetheless all *dharma*. In other words, it would be impossible to decide in a general way which behavior should be considered as appropriate and, then, to lay down general rules that are suitable in every context. Variability and endlessness entail that appropriate behaviors cannot be fixed once for all and collected in a compilation *(nibandha)*, and this is, according to Medhātithi, the distinctive character of *sadācāras* and the real ground of difference with *smṛti* texts [6].

Medhātithi goes further commenting on Manu 2.10, which states that the Veda is *śruti* and the Dharmaśāstra is *smṛti*: "The Veda should be known as the 'revealed word' and the *Dharmashastras* as the 'recollections'; in all matters, these two do not deserve to be criticised, as it is out of these that *Dharma* shone forth" (Jha 1999: 211) [7].

The commentary starts with an objection concerning the usefulness of the verse, which, providing an explanation of terms, could seem more appropriate in a treatise on the meaning of words than in a treatise on *dharma*. The answer to this objection clarifies the relationship between *smṛti* and *sadācāra* in this view. According to Medhātithi, who overrides the literal meaning of the text, this verse has an interpretive character and aims to establish that *sadācāras* must also be considered *smṛti*. In fact, considering that *sadācāras*, being uncollected, are normally considered neither *śruti*, revealed texts, nor *smṛti*, recollection, the verse would aim to clarify that, in the work of Manu, *"smṛti"* refers to *sadācāra* also, differently from the common use of the term. As a result, what is said with reference to *smṛti* in general must be applied to *sadācāra* also.

The argument that allows the elaboration of a concept of *smṛti* so wide as to include both *smṛti* in a strict sense, as properly written "codified" texts, and *sadācāras*, as non-codified practices, is based on their functional identity. Manu 2.10, stating that *"smṛti"* has to be understood as Dharmaśāstra, would aim, according to Medhātithi, to

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6. See Jha 1999: 206.

7. Olivelle (2005: 95) translates: "'Scripture' should be recognized as 'Veda,' and 'tradition' as 'Law Treatise.' These two should never be called into question in any matter, for it is from them that the Law has shined forth." It is noteworthy that Jha does not translate the term *dharmaśāstra*, but in this context, on the basis of Medhātithi's view, perhaps he could not have translated this term as 'law treatise.' On the implications of commentaries on translation see Doniger (1991).

define *smṛti* as the teaching of *dharma*. In fact, in this case Dharma-śāstra would not be meant as a specific kind of work but, generally, as the teaching of *dharma*. The following step is the statement that the teaching of *dharma* is the function of *sadācāras* as well. Therefore, *smṛti* texts and *sadācāras* have the same function and the written form of *smṛti* texts is seen as an immaterial difference [8].

This view, which is indeed an original one, raises a possible objection: if one accepts that *smṛti* function is to teach *dharma*, then one should conclude that Veda also is *smṛti*. Medhātithi, answering this objection, clarifies that, while in the Vedas the teaching of *dharma* is direct and non-mediated, *smṛti* texts and *sadācāras* consist of "remembered," and therefore mediated, teachings. Thus, this view outlines a substantial functional identity of Veda, *smṛti* and *sadācāras*, notwithstanding some structural difference, which is crucial only in the case of Veda [9].

In fact, in this view, the Veda is the only self-sufficient source of knowledge of *dharma* and the authority of other sources depends on a Vedic foundation. In general, we can remark that *smṛti* texts and *sadācāras* are considered authoritative by assuming that they are based on even lost Vedic texts [10]. However, the endlessness and variability of *sadācāras* make the connection with Veda more troublesome than in the case of *smṛti* texts. In fact, normative practices are by their very nature spontaneous and localised and, thus, basically beyond control. This will require the assessment of the authority of a specific practice, while dharmic rules included in texts are seen as more reliable, having

8. See the following parts in Jha 1999: 211: "In ordinary life, the 'Practices of Cultured Men' are not regarded either as 'Revealed Word' or as 'Recollection,' on the ground of their being not codified; codified treatises alone are known as *'Smṛtis'*, 'Recollections'; and it is for the purpose of declaring that these practices also are included under *'Smṛti'* that the author has set forth this verse." And "*'Dharma-shāstra'*, 'Dharma-ordinance', is that which serves the purpose of 'ordaining' (teaching) *Dharma* as to be done; and *'Smṛti'* is that wherein *Dharma* is taught, i.e., laid down as to be done; and codification or non-codification is entirely immaterial. Now as a matter of fact a knowledge of what should be done is derived from the Practices of Cultured Men also; so that these also come under *'Smṛti'*. Hence whenever mention is made of *'Smṛti'* in connection with any matter, the Practices of Cultured Men should also be taken as included under the name." See also Davis 2004b: 133.

9. See Jha 1999: 212.

10. See Olivelle 1999.

been duly considered and accepted. In this sense, from the point of view of a *dharmaśāstrin* or a *mīmāṃsaka*, śāstric rules are in principle more authoritative, but this depends on the fact that they have acquired reliability, by being tested and accepted in different ages and in different contexts. In other words a well-established *sadācāra* is likely to be seen as equally authoritative, if not prevailing.

