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PUNISHMENT AND EXPIATION:
OVERLAPPING DOMAINS IN BRAHMANICAL LAW

1. Introduction

The Pallava king Śivaskandavarman, in issuing a copper-plate grant of tax-free income to a group of twenty-four brahmins, warns of the consequences of depriving those brahmins of their rights:

[6r40] *atha koci vallabhamadena pilā bādhā kareyya kāravejjā*
[6v41] *vā **tasa khu amhe nigahavāraṇa kareyyāma ti bhūyo ca***
[6v42] *varisasatasahassātirekasamakāle amhaṃ Pallava-*
[6v43] *kulamahaṃte bhavissabhaḍe anne ca no*
[7r44] *vasudhādhipa bhaya abhatthemī jo sakakāle upari-*
[7r45] *likhitamajātāye aṇuvatthāveti tasa*
[7r46] *vo sammo ti **yo casi vigghe vaṭṭeja***
[7v47] ***sa ca khu pañcamahāpātakaśaṃjutto narādhamo***
[7v48] ***hota ti***¹

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1. G. Bühler, “A Prākṛit Grant of the Pallava King Śivaskandavarman,” EI 1: 2–10. My translation is adapted from BÜHLER’S. Similarly, the Kannada portion of an inscription of Kṛṣṇadevarāya of Vijayanagara warns that “those who injure this meritorious gift (*dharmā*) shall incur the great sin of slaughter of a cow or brahmin, or the like (*gohatyā*]*brahmatyādimahāpātaka*)”): EI 1: 366, line 39.

If anyone, out of pride [considering himself a royal] favorite, should cause or cause to be caused [even] a small obstacle [to the donees], **we shall surely restrain him with punishment**². And, further, I beseech the future great warriors of our Pallava line, during the coming one hundred thousand years and more, and kings different from us, saying, “Blessings to him among you who in his time makes [people] follow the above-written rule. **But he who acts contrary to it shall be the lowest of men, tainted with the five mortal sins.**”

In other words, so long as he is on the throne, the king will exercise his power to punish those who violate the terms of the grant; but if the violation occurs in future generations, when his own political power has expired, he invokes a spiritual sanction: the crime is equated with the most serious category of sins, with the implicit threat of karmic retribution.

An inscription of this sort (which is not at all uncommon) constitutes a piece of legislation in pre-modern India, enforced by the state as far as possible. Beyond that limit, its moral force is invoked and spiritual sanctions are substituted. While the consequences of sin might seem less daunting when set beside the immediate threat of punishment, they have the advantage of not having an ‘expiration date’. This inscription raises questions regarding the nature of crime and punishment in India: To what extent do religious criteria and categories penetrate the sphere of state-administered and state-enforced justice? Do different sorts of offence – ‘spiritual’ vs. ‘secular’ – incur different categories of penalty? And is there a corresponding distinction between the types of person empowered to prescribe and administer such penalties?

This article approaches this problem by examining legal remedies for misconduct, giving special attention to roles played by the various participants in a legal process, as prescribed in Dharmaśāstra and as institutionalized in particular legal systems. The hypothesis is offered that despite the appearance of some blurring of the boundary, there remains a fundamental distinction between the legal treatment of the spiritual and secular aspects of a given offense.

2. The nature of the punishment is made quite clear in a parallel formula found in the Mayidavolu plates issued by the same king (EI 6: 84–89 [line 7r23–24]): *tasa amho śārīraśāsanam karejāmo*, “on him we shall inflict corporal punishment.”

2. Are 'Religious' and 'Secular' the Applicable Categories?

It is commonly said that Dharmaśāstra does not make or recognize a distinction between secular and religious domains, or spheres of authority. This is the view of the majority of Western scholars of Dharmaśāstra³, especially those who believe that the distinction was a spurious one introduced by the British. It is true that the Dharmaśāstra has been consciously constructed in such a way as to subsume everything within an overarching system unified (at least theoretically) by dependence on the Veda, and thus on religious authority. Nevertheless the theological claim of vedamūlatva (that Veda is the root of all Dharma) and the unity of the śāstra should not be uncritically adopted by historians as the timeless essence of Dharmaśāstra. That synchronic view diverts our attention from markers of disunity, such as the fact that, as regards legal remedies for misconduct, we find two sets of standards, correlated with at least two distinct human authorities operating in parallel: (1) the brahmins who propound a set of principles based on spiritual status and the unseen (*adr̥ṣṭārtha*) or otherworldly (*apūrva*) consequences of actions (hence, 'spiritual'); (2) the king and his representatives, who act upon a set of principles based on pragmatic ends such as deterrence and compensation "in this world" (*loke, laukika*) (hence, 'secular'). Caste elders constitute a third group responsive to both of the others, and thus bridging the two spheres, as I shall explain below.

3. Apart from those who were primarily concerned with adapting it to practical application in the colonial period. Thus RANGASWAMI AIYANGAR (1941: 9) writes: "Hindu thought does not recognize the distinction. Secular and religious considerations are inextricably interwoven in Hindu motives and actions"; cf. MAINE 1861 (ch. 6): "Among the Hindoos, the religious element in law has acquired a complete predominance"; and DERRETT 1959. JOLLY writes: "The Indian king was believed to be responsible as much for the correct conduct (*ācāra*) of his subjects, and their performing the prescribed rites of expiation (*prāyaścitta*) as for punishing them, when they violated the right of property or committed a crime. The *ācāra* and *prāyaścitta* sections of the *smṛti* cannot accordingly be put *outside* the 'secular' law" (p. 23). Likewise, ROCHER 1972 considers a number of court rulings that asserted the separateness of legal provisions from religious factors in the Dharmaśāstra, and refutes them by showing, e.g., that the actions of the king in punishing criminals purifies him, or that in paying off a debt, the debtor clears himself of religious as well as worldly obligations. However the claim that both religious and immediate concerns are present does not in itself prove that the tradition did not or could not distinguish between them, or even that the distinction is illegitimate.

In what follows, I will prefer to speak of a thoroughgoing distinction between ‘spiritual’ and ‘secular’ elements within Dharmaśāstra to refer to the realms in which acts are understood to entail consequences, observing that the two elements elicit separate responses from different authorities. The Dharmaśāstra as a whole may still be judged to be a religious system: my aim here is not to segregate the notions of law and religion. In fact, a preoccupation with this debate has tended to get side-tracked into a terminological impasse⁴.

3. Spheres of Personal Authority: Brahmin and King

It is recognized that the Dharmaśāstra codes spring from a confluence of two textual sources: the **priestly ritual codes** on the one hand, and the **‘political science’ (Arthaśāstra) tradition** on the other⁵. In fact the distinction between these sources seems to be recognized in the later, “composite” tradition:

NSm 1.31:

*dharmaśāstrārthaśāstrābhyām avirodhena mārgataḥ |
samikṣamāṇo nipuṇaṃ vyavahāragatiṃ nayet ||*

The one who hears a case should conduct the legal proceedings skillfully, so that there be no contradiction between the texts on Dharma and the texts on polity⁶.

