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# CORPUS IURIS SANSCRITICUM
## ET FONTES IURIS ASIAE MERIDIANAE ET CENTRALIS

A Series on Social and Religious Law
edited by Oscar Botto

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*Scientific Committee*

# THE ROOTS OF
# HINDU JURISPRUDENCE

## SOURCES OF DHARMA AND INTERPRETATION
## IN MĪMĀṂSĀ AND DHARMAŚĀSTRA

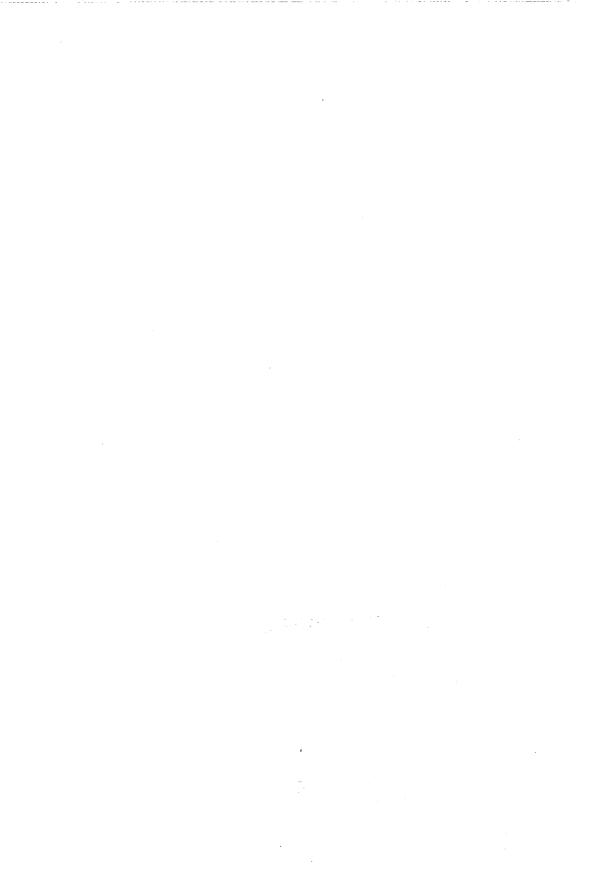by Domenico Francavilla

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Le pubblicazioni della Collana del Corpus Iuris Sanscriticum sono state presentate in occasione della riunione plenaria del XIIIth World Sanskrit Conference (Edinburgh, 10-14 luglio 2006), il più importante appuntamento congressuale per gli studiosi di discipline indologiche. L'entusiastica accoglienza della Collana da parte dei molti studiosi presenti è ulteriore testimonianza dell'alto livello scientifico e della diffusione internazionale che il Corpus Iuris Sanscriticum ha raggiunto nel volgere di pochi anni.

Il mondo accademico ha mostrato particolare apprezzamento soprattutto per il programma editoriale pluriennale della Collana e per il rigore metodologico con il quale viene svolto. Tale aspetto è stato sottolineato recentemente anche dal Prof. Richard Larivière, Provost and Executive Vice Chancellor, University of Kansas, il quale, nell'annuale valutazione presentata all'Union Académique Internationale, afferma con viva soddisfazione che "The progress of the series is indeed edifying" e ribadisce, nel giudizio conclusivo, che "The Commission expressed its satisfaction and gratification at the progress of the series".

<div align="center">*</div>

Il *dharma* è un concetto fondamentale del pensiero indiano che ha avuto e ha tuttora una profonda influenza sulla vita degli individui sia sul piano personale sia sul piano sociale. Non è pertanto limitato solo al campo giuridico, ma la sua normativa abbraccia tutti gli aspetti della vita della persona e del contesto sociale di appartenenza.

Tale ampia materia trae origine sia dai testi rivelati *(śruti)*, essenzialmente appartenenti alla letteratura vedica, sia da quelli composti e tramandati dall'uomo *(smṛti)*; infatti, in apertura, ogni trattato di *dharma* fa esplicito riferimento alle fonti utilizzate, pur senza indicare la teoria che soggiace alla scelta effettuata, importante tema che viene affrontato solitamente dal commentatore.

Lo studio di Domenico Francavilla intende trattare la definizione teorica e il fondamento di autorità delle quattro fonti riconosciute da Manu e Yājñavalkya, considerando anche altre opinioni al fine di evidenziare la discussione interna sull'autorità delle diverse fonti. Particolare attenzione è stata dedicata all'analisi dell'autorità della *smṛti* e del *sadācāra* (buone abitudini), che sono le due fonti cruciali per il funzionamento pratico del sistema.

<div align="right">Irma Piovano</div>

# Acknowledgements

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Introduction

# *Dharma*, law and culture

## Hindu law and jurisprudence

Every culture elaborates rules of behaviour that are justified within a
set of conceptions concerning human action in the world. This cultural
elaboration necessarily goes beyond the boundaries of a specialists'
elaboration. Nonetheless, the questions concerning the normative
sphere are dealt with in a specialised way by what is usually called
jurisprudence. In recent years, several authors have strongly remarked
the importance for legal studies of a "general" or "global" juris-
prudence, which could allow us to view side by side the different
jurisprudences that have been elaborated in different cultures. In this
perspective, jurisprudence and comparative law cooperate in order to
provide a better understanding of emerging complex conceptions and
practices of law.[1]

Within the wide scope of cultural elaborations of law that have
been developed in course of time, an important place, despite the
views on its purported dismissal in modern times, is occupied by
Hindu jurisprudence.[2] The expression "Hindu jurisprudence" is a
scholarly term that reflects the uncertainties affecting the expression
"Hindu law". These uncertainties are related, on the one hand, to the
history of the term "Hindu" and to the inherent pluralism that has
always characterised the Indian sub-continent and, on the other hand,
to the debate concerning the character of Hindu law as properly law.[3]