## *The question of completeness*

As we saw, according to Medhātithi it would be simply impossible to collect in a compilation all the rules of behavior embodied in *sadācāra*. This also indicates that Dharmaśāstra texts, like any other text, are necessarily incomplete. On the other hand, "The Dharmaśāstras never pretend to present all the laws and norms that govern the behavior of people" (Olivelle 2005: 65). An indication in this sense could be also drawn from a well-known Manu verse (8.41), which states that: "A king who knows the Law should examine the Laws of castes, regions, guilds, and families, and only then settle the Law specific to each" (Olivelle 2005). These different rules were not entirely codified and, on the contrary, were mostly non-written rules.

A hypothetical text, or even a group of texts, which would aim to collect all those rules would probably appear as a 1:1 scale map. In addition, considering that rules continuously change, this hypothetical text would be quite soon out-of-date. Therefore, nobody would deny that there are *lacunae* in the texts on *dharma*. However, gaps in texts do not imply gaps in *dharma*, because it would be incorrect to identify dharmic rules and the content of Dharmaśāstra texts. A *lacuna*, meant as an impossibility to ascertain the *dharma*, could be properly envisaged if there is no rule, which is very different from the lack of a verbalized written rule.

The question of completeness requires some conceptual remarks. In fact, especially for a civil lawyer, "completeness" has become a technical term, connected to the elaboration of the idea of codes. This idea is a modern one, having been developed in the 18th century and having the French Civil Code (1804) as a prominent outcome. As a result, a historical comparison with texts on *dharma* is not sound. On

the other hand, a conceptual comparison with the modern technical idea of code may provide some useful insight. The term “code” is often used to mean simply a written set of rules, while it is almost universally acknowledged nowadays that Dharmaśāstras are not legal codes in a technical sense.

One of the differences is that a Dharmaśāstra, differently from a code, is not binding, but I would like to highlight that completeness is another important aspect that makes Dharmaśāstras different from modern legal codes. During the age of codifications, completeness had become an ideology according to which law is equal to statute (or: *droit* is the *loi*) [11]. In fact, in this view, all the law is in the code, which is thus the only acknowledged source of law. This was an ideology inspired by the political need to limit competing sources of law, particularly customs, and the power of interpreters to freely ascertain the law. In other words, codes *had to be* complete, because *lacunae* were seen as the door from where other normative actors, and then legal pluralism, could enter in the legal system once again. As a legal ideology, it never worked in reality, but this idea became part of the thought process among jurists and of the way they represent their work. Nowadays no legal scholar would accept this view, but it remains a basic attitude of a civil lawyer.

What happens if a *lacuna* is found in the code? In this view, *lacunae* may be filled through logical operations and textual interpretation. Or, the code itself may provide for its own supplementation, laying down that in limited cases the interpreter may make recourse to customs or also to the general principles of the legal system. One could mistakenly transfer this positivistic idea to Hindu law also, arguing that the authority of *sadācāras* depends on textual statements including a list of sources of *dharma*, such as Manu 2.6, or that some customs are authoritative because they are referred to by verses such as the above-quoted Manu 8.41. In this perspective, the authority of *sadācāras* would be derivative, i.e. grounded on the authority of Manu’s verses, in the same way as the authority of usages depends on their statutory acknowledgement in a positivist approach. But, in my opinion, this is not the view of Hindu texts on *dharma*.

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11. On this topic see Cavanna 1982 and Lombardi Vallauri 1981.

As we mentioned above, according to the theory of sources of *dharma* developed by Hindu jurisprudence, the authority of *smṛti*, *sadācāra*, and *ātmanastuṣṭi* depends on their being based on the Veda, which is seen as the sole self-sufficient means of knowing *dharma* and, in this sense, provides a foundation to all sources. However, this does not mean that the list of authoritative sources of *dharma* is contained in the Veda or that *sadācāras* are authoritative because verses included in *smṛti* texts, such as Manu 2.6, state that they are authoritative. In other words, Manu 2.6 is not a binding norm that lays down the sources of *dharma* but a verse stating that the authority of Veda, *smṛti*, *sadācāra*, and *ātmanas-tuṣṭi* as reliable means to know *dharma* has been duly ascertained through reasoning. The paramount authority of the Veda is ascertained thanks to complex philosophical arguments concerning, for instance, its eternity, while the authority of other sources is ascertained by arguing that they are based on existing or even lost Vedic texts [12]. In this sense, this is a matter of theological and philosophical foundation – which, by turn, can be seen as theoretical legitimation of authoritative sources in social practice – rather than of authoritative will of the ruler, establishing in a binding provision which sources of law are valid in the legal system.

As a conclusion, Dharmaśāstra texts are not complete, and are not supposed to be, as we saw considering the opinion of Medhātithi. Dharmic rules may be found in different sources, textual and non-textual, which are all considered authoritative. Dharmaśāstra authors, theorists and, generally, interpreters are aware of the limits of texts and acknowledge that most rules will be found in *sadācāras*, which can be thus seen as the prominent source in the process of ascertainment of *dharma*. In other words, the relevance of *sadācāras* is both a matter of fact and the outcome of theoretical legitimation.