We find here a distinction between the principles of Dharma and principles of Artha in legal affairs (*vyavahāra*). The implication seems to be that ‘Arthaśāstra’ stands for that part of the law dealing with what comes within the purview of the king, while ‘Dharmaśāstra’ refers to the principles derivable from the Veda, as mediated by learned brahmins. Unlike Kauṭilya’s *Arthaśāstra*, however, the *Nāradaśmṛti* (1.33) specifies that when they conflict a Dharmaśāstra

4. LARIVIERE 1996 is an attempt to sort this out.

5. OLIVELLE 2005: 13–16, 46–50, citing the earlier literature.

6. LARIVIERE’S 1989 translation, but with “and the texts on polity” instead of “or the texts on polity.”

rule trumps an Arthaśāstra rule. On the other hand, the very next stanza says that legal practice or usage (*vyavahāra*) (and common sense, *yukti*) “prevails over Dharma” (i.e., general principle).

This recognition of two sets of principles that could come into conflict (*virodha*) in practice raises the further question about the notion of authority in this system. Authority is invested in various forms: authoritative texts, authoritative persons (*adhikārins*, *āptas*), and the valid modes of thought and action based thereon. These are of course interconnected: for example, texts cannot be considered apart from those who preserve and teach them and the ways in which they are invoked or appealed to. A general discussion of authority in any case certainly must move beyond scholastic formulas such as the Mīmāṃsā definition of *prāmāṇya* (‘authoritativeness’), which pertains mainly to the Vedic basis of Dharma. I will defer such a discussion for another occasion; here it will suffice to notice the disjunction between the theological claim that the Veda is the ultimate source and criterion of Dharma, and the procedural principle that the king is the ultimate authority in deciding what is Dharma.

The “sacred” (viz., Vedic) basis of Dharma is justified by reference to the four roots (*mūla*) of Dharma, a sort of ‘trickle-down theory’ of righteousness that establishes an idealized hierarchy of sources. In theory, all Dharma derives ultimately from the Veda, i.e., *śruti*, which thus constitutes a source that transcends human wisdom, and is apt to be deemed not of human authorship (*apauruṣeya*). *Smṛti* represents a recollection of Vedic wisdom not actually ‘heard’ in the *śruti* but recorded by the ancient sages who composed the *Smṛtis*. The third source, where the others fail or are ambiguous, is *sadācāra*, the ‘practice of the good’, or *śiṣṭācāra*, the ‘practice of the learned’. Their authority derives from their exemplary personal embodiment of the Veda, achieved by means of their birth, virtue, and deep learning; the fact that it is their *ācāra* that matters indicates that consensus and generally accepted usage among such persons is the criterion. Finally, some scope is left for what is termed *ātmatuṣṭi* or the like, ‘what is satisfactory to oneself’, which has usually been interpreted to mean one’s conscience. This slippery factor is clarified somewhat in Manu:

Manu 11.234:

*yasmīn karmaṇy asya kṛte manasaḥ syād alāghavam |
tasmīṃs tāvat tapaḥ kuryād yāvat tuṣṭikaram bhavet ||*

If one's mind is uneasy about some deed he has done, he should perform ascetic toil on that account until he is satisfied.

Although it is still understood that the individual in question should be thoroughly good (*sādhu*) and qualified (*āpta*) by knowledge of the Veda⁷, the criterion in this case is not established usage but an inward sensibility, an emotional response to a particular act – namely, a heavy heart – which signals the need for expiation; another inward sensation, ‘satisfaction’, is taken as evidence of rectitude.

In this scheme, texts have greater authority than persons, and the consensus of certain persons – namely, learned and pious brahmins – has greater weight and range of applicability than the personal judgment of any one of them. Of course, since access to the two sets of textual sources is mediated and controlled by learned brahmins, their personal authority simply reflects that of the texts; at the same time, their personal views and customs have whatever weight they do because they are taken to be indirect evidence for authentic Vedic knowledge.

What is left out of account in this catalogue of ‘roots’ or sources of Dharma are the other types of sanctioned *ācāra*⁸ – that of different castes, guilds, or communities, called *lokācāra* or *deśācāra*⁹ – and the central role of the king in determining, applying, and enforcing the principles of Dharma in the case of disputes (*vivāda*). When the latter topic is raised, a different set of principles gets invoked. The NSm begins (1.2) by identifying the king as the supreme authority, at least in legal process (*vyavahāra*). It is interesting to notice, however, that this reflects the relatively lower status of *vyavahāra* vis-à-vis Dharma:

7. As Medhātithi (ad MDhŚ 2.6) and other medieval interpreters remark.

8. In fact, DAVIS (2004b; also 2004a; 2005) sees *ācāra* as the primary source of law (as opposed to Dharmaśāstra). This article, attending primarily to the śāstra as jurisprudence, and to self-conscious attempts to efforts to put it into practice, must skirt this issue.

9. WEZLER 1985 examines the role of *deśadharmas* (= *deśācāras*) in Dharmaśāstra, noting the various views that śāstrins have had of their relative authority.

NSm 1.1–2:

dharmāikatānāḥ puruṣā yadāsan satyavādīnaḥ |
tadā na vyavahāro 'bhūn na dveṣa nāpi matsaraḥ ||
naṣṭe dharmā manuṣyeṣu vyavahāraḥ pravartate |
draṣṭā ca vyavahārāṇām rājā daṇḍadharaḥ kṛtaḥ ||

When men had Dharma as their sole purpose and were speakers of the truth, there was no *vyavahāra*, no enmity, and no selfishness. *Vyavahāra* came into being at the time when Dharma was lost among men. The overseer of *vyavahāras* is the king; he has been made the staff-wielder. [after Lariviere]

The golden age of natural righteousness is past; law in the sense of legal process belongs only to a corrupt world, in which the king's role is to “wield the stick,” i.e., to punish the wicked¹⁰.

4. *Legal Principles in the Arthaśāstra*

Given that most of the *rājadharmā* and *vyavahāra* material in the *Dharmaśāstra* derives ultimately from the *Arthaśāstra* tradition, it is noteworthy that *Dharmaśāstra* is not the ultimately decisive criterion of judgment in the *Kauṭīliya Arthaśāstra*. In spite of the uncertainty of the precise historical context of this work and its generally *śāstric*, normative format, it gives the strong impression at many points of reflecting an actually employed administrative and legal system. It recognizes two triads of chief legal officers under the king: the *dharmasthas* and the *pradeṣṭṛs*. First group, the *dharmasthas* (‘judges’), conduct the trial of civil cases (*vyāvahārika ārtha*), and serve as authorities on civil law.

The second group, called *pradeṣṭṛ* (‘magistrate’), are officers under the *samāharṭṛ* (‘administrator’; vide 2.35.7, 4.4.1–3, 4.5.13) charged with assigning and enforcing punishments as a means of ‘eradicating thorns’ (*kaṇṭhakaśodhana*), and with criminal law more generally.

10. For an earlier attempt to establish the relative roles of king and brahmin in regard to punishment and expiation, see PRAKASH 1975.

Both groups are specified to be *amātyas*, ‘ministers’ of the king; their authority thus derives exclusively from his. No mention is made of their necessary personal virtues, nor of their caste status, and aside from the use of the word *dharma*, there is little allusion to scriptural sources or divine criteria. Instead, this-worldly support is required for a suit to succeed. For example, labor disputes “shall be settled only on the testimony of witnesses” (*sākṣipratyayam eva syāt*); where there are no witnesses, the judge must make inquiries at the workplace itself (*ArthaŚ* 3.13.31–32).

In its discussion of judges (*dharmastha*), the *Arthaśāstra* (3.1.38–47) offers an analysis of the various types of admissible evidence (criteria on which to base a judgment), which includes some explicit statements of the relative weight of royal authority and sacred knowledge.

ArthaŚ 3.1.38–47:

38. caturvarṇāśramasyāyaṃ lokasyācārarakṣaṇāt |
 naśyatām sarvadharmāṇām rājā dharmapravartakaḥ ||
 39. dharmas ca vyavahāras ca caritraṃ rājaśāsanam |
 vivādārthaś catuṣpādaḥ paścimaḥ pūrvabādhaḥ ||
 40. tatra satye sthito dharmo vyavahāras tu sākṣiṣu |
 caritraṃ saṃgrahe puṃsām rājñām ājñā tu śāsanam ||
 41. rājñāḥ svadharmāḥ svargāya prajā dharmeṇa rakṣituḥ |
 arakṣitur vā kṣeptur vā mithyādaṇḍam ato ’nyathā ||
 42. daṇḍo hi kevalo lokam paraṃ cemaṃ ca rakṣati |
 rājñā putre ca śatrau ca yathādoṣam samaṃ dhṛtaḥ ||
 43. anuśāsad dhi dharmeṇa vyavahāreṇa saṃsthayā |
 nyāyena ca caturthena caturantām vā mahim jayet ||
 44. saṃsthā yā dharmasāstreṇa śāstraṃ vā vyāvahārikam |
 yasminn arthe virudhyeta dharmeṇārthaṃ vinirṇayet ||
 45. śāstraṃ vipratipadyeta dharme nyāyena kenacit |
 nyāyas tatra pramāṇam syāt tatra pāṭho hi naśyati ||

38. When all laws (*dharmas*) fail ¹¹, the king here is the promoter of Law (*dharma*), since he protects customary rules (*ācāra*) of people of all four *varṇas* and four *āśramas*.

11. For *naśyati*, ‘come to naught, be unsuccessful’ and hence ‘be rendered null, invalid’, see also st. 45. The implication may be “when standards are collapsing,” or more generally, something akin to *yadā yadā hi dharmasya glānir bhavati...* (BhG 4.7), but with the human king rather than the divine as preserver.

39. A matter of dispute has four bases¹²: *dharma* (here, ‘righteous act’: a sworn deposition or an ordeal), *vyavahāra* (‘legal transaction’), *caritra* (‘local law’)¹³, and the ‘ruling of the king’; each latter [of these] supercedes those that precede it¹⁴.

40. Of these, an ‘act of righteousness’ is based on truth, a ‘legal transaction’ on witnesses, a ‘local law’ on the assembly of men, while the command of kings is the ‘ruling’¹⁵.

12. The words denoting the four bases in stanzas 39 and 40 are technical terms probably reflecting actual practice that informed the *Arthaśāstra*. Various understood both by the commentators and by modern scholars, the criteria for resolving disputes are listed; LINGAT (1962) notes the sense of *dharma* here (cf. note 1), but only KANGLE (in his translation, but not in the glossary to his edition!) has recognized that the second basis is the ‘transaction’; an ‘act of *dharma*’ can take the form either of a truthful deposition or an ordeal (from which a divine indication of the truthfulness or falseness of the defendant is expected). Where the dispute concerns a formal transaction, duly witnessed – this is the topic of *Arthaśāstra* 3.1 – this evidence is of greater weight. The customary laws of local groups can override the terms of a given transaction. But where a resolution is still not reached, the king’s sovereign authority in the form of a ‘ruling’ (*śāsana*) is the final criterion. All of these are valid, in theory, only insofar as they are in accord with the principles of *Dharma* (writ large), but within that realm, the king remains the final arbiter and last recourse. LINGAT is also at pains to point out that this type of *śāsana* does not necessarily acquire general validity, like a formal legal precedent, but applies only to the case at hand.

13. = *ācāra* according to LARIVIERE’s translation of a the NSm 1.10 parallel (1989: 5), despite the fact that the next stanza (1.11) defines it as being based on “what is recorded” (see the next note). Compare *Arthaśāstra* 2.7.2, where *deśa-grāma-jātikula-saṃghānām dharma-vyavahāra-caritra-saṃsthānam* (KANGLE: “laws, transactions, customs, and fixed rules of countries, villages, castes, families, and corporations”) is something to be recorded in record-books (*nibandha-pustaka*); the compound occurs also at 2.7.29. There is also the grouping *pracāra-caritra-saṃsthāna* of *Arthaśāstra* 2.7.3 and 10, which seems to denote “practices, customs, and fixed rules/conventions”; *pracāra* and *caritra* seem to be contrasted in 2.8.3: *pracārasaṃrddhiś caritrānugrahaś coranigraha yuktapraṭiśedhaś sasyasampat paṇyabāhulyam upasargapramokṣaḥ parihārakṣayo hiraṇyopāyanam iti kośavrddhiḥ* (‘the prospering of *pracāra*, the fostering of *caritra*, the suppressing of thieves, the prohibition of *yuktas* [? KANGLE: “control over employees”]...’). At 2.16.25, *vyavahāra* can be ascertained *caritratāḥ* (‘from written accounts’? ‘according to custom’?). A similar verse closes 2.22(.15), where it seems likely that customs or practices are meant; see also 2.35.5; 3.11.3; 7.5.20; 13.5.14, 24.

14. NSm 1.10 has the same, differing only in the second line, where, awkwardly, *vyavahāra* occurs as the subject: “Legal process has four bases...; [each] latter supercedes the former” (*catuṣpād vyavahāro ’yam uttaraḥ pūrvabādhakaḥ*). Whatever its ambiguities, this definition appears to subordinate scriptural criteria to social and royal ones, and above all to the authority of the king and the state.

15. For a full discussion of the terminology and logic of this stanza, see Rocher 1979 and Lariviere 1989: 5–6.

41. The [observance of the] proper Dharma of a king who protects his subjects according to Dharma leads to heaven; the opposite of this applies to one who does not protect or who strikes wrongly with the Staff [of punishment].

42. For it is the Staff alone that guards this world and the other, when the king wields it equally upon his son and his enemy, according to the offence.

43. For, administering the law in accordance with the righteous act, the legal transaction, the established rule, and legal reasoning ¹⁶ as the fourth, he would conquer the earth to its four ends.

44. If, in a certain case, an established convention (*saṁsthā*) or precept on transactions is contradicted by a precept of Dharma, he should decide that case by means of Dharma.