## *Non-verbalized knowledge, imitation, and change*

The legal relevance of non-verbalized rules of behavior, which are embodied in *sadācāras*, could appear as an obstacle for the analysis of Hindu law. In fact, the point would be that what is really rele-

12. See Jha (1964) for a detailed analysis of these theories.

vant in Hindu law is actually ungraspable, or at least extremely difficult to investigate.

Menski is the author who, probably more than any other, has highlighted the relevance of invisible and internalized processes of ascertaining *dharma*. Particularly, as regards *sadācāra*, Menski states:

> When one Hindu individual consults another or others for guidance, and 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*. (2006: 217)

And, considering also *ātmanastuṣṭi*, which cannot be dealt with in this paper, Menski remarks that:

> This internalised process does not lead to visible action in terms of dispute settlement and is therefore impossible to quantify, but that does not mean it can be ignored and defined away by lawyers. Here is a classic case of declaring a manifestly legal process in a particular culture as 'extra-legal'. (2006: 217)

Davis (2004a) has criticised this approach for several reasons, but we could say here basically for the representation of real Hindu law as "invisible," "hidden," and thus supposedly inaccessible to formal legal analysis. This is an open debate that could help a deeper understanding of the complexities of Hindu law. Within the limits of this paper, I would like to make few remarks, which may be seen as related to the above debate. In fact, I focused on the transmission of the knowledge of *dharma* through texts and practices, and particularly on the relevance of the transmission of non-verbalized rules, which seems to be an invisible process *par excellence*, considering that it is a largely informal and unrecorded process.

Once acknowledged that *sadācāras* have a prominent role in the Hindu tradition, one cannot avoid asking how does the transmission of *sadācāra* rules works. As we said, some of these rules are included in texts and transmitted through them. But, what about those *sadācāras* that remain unrecorded? In the realm of non-verbalized rules, formal

analysis cannot be of much use but many indications may be drawn from legal anthropology and, in my personal opinion, also from the field of cognitive psychology.

This perspective can be only suggested here, relying on the work of a prominent anthropologist such as Maurice Bloch. According to Bloch:

> Another area of joint concern to anthropology and cognitive psychology also reveals the importance of non-linguistic knowledge. This is the study of the way we learn practical, everyday tasks. It is clear that we do not usually go through a point-by-point explanation of the process when we teach our children how to negotiate their way around the house or to close the doors. *Much culturally transmitted knowledge seems to be passed on in ways unknown to us*. Perhaps in highly schooled societies this fact is misleadingly obscured by the prominence of explicit instruction, but in non-industrialised societies most of what takes people's time and energy – including such practices as how to wash both the body and clothes, how to cook, how to cultivate, etc. – are learned very gradually *through imitation* and tentative participation. (1991:186, italics added)

In my view, imitation is the key to understanding *sadācāra*, and the examples in the above citation could be replaced with "to perform a ritual" or "to celebrate a marriage", and so on. In other words, rules are learned by imitation of approved behaviors.

It is worth remarking that imitation does not prevent change. While it is usually assumed that black-letter law is more effective in driving legal change, non-verbalized rules actually allow changes. In fact, imitation may be a powerful tool for the diffusion of innovation, and an old rule may be substituted by a new rule, provided that it is accepted as dharmic. The qualification of some practices as dharmic allows to include new social facts into the dharmic complex, which is by its nature open. In this process of selection of rules the crucial factor is the acceptance by the community, which defines what is part of tradition, on the basis of its self-understanding. New practices, and then new rules of behavior, may be integrated or, on the contrary, set out from a given tradition, depending on their being accepted as dharmic. Social acceptance interacts with theoretical legitimation, which may be more or less fictitious but not at all devoid of any relevance. Interaction means in this context a two-way process, for com-

munity acceptance leads to an effort of legitimation and theoretical legitimation favors social acceptance.

Finally, I want to remark that this informal process is not actually a peculiar feature of Hindu law. As a matter of fact, in many cases I myself would ascertain a rule by considering what is usually done by qualified persons and what receives social acceptance. These rules may be also written in legal texts, but even in this case, in many contexts I would directly rely on what I can discern as the appropriate way to behave, presuming that it conforms to what is laid down in texts. As we said, the same rule can be both followed in practice and written in a text. This should be considered the normal case, which justifies a strong presumption of conformity. On the other hand, a rule written in a text could become ineffective, and, although existing formally, it can be substituted by a new rule followed in social practice. Or, a rule can be simply followed in practice, without being written in a text. In this case, the only way to ascertain it is to look at social practices.

One of the interesting aspects of any comparative research is that the displacement a scholar has to manage is a two-way process. Thus, it is likely that the “odd thing” one has found in a different culture could be found in one’s own cultural environment as well. This is the case for some legal processes that have been outlawed and nonetheless exist and have a prominent role in the shaping of laws. Informal processes of transmission of normative knowledge, through imitation, for instance, are common everywhere. Certainly there are differences as regards the concrete features of these processes, but hardly one of them is totally absent in a different legal experience. The scope of customary laws and models of behavior in Western legal traditions has been progressively delimited and set out by official legal discourse. However, reality cannot be understood only through words.

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