45. Should a śāstric precept conflict with some reasoning (*nyāya*) about Dharma, the reasoning has authority (*pramāṇa*), for in that situation a textual passage (*pāṭha*) loses its validity.

In this passage we find two sets of procedural rules, framed in rather different terms: that in stanzas 39–40, and that in stanzas 43–45 ¹⁷. We learn here that the king has the authority to determine what is Dharma, though in principle he should do so in accordance with Dharma, which may more strictly mean Dharmasāstra.

In Dharmasāstra works, however, we can encounter some disagreement on the general principle that the king rules in the sphere of *vyavahāra*. NSm 3.1 declares that “one should never speak in a trial unless he has been appointed to do so [by the king]” (*nāniyuktena vaktavyaṃ vyavahāre kathaṃcana*). But the commentator cites a verse arguing just the opposite:

16. It is not clear that *nyāya* and *sāsana* are meant to be synonymous. *Nyāya* refers to the reasoning applied to form a judgement properly, according to evidential criteria, while the word *sāsana* denotes the end result, which may reflect the arbitrary will of the king. Nevertheless, in both cases we have to do with a formal ruling that concludes a dispute.

17. The main difference between these two formulations is that the word *dharma* has a different sense in each case. In the latter it refers to Dharmasāstra as the set of norms with which practical law is meant to be reconcilable. The *caritra* of st. 39–40 is replaced by *saṁsthā* in st. 43–44, but both may denote an established practice or convention, especially as documented in writing.

Asahāya ad NSm 3.1:

*aniryukto niiryukto vā śāstrajñō vaktum arhati |
daivīm vācam sa vadati yaḥ śāstram upajīvati ||*

One who knows the Śāstra ought to speak whether or not he has been appointed. One who lives by the Śāstra speaks with divine authority. [after Lariviere]

Asahāya explains the meaning of this so:

*yadi katham api sarve 'pi sabhāsado buddhikṣobhāc chāstrārthaṃ
vismṛtyāthavā lobhādinā kāraṇena śāstroktam nyāyamārgam utsrjya
vyavahārasyānyāyayuktam nirṇayam dātuṃ pravṛttā bhavanti tatra ca
prasaṅgāgataḥ kaścit smṛtitantravyavahāramārgajñō brāhmaṇaḥ
pratyakṣas tiṣṭhati tena śāstroktavacanapāṭhapūrvakam pratiṣedhanīyāḥ
sabhāsadaḥ | evaṃ prabodhayato vadatas tasya chalaṃ nāsti | **aniryukto**
'pi **śāstrajñō vaktum arhati** | yataḥ śāstram nāma devabhāṣā |*

If, somehow forgetting the meaning of the Śāstra because of a disturbance of the mind, or departing by reason of greed from the path of legal argument prescribed by the Śāstra, all the court officials become inclined to give a judgment incompatible with the legal argument, and if perchance some brahmin happens to be present who knows legal method according to the system of the Smṛtis, he should contradict the court officers, citing passages from statements made in the Śāstra. Speaking thus and making them aware, he does not commit a technical error. Even though 'he is not court-appointed, one who knows the Śāstra should speak', because Śāstra is indeed the speech of the gods.

This is a defense of the notion that the truly learned brahmin has more authority, by virtue of his learning in the sacred science, than any court official (*sabhya*) has by virtue merely of his having been appointed by the king. It is a practical application of the principle that although the king presides over *vyavahāra*, the sphere of *vyavahāra* itself is valid only insofar as it remains in accord with the higher principle of Dharma, which is embodied in holy writ.

5. Punishment and Expiation

One of the traces left by this dual heritage is a double set of corrective measures prescribed in the case of misconduct: **punishments** meted out by state authorities upon a passive convict, and **expiatory penances** meant to be voluntarily performed by the wrong-doer himself¹⁸. The first reflects a conception of the misdeed as a crime in the eyes of the state; the second pertains to the sinful character of the act, that is, its negative spiritual or karmic effect.

These two principles come together in the Dharmaśāstra, a confluence that in some ways sets them on a par, and assimilates expiations as another species of punishment that can be imposed coercively by human authorities. Yet although there is some seeming blurring of the distinction, religious remedies apply mainly in the domain of *ācāra* (collectively acknowledged rules of pious conduct), while judicial remedies belong principally to the sphere of *vyavahāra*.

Classical Dharmaśāstra is thus the synthesis of two independent streams of scholasticism, achieved by brahmin theorists who were, on the one hand, interested in extending priestly authority beyond the limits of ritual norms to define moral and social norms more broadly; and on the other hand, concerned to anchor the role of the brahmin as royal advisor (*purohita*) and as a sort of judge within a sacred framework. The coordination of these two sets of normative principles however has led to a certain redundancy and overdetermination in treating certain cases of misconduct.

5.1 Prāyaścitta

The earliest prescriptions of *prāyaścittas* occur in liturgical sources, as a means of compensating for omissions, errors, and mishaps in ritual performance¹⁹. Hence, misdeeds of the sort remedia-

18. DAY (1982: 221) perceived that volition and agency are at the heart of this distinction: “The basic distinction between penance and penalty... lies in the voluntary character of the former in recognition of the principle of justice, and the compulsory character of the latter as an assertion and asseveration of the authority of the law upon unwilling acknowledgedgers of it.”

19. E.g., *Sāmavidhānabrāhmaṇa* (see KONOW 1893); also: 1.5.6–9, 12; 1.8.5. TB 3.2.8.11ff. contains a list of sinners similar to that of ApDhS 2.12.22. BGS 4 prescribes the *mindāhuti* and the *hotṛ* recitations as expiations for the *gṛhya* rites.

ble by penances include many that would never come in for the application of *danḍa*: (i) lapses in the performance of ritual obligations; (ii) acts and omissions that compromise one's purity (such as eating forbidden foods: Manu 11.147–162), including many outside the control of the person affected (e.g., getting bitten, Manu 11.200); (iii) defects in ritual performance; (iv) misdeeds committed in a previous life, which may be inferred from the occurrence of bodily disfigurements in this life (Manu 11.48–54). But they also include virtually any crime that is liable to incur judicial action and punishment. That is to say, crimes are simultaneously sins, and so incur religious or spiritual consequences as well as state-enforced penalties²⁰.

According to Manu:

Manu 11.44:

*akurvan vihitaṃ karma ninditaṃ ca samācāraṇaḥ |
prasaṃśā cendriyārtheṣu prāyaścittīyate naraḥ ||*

When a man fails to carry out prescribed acts, performs disapproved acts, and is attached to the sensory objects, he is subject to a penance (*prāyaścitta*).

Prāyaścitta is called for to rectify sin (*pāpman*, *pāpa*) or wrongdoing (*adharmā*, *duṣkṛta*). The defect in this case is regarded as a personal, even private, matter. It may be signaled by mental discomfort, the pricking of the conscience mentioned by Manu 11.234 (mentioned above). However it is not merely psychological relief that is sought, but a quasi-physical purging of the traces of the sin by a mental resolution not to repeat the deed:

Manu 11.230–231:

*yathā yathā manas tasya duṣkṛtaṃ karma garhati |
tathā tathā śarīraṃ tat tenādharmeṇa mucyate ||
kṛtvā pāpaṃ hi saṃtāpya tasmāt pāpāt pramucyate |
naivaṃ kuryāṃ punar iti nivr̥tīyā pūyate naraḥ ||*

20. Jolly (1928: 263–270 [para. 39–40]) already perceived the operation of “two systems of punishment [that] developed independently,” viz. “spiritual and worldly punishments” (263). Both are prescribed for most crimes (pp. 267–268).

Insofar as the mind censures (*garhati*) its²¹ misdeed (*duṣkṛta*), that body is freed from the wrong (*adharmā*), for when a man is contrite (*saṃtāpya*) about a sin he has committed, he is freed from that sin. “I will not do that again”: by this forswearing he is purified.

The mind rebukes the body; the conscience thus purifies the wayward flesh.

Beyond such inward self-correction, other cleansing actions are identified:

Manu 11.228–229:

khyāpanenānutāpena tapasādhyayanena ca |
pāpakṛṇ mucyate pāpāt tathā dānena cāpadi ||
yathā yathā naro ‘dharmaṃ svayaṃ kṛtvānubhāṣate |
tathā tathā tvacevāhis tenādharmaṇa mucyate ||

By public confession, by repentance, by ascetic toil, and by Veda-recitation the sinful (*pāpakṛt*) are freed from sin (*pāpa*); so too by giving in time of misfortune.

Insofar as a man confesses to a wrong (*adharmā*) that he has himself committed, he is released from his wrongdoing as a snake from its skin.

The latter two means are spelled out at length. Expiatory recitation runs the gamut from reciting all the Vedas (including the Upaniṣads) three times (Manu 11.263) down to the simple remedy of controlling the breath while reciting the *om bhūr bhuvah svaḥ* sixteen times daily for a month (11.249), which is supposed to remove even the sin of killing a learned brahmin²².

21. Understanding *tasya* as referring not to the (unstated) agent but to “that body” (*śarīraṃ tat*); Olivelle translates the first stanza thus: “The more his mind abhors that evil deed, the more his body is freed from that infraction ...” The rest is his translation, but with a slight alteration in *pāda* c.

22. Indeed, since Chapter 11 ends by noting that the syllable *om* by itself is equivalent to the “triple Veda” (11.266), it seems to follow that reciting this syllable three times fulfills a requirement to recite the three Vedas *in extenso*. Similarly, simply retaining the *Ṛg-Veda-Saṃhitā* in one’s memory is said to make a brahmin immune to the taint of sin (Manu 11.262). Between these two extremes, in any case, several individual hymns and other formulae are proposed as having expiatory value (11.250–261).

Ascetic toil (*tapas*) is packaged in a few generic forms that can be applied to cleanse a variety of sins (Manu 11.212–227): the *prājāpatya* (or *kr̥cchra*), *sāntapana*, *atikr̥cchra*, *taptakr̥cchra*, *parāka*, and *cān-drāyana* penances, all special sorts of *vrata* (*rules of self-discipline*)²³.

The consequences of unexpiated sin are dire. For instance, the *pātakas* listed in ViSm 33–42 including murder of a brahmin, incest, theft, etc., are said to lead to hells (*nāraka*, ViSm 43), to undesirable rebirths (ViSm 44, Manu 12.53–81), or to physical defects or diseases in the next life, such as bad breath or rotten nails (ViSm 45, Manu 11.48–54), all of which are automatic spiritual consequences by the law of karma.

Even before such remote consequences are realized, one may also be subject to social ones: such sins are *jātibhramśakara*, ‘resulting in loss of caste status’, and *apātrīkara*, ‘making one unfit to receive alms’. But these are status changes entailed by the impurity generated by the sin (a religious criterion), rather than penalties imposed by a state authority. Loss of caste is recognized through the rite of *ghaṭasphoṭa* (Manu 11.183–190), an excommunication or ostracism enacted by the outcast’s relatives. The ban may later be ritually removed following the completion of a prescribed expiation (11.187)²⁴.

5.2 Punishment

There is no space here to discuss the vast topic of punishment in detail, but some general remarks are necessary²⁵. The state was insinuated into the sphere of Dharma, in the first instance, by stipulating among the duties of a king the obligations of protecting and punishing. Part of this is *kañṭhakaśodhana*, ‘the removal of thorns’ (i.e., execution of criminals)²⁶. For this, the special machinery of legal

23. Cf. *sāvitrīm ca japen nityam pavitrāṇi ca śaktiṭaḥ | sarveṣv eva vratesv evam prāyaścittārtham ādṛtaḥ || etair dvijātayaḥ śodhyā vratair āviṣkṛtainasaḥ | anāviṣkṛtapāpāns tu mantrair homaiś ca śodhayet ||* Manu 11.226–227.

24. Where individual remedies (*niṣkṛti*) are suggested in ViSm for these *pātakas*, they are all voluntary penances, and following the lists of unpleasant rebirths, we find the sections describing *prāyaścittas* (ViSm 46–56).

25. JOLLY (1928: 268–284 [§40–43]) provides a good summary.

26. Manu 9; JOLLY notes (p. 270) that this activity is mentioned in *praśastis* praising the Candella kings of the 12th–13th c.: EI 1: 198 (*ucchinnaḥ kañṭhakaugho jagati*, line 5), 210 (*dūrādhaḥkṛtakamṭakasya*, line 18), 334 (*rājyam akaṃṭakam*, line 9).

process is set in motion: a complaint (*vāda*, *bhāṣā*) and a plea (*uttara*) in court (*saṃsad*), the presentation of witnesses (*sākṣin*) and documentary evidence (*deśa*, *lekhyā*), and a formal judgment (*nirṇaya*) of the basis of the proofs offered – all of which is derived from the tradition that produced the *Arthaśāstra*²⁷.

The king is enjoined to conduct an inquiry and, in case of guilt, to assign a punishment (*daṇḍa*). To a certain extent, his role was sometimes said to include enforcing the *prāyaścitta* prescribed by the *sabhā*, when necessary (e.g., ĀpDhS 2.5.10.12–16, 10.1). From this point of view, the king is “only the servant of *dharma* and the brahmins’ auxiliary”²⁸. Yet this opens the door to a more independent role in prescribing corrective measures of his own, just like a god (VDhS 19.48, Manu 5.93). And while the brahmin codifiers sought to secure their immunity (as a class) to such punishments, it is also clear that royal prerogative was recognized as following its own logic²⁹.

Punishment comprises a range of penalties inflicted by the king or his agents:

Manu 8.129:

vāgdandaṃ prathamam kuryād dhigdandaṃ tadanantaram |
trīyaṃ dhanadaṇḍam tu vadhadandaṃ atah param ||

[The king] should employ first the punishment of verbal reprimand; next a public denunciation; third, a fine; and finally, corporal punishment.

The prescribing of *prāyaścitta* has no place here; the aim of such punishments is the maintenance of the civil order by means of deterrence (through public shaming, fines, and the display of force by the state) and the elimination of serious offenders.

27. OLIVELLE 2005: 46–50.

28. LINGAT 1973, p. 66; see GDhS 10.7–8; VDhS 19.1.8.

29. Manu 7.14–31 presents a quasi-mythical etiology for the king’s capacity and duty to punish, and declares the manner in which it should be applied.

5.3 Points of Convergence?

JOLLY has pointed to a few cases in which these two categories seem to converge in the Dharmaśāstra. He cites:

Manu 8.318:

*rājabhir dhṛtadaṇḍās tu kṛtvā pāpāni mānavāḥ |
nirmalāḥ svargam āyānti santaḥ sukṛtino yathā ||*

When men who have committed sins are punished by kings, they go to heaven immaculate, like virtuous men who have done good deeds³⁰.

Words such as ‘sins’ (*pāpāni*), ‘immaculate’ (*nirmalāḥ*), ‘ritually observant’ (*sukṛtinaḥ*), along with the talk of going to heaven certainly suggest that punishment by the king in this case substitutes for a self-performed *prāyaścitta*. Yet a glance at the context shows that the fundamental distinction between the two categories has not been effaced:

Manu 8.314–316:

*rājā stenena gantavyo muktakeśena dhīmatā |
ācaksāṇena tat steyam evaṃkarmāsmi śādhi mām ||
skandhenādāya musalaṃ laḡuḡaṃ vāpi khādiram |
śaktiṃ cobhayatas tīkṣṇām āyasaṃ daṇḡam eva vā ||
śāsanād vā vimokṣād vā stenaḥ steyād vimucyate |
aśāsivā tu taṃ rājā stenasyāpnoti kilbiṣam ||*

A wise thief, with his hair loose, should go to the king confessing his theft: “I have done this. Punish me,”

and carrying on his shoulder a pestle, a club of Khadira wood, a spear with both ends sharpened, or an iron rod.

Whether he is punished or released, the thief is released from the theft; but if the king fails to punish him, he takes upon himself the thief’s guilt.

It turns out that the punishment meant here is voluntarily sought

30. Cf. VaDh 19.45; NāSm App. 48. WEZLER 1995 also deals with this theme, arguing that death, even when imposed as a punishment, can serve to expiate sin (both for the criminal, and for the society).

by a “wise”³¹ thief – that is, a repentant one who has recognized his spiritual peril – to erase his sin and exchange heaven for hell. It includes a confession, a standard form of penance; the blow to be dealt by the king serves as a bodily mortification. The proof lies in the fact that the actions of the thief are sufficient to erase the sin, whether or not the king effects a punishment. Moreover, the king is at risk of absorbing the sin of the thief. It should also be noted – although it never is in this connection – that the same procedure is in fact included in the chapter on *prāyaścitta* (Manu 11.100).

Another seemingly ambiguous case mentioned by JOLLY (p. 264), Gautama’s inclusion in a list of *prāyaścittas* of a punishment inflicted by the king (GDhS 23.14–16), appears rather to be a parenthesis interrupting the section. It is the only instance there of a remedy in which the king is mentioned and the wrong-doer has a passive role. There is also no mention that the wrong-doing will thus be purified (*śudhyet*), whereas this claim is repeatedly made in the section regarding those who perform expiations. Hence this appears to be a true punishment included in the section on expiations because of its relevance to the theme of sexual misconduct. A further indication that this was not intended to be taken as an example of expiation is that it refers back to the earlier section on punishments (GDhS 12.2) for further options.

On the other hand, there are cases in which the religious remedy, *prāyaścitta*, gets embedded within a determination of punishment. Certain acts that are deemed sins are also punishable crimes: murder of a brahmin, drinking of liquor, thievery, and sex with an elder’s wife. If, for example, a guilty party does not perform the appropriate penance, the king should hand down a fine plus corporal punishment, such as branding (Manu 9.235–239). (They are also subject to the social penalty of ostracizing.) But if the criminal does perform the penance, he should merely be fined (Manu 9.240). The difference in punishment seems to depend upon the repentance implied in the performance of the penance.

31. OLIVELLE’S edition is the first to give this reading in place of *dhāvatā*; *dhīmatā* is supported by the mss. of the southern transmission, northern manuscripts in old Nāgarī script, and the oldest commentators, Bhārucci and Medhātīthi. For a fuller discussion, see Olivelle 2005, pp. 959–960.

6. Late Medieval and Early Modern Applications

The persistence of two distinct frameworks within Dharmaśāstra is mirrored wherever we find evidence of attempts to put the Śāstra into practice. Corresponding to the two domains, civic and ritual-social, are two institutional structures embodied in the king (and his representatives and officials) and a brahmin pandit (presiding over a council of pandits or *rājagurus*). Three examples are offered from three diverse regions of South Asia in the 17th–19th centuries.

6.1 *Smārtavicāra* according to the *Laghudharmaparakāśikā* from Kerala

A detailed description of a formal trial for adultery is found in the chapter on *smārtavicāra* in the *Laghudharmaparakāśikā* (8.1), a 17th c. work from Kerala. Kerala brahmins are in fact well known for prosecuting women’s sexual transgressions. The individuals serving in an official capacity in this process are:

- The *smārta*, an expert in the Smṛti codes
- The investigators (*mīmāṃsaka*)
- The king’s representative (*rāja-pratinidhi*)
- The king (*rājan*)
- The presiding priest (*purohita*, *purodhas*)

The *purodhas* appears to play no more than a ceremonial role of presiding passively over the proceedings. The plaintiff brings the case directly before the king, beseeching him to “protect and preserve Dharma”:

LDhP 8.1.6:
yathā mucyeta sandehād asmād eṣa janas tathā |
kṛtvā dharmasya rakṣā ca tāryety abhyarthayeta ca ||

He should request: “Since this man (i.e., the king) may release [us] from this doubt, he should thus both protect and preserve Dharma”³².

32. The syntax of this stanza is not clear to me. In cd, I understand *kṛtvā dharmasya rakṣā ca tāryā... ca* as the end of the direct speech, with the main clause *ity abhyarthayeta* inserted anomalously before the second *ca*.

The king should then send a brahmin who will act in his stead, along with the *smārta*, and four investigators (8.1.7–8). The trial itself takes place in the family home. The investigators propose the questions to be asked. Having been debriefed, the *smārta* and the royal representative, together with the plaintiff, enter the house where the accused woman is waiting (8.1.9, 11). Remaining hidden behind a wall, the *smārta* questions her, while the royal representative silently listens, his head covered by a veil.

LDhP 8.1.14–15:

asamīcīnatāprāptaū praśnasyaiṣa kvacit kvacit |
apanīya śirovastraṃ bhūtale nikṣipet sudhīḥ ||
taṃ dr̥ṣṭvā samanudhyāya yathā mīmāṃsakoditaṃ |
tathaiva pṛcchet smārtañ ca jāyamāne 'sya sauṣṭhave ||

If, at any time, a question is inappropriate, the wise [brahmin] should remove his head cloth and throw it on the ground.

Seeing him [do this], and reflecting upon it, when he finds the eloquence, the *smārta* [?] ³³ should ask [in different words] the very question that had been posed by the investigators.

Once they have finished their questions, the *smārta* and the representative are to reflect on the woman's answers, and the *smārta* informs the investigators of his conclusions, the representative (it seems) continuing to monitor the process by means of his veil.

Then they go before the king, where the *smārta* makes a report; at this time too the king's representative, although he should not himself 'act as a witness' by giving a report, continues to signal any inaccuracies by dropping his veil.

In this process, three brahmins take roles of responsibility: the *purodhas*, the *rājapratinidhi*, and the *smārta*. The first is there at the

33. Based on the emendation of *smārtañ ca* to *smārtaś ca*; UNNI seems to have tacitly made the same assumption in his paraphrase: "Seeing this the question of the *Mīmāṃsakas* should be reconstituted by the *Smārta* to please the representative" (p. 260). Otherwise, the text as edited by UNNI would seem to mean that the royal representative himself rephrases the question to the *smārta*, but the opening words, *dr̥ṣṭvā taṃ* are very difficult to construe with the rest, since it is natural to understand the representative as the direct object.

plaintiff's (the husband's) bidding; the other two are appointed by the king, but in different capacities. The *smārta* is there ostensibly on the basis of his expertise in the Dharmaśāstra; he represents a sacred or transcendent authority, and thus ensures that the accused woman will be examined "in a Dharmic manner" (*dharmyeṇa vartmanā*, 8.1.19).

The *rājapratidinidhi*, on the other hand, is a stand-in for the king himself. Although he remains silent throughout, and nominally "invisible" thanks to the veil, he acts as a check upon the independent authority of the *smārta*. Even during the *smārta*'s report to the king, the *rājapratidinidhi*, although uncovered and refraining from bearing witness himself, continues to monitor the *smārta*'s accuracy:

LDhP 8.1.24–26:

āvedanasya samyaktve vaiparīye ca puruṣaḥ |
rājñas tatra na sākṣī syāt te tu mīmāṃsakās tathā ||
anāvṛtaśirā eva tasmāt tatra praviśya saḥ |
smārtenāvedyamāneṣu dattakarṇaṃ vaset kvacit ||
āvedanasyāsamyaktve smārtaṃ mīmāṃsakāḥ svayaṃ |
smārayeyuḥ śrutaṃ samyag brūyur vā svayam eva tat ||

As regards the accuracy or inconsistency of the report, the king's representative should not attest to it (*tatra na sākṣī syāt*); but the investigators should do so.

Hence, although he enters (*praviśya*) there with his head uncovered, [the king's representative] should remain somewhere [to the side], giving ear to the things being reported by the *smārta*.

If his report is not accurate, the investigators themselves should remind the *smārta* of what has been heard, or they themselves may state it correctly.

Although the LDhP stipulates that he be a brahmin, his authority reflects that of the king. Even as the appointment of the *smārta* attests to the role of Brahmanical learning in defining Dharma, the king's personal authority acts, by means of the *rājapratidinidhi* and indeed the investigators, to keep the learned doctor of jurisprudence mindful of the empirical evidence. I wonder whether the author intended somewhat playfully to make this point in stanza 26 when he says that, in case of misreporting, the investigators "should remind the *smārta* of

what has been heard” (*smārtaṃ... smārayeyuḥ śrutam*), playing on the sacred and mundane senses of *smṛti* and *śruti*!

In any case, this court apparatus reflects very well the nuanced balance of authorities in this legal process: It is the king who fulfills his *rājadharma* by appointing a qualified brahmin Dharma scholar to ensure that the trial will be in accord with principles rooted in the priestly tradition. At the same time, he sends a deputy to monitor the process, under a pretence of anonymity, and to interfere when necessary through silent gestures of disapproval. Yet even here, the ‘higher’, sacred authority dictates that this role too should be played by a brahmin.

6.2 The Maratha Courts

One of the first Hindu states for which we have detailed court records is the Maratha state. After declaring himself independent of the Bijapur king and having himself enthroned in 1674 with Vedic ceremonies, Śivājī reconstructed the old judicial system of the Islamic Bahmanis and their successors in the western Deccan, giving it a Brahmanical makeover. The old *rakhtākhānā* (of which he had earlier been a member as *jāgirdār* in the Bījāpur government) he remade as a *rājamaṇḍala* or *rājamudrā*, a department within the *dharmasabhā* (which however continued to be known more commonly as the *huzūr hāzir majlis*, i.e., the judicial assembly of the Sultanate period), which was convoked to hear major cases (see YSm vyav. 1–3). Śivājī also appointed two special officials who reported directly to him: the *nyāyādhiśa* and the *paṇḍitarāva*³⁴.

As under the Bahmanis, the Marathas recognized the authority of the *brahmasabhā* and the *jātisabhā*. These groups were said to exercise, respectively, *deva-daṇḍa* or *brahmadāṇḍa*, and *jātidaṇḍa* (or *gotādaṇḍa*), as opposed to the *rāja-daṇḍa* exercised by the judicial assembly. *Brahmadāṇḍa* took the form of *prāyaścittas* prescribed to purge the sin; following this, the offender had to serve a meal to a

34. The *nyāyādhiśa* “should have jurisdiction over all religious matters. He should investigate the truth, by judging what is right and what is wrong. He should put the word *sammata* (‘approved’) on the judgement-deed, on all papers relating to conduct (*ācāra*), law (*vyavahāra*) and the penance (*prāyaścitta*)” (Kanūn Jabta, in AVV 1, p. 25; SL 4, p. 123; GUNE’s translation (1953: 111; cf. p. 32).

committee of his caste fellows; this *jātidanḍa* completed the correction and allowed his reacceptance in his community.

For penances, the case was routinely “handed over to the brahmins by the local public officers,” or the guilty party was sent to “visit the brahmins of the holy places directly, or with a letter from his caste people to the public officer, requesting them to purify him.” A fee or fine might be charged to be paid to the officiating brahmins. The offender was required to present a confession and statement of repentance (the ‘letter of guilt’, *doṣapatra*), and received upon completion of the penance a ‘letter of purity’ (*śuddhipatra*)³⁵.

Hence, in criminal cases, three distinct, parallel steps were envisioned: a secular punishment determined by the state; a religious expiation prescribed by a council of brahmins; and a social ceremony presided over by a caste-based committee, which served as a confirmation that the prescribed penance had been properly performed. The fact that this process was sanctioned and coordinated by the state should not lead us to view the religious element as indistinguishable from the secular: the *majlis* had no direct authority to prescribe or enforce a *prāyaścitta*. Ultimately, it was the *jātisabhā* or *gotā* that decided on a further penalty (*ghaṭasphoṭa*, the social equivalent of capital punishment) if the penance was not performed. Moreover, the use of the term *brahmadanḍa* or *devadanḍa* to designate *prāyaścitta* ought not to be taken as blurring the distinction between punishment and expiation: it is a purely analogical use of the word *danḍa*. It is merely a way of highlighting the parallel roles of the three bodies empowered to prescribe a remedy, each remedy for a separate purpose.

6.3 The Nepali Courts

A very similar pattern is found in the legal system represented in the *Mulukī Ains* (royal legal codes) of 1854 and 1888, of Rāṇā-period Nepal. In fact, it may have been brought to Nepal by the Marahaṭṭa brahmins, who trace their origins to Maharashtra³⁶. As in the Maratha state, the king had ultimate authority, which he could delegate to his Prime Minister and other authorities. Most cases were in fact heard by a variety

35. GUNE 1953, p. 113; examples of such documents are provided.

36. MICHAELS 2005: 11–13.

of lower courts of justice, such as the *bhārādāri kausal* (Court Council). Such courts consisted of senior members of the Rāṇa's family and civil and military officers, as well as royal priests (*rājagurus*). However the latter accounted for only a small minority. Of the 219 members of the *kausal* set up to compile the first *Ain*, only 30 were brahmins.

The post of *dharmādhikārin*, on the other hand, was given to a brahmin pandit learned in Dharmaśāstra – that is, an authorized expert (*adhikārin*) in the Dharma. His main role was to prescribe *prāyaścittas* in cases of purity violations and loss of caste. The particular focus of his duties is aptly stated in the order of appointment of Vijayaraj Pandey as *dharmādhikārin* in 1845, which includes a virtual job description:

- [7] ...āphnā śātirajāmāsita bhara mulukakā cāra varṇa chatīśai jātakā
 [8] bhāta pānī saṃsarga ra chinako kurā pakṣa jāci bujhi śāstra herī
 yathokta
 [9] pāri chin anusāra bheṭi dhakṣiṇā lū pūrjīmā chāpa lagāi anusāra
 [10] prāyaścita dinyā kāma gara...

Perform your duty of granting *prāyaścitta* by stamping the writs, showing your sympathy to the people of the 4 *varṇa* and [36] castes (*jāt*) all over Nepal after examining [in cases of violation against the rules of commensality] the matter of cooked rice, water, contamination and the final decision of the courts (*china*) enquiring and consulting the religious texts and collecting the gifts and offerings according to the final decision of the court.

This jurisdiction limited to purity violations is confirmed by the observations of Brian Hodgson, the British Resident during 1833–1843: “In such matters only has the *dharmadhikari* concern”³⁷.

The *Mulukī Ain* (MA) of 1854 broadly maintains the distinction between *khat* (punishment meted out by the state) on the one hand, and *prāyaścita* (expiation) and *patiyā* (rehabilitation) on the other. For instance, a *pūrji* (a writ or certificate of rehabilitation) can be issued for a criminal – including one who has had illegitimate sexual or commensal contact – only after the punishment (*khat*) has been undergone; yet if the

37. These passages, and the translation from the Nepali of the order of appointment, from MICHAELS 2005: 13–15.

offense was unwitting (e.g., if food was taken from a person whom one did not know to be impure or degraded), no punishment is necessary before proceeding to a *patiyā*. In other words, even without constituting a punishable crime, the act still has karmic and hence social consequences.

7. Conclusion

The fact that both in Dharmaśāstra and in legal practice a dual system of remedies persists from antiquity down nearly to modern times should be seen to confirm several things. First, in both theory and practice, a distinction was made between secular (or civil) offenses and ritual offenses – that is, between ‘crimes’ and ‘sins’, although many offenses may be both at once. This distinction corresponds to a dual institutional structure according to which secular punishments were handed down and carried out primarily by the king or his agents, while religious remedies were prescribed and administered, and compliance certified, by a distinct set of brahmin authorities. In a future publication, I will address the implications of this dual structure for an analysis of authority in this system.

This distinction holds even in cases where a punishment is made to act as an expiation, or where an expiation simultaneously satisfies the need for a punishment, or where the state may be asked to intervene with further penalties if the offender shows himself unrepentant. And in general, the degree of convergence of the two systems is exaggerated, with a single verse being cited over and over again to clinch the argument³⁸. I have shown that this verse, *Manu* 8.318, can be properly understood only in light of the preceding verses, which state that the purificatory force of the punishment lies in the sinner’s demand for punishment, which converts it into a form of expiatory self-discipline³⁹.

38. Recent examples are WEZLER 1995: 122 and fn. 124; MICHAELS 2005: 59. Michaels further lists a number of passages to illustrate that “the death penalty was generally recognised as expiation (*prāyaścitta*), especially if it took the form of a suicidal penance-unto-death” (p. 22). But the passages he lists are simply expiations leading to death, in which the wrong-doer is the willing agent.

39. This point has not been sufficiently noted in earlier studies, such as FÉZAS 1989/1990.

The distinction is also reproduced in legal practice known to us. In the *smārtavicāra*, even the investigative phase of the trial reflects this dual authority, which is founded on the separate yet complementary criteria of śāstric principle and procedural correctness. The Maratha and Nepali court systems employ a similar division of labor.

In all these cases – in the śāstras, in the Kerala trial, and in the Maratha and Nepali courts – the third body, the caste council with its power of ostracism, might be judged to bridge the secular and the spiritual spheres of the king and the brahmin. The ostracism is a ritual matter in that it is concerned with the impurity incurred by the offender, and its capacity to contaminate the family and larger social group; it is a worldly matter precisely because it is a social consequence of a sin. It must be noted however that the state's perception of guilt is not the decisive factor that would lead to ostracism. Rather, it is the public awareness of the ritual violation of purity. Hence, the *jātidanḍa* or *patiyā* should be treated as the social sequel to the expiation, rather than as a truly secular measure.

The whole system is boxed and wrapped up in Brahmanical paper; it is constructed as religious and simply 'Dharmic' in the end, insofar as the only check on the king himself is Dharma and the automatic sanction of karma: he cannot be punished; he can only perform expiation. He has administrative and executive authority in legal process, but that authority in turn is justified by the transcendent authority of the Veda as embodied in pious, learned brahmins. The result is a systemic counterpoint of royal and brahmin legal authority that is intentionally religious in character, but this should not obscure the outlines of the distinct components of the system.

Abbreviations

ĀpDhS	<i>Āpastambadharmasūtra</i> (OLIVELLE 2000)
ArthaŚ	<i>Kauṭīliya Arthaśāstra</i> (KANGLE 1969)
BGS	<i>Baudhāyanagr̥hyasūtra</i> (SHAMA SASTRI 1920)
EI	<i>Epigraphia Indica</i>
GDhS	<i>Gautamadharmasūtra</i> (OLIVELLE 2000)
LDhP	<i>Laghudharmaparakāśikā</i> (UNNI 2003)
Manu	<i>Mānavadharmasāstra</i> (OLIVELLE 2005)
NSm	<i>Nāradasmṛti</i> (LARIVIERE 1989)
TB	<i>Taittirīyabrāhmaṇa</i> (GODABOLE 1934–1938)
VDhS	<i>Vasiṣṭhadharmasūtra</i> (OLIVELLE 2000)
ViSm	<i>Viṣṇusmṛti</i> (KRISHNAMACHARYA 1964)
YSm	<i>Yājñavalkyasmṛti</i> (KHISTE & HOŚINGA 1930)

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