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1    See, for instance, Glenn (2000), Menski (2000; 2006), Twining (2000).
2    For an introduction to modern Indian jurisprudence, which takes into account
     Hindu jurisprudence, see Dhyani (2002) and Singh (2005). An extensive critique
     of the views arguing the "death" of Hindu law in modern times may be read in
     Menski (2003).
3    It is a well-known fact that the term "Indian" refers not only to Hindus but also to
     people belonging to other cultures that originated or had prominent manifesta-

Notwithstanding the inherent plurality of people, philosophies and religions that are included under the "Hinduism" label and their evolution in course of time, the expression "Hindu jurisprudence" may be defined making reference to a prominent tradition of thought, which has a definite identity and continuity. This is the tradition of thought that has been expressed with reference to *dharma* in the Sanskritic tradition, a plural tradition in itself but sharing different features and, more significantly, recognising itself as one.

This thought may be deemed as basically Brahminical, in keeping with the role played in India by these recipients of science and learning, and, therefore, it represents an elite elaboration.[4] However, some facts have to be taken into account in this regard. First, there have always been in India, as everywhere, conflicting philosophies and conceptions deriving from different cultural traditions and sub-traditions. Therefore, Hindu jurisprudence reflects the history of intellectual interactions, which is often a history of integration and further elaboration of originally competing views. Second, learned elaborations do not set aside the relevance of implicit or non-verbalised knowledge systems, which were and are diffused in many areas of Indian society. Third, the very same bearers of this tradition were aware of the existence of conflicting learned views and widespread conceptions of people and had an acute sense of their specific identity and role within the wider framework of Hinduism and Indian culture.

The above considered, it may be held that the Brahminical elaboration is the main elaboration of Hindu thought on *dharma*, be-

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tions in India, such as for instance Buddhism, Jainism and Islam, and to the many different people that inhabited the Indian Subcontinent. On the other hand, it has to be considered that the term "Hinduism" itself is a late term and that the concept of Hinduism is controversial. On this debate see Sontheimer and Kulke (1989).

4   Properly "Brahmanism" is a term denoting a main component of the history of Hinduism, which is strictly linked to Vedic knowledge and culture. On the several phases of Hinduism see Piano (1996) and Flood (1996). Hinduism has become in course of time a complex reality, but even if the so-called Neo-Hinduism movements, mainly connected to *bhakti* movements, are now probably the most important, Brahmanism is still one of the basic cultural components of Hinduism. The views we will analyse are mainstream Brahminical views. Their influence and role reflect the limits of influence and role of Brahmanism in Indian traditions.

cause properly Brahmins had the social role and the cultural instruments to *develop* a specific learning to be transmitted to following generations and to other parts of Indian society. In this sense, we will deal with a thought that is essentially Brahminical but, at the same time, reflects some basic features shared in other Indian contexts. In other words, we will deal with the Brahminical elaboration of shared problems.

An understanding of the origin and development of science and learning is the proper context for an understanding of juridical thought and jurisprudence as a part of this culture. Men in very ancient communities, very different from modern ones as concerns their size and features, elaborated their vision of life and developed a system of sciences, organising their knowledge on different aspects of human activities.[5]

The Veda has a prominent place in Hindu culture. As we will see in more detail later, the Veda is conceived as the entire valid knowledge, and in this sense it encapsulated an entire culture. The role of the Veda in Hindu culture is now largely debated. However, its centrality should be assessed from a historical point of view: the relevance of the Veda in Hindu culture, in spite of its progressively decreasing role in Indian society (Halbfass 1990b), is probably due to the centrality of Vedic thought in the early phase of Hindu civilisation. In fact, it may be argued that the entire system of sciences of this civilization was elaborated *through* the Veda. The ritual conception of life and cosmos embodied in the Veda is central in the elaboration of Hindu culture and in the development of sciences (Malamoud 1998; Smith 1994).

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5   For a periodization of Hindu law see Menski (2000) and, specifically on the literature on *dharma*, Lingat (1998) and Olivelle (1999). Many of the concepts we will analyse had their origin in the Vedic period and we will focus on their classical and post-classical elaborations. The very same continuity of the Hindu tradition could lead to several misunderstandings in comparative analyses. In other words, there is the risk to compare this tradition sometimes to Roman law and sometimes to modern natural law theories, or to compare ancient Hindu law with modern Western traditions, failing to acknowledge its own internal evolution. An important issue is the continuity of this system of thought in modern India particularly as regards the so-called reappraisal of tradition by modern Indian jurisprudence. Different views have been expressed on this topic. We cannot deal with this important question. For a brief introduction and further bibliographical references see Davis (2006a).

Every science was developed in connection to ritual, trying to provide the appropriate knowledge for the correct accomplishment of rites, which affect the relations of men at every level in an interconnected whole. In this context, grammatical science, etymology, logic and also other sciences, such as mathematics, astronomy or the science of construction are conceived, explicitly or implicitly, as *auxiliary sciences* of the Veda.[6] For instance, the origin of Indian theories of meaning and interpretation may be seen as closely linked to the necessity of an appropriate understanding of Vedic texts. In this regard, the importance and – we could say – the urgency of this understanding may be highlighted. Dealing with conflicts between sources of *dharma* we will analyse several arguments held to decide which kind of grains has to be used in a specific sacrifice. The extent of this discussion on grains is surprising only if we fail to recognise that the accomplishment of some ritual acts is part of a wider system of beliefs and practices: ritual thought and ritual action have to be seen as a whole. Hymns, rituals, philosophies, arts, and social practices formed an integrated system of beliefs and actions in which this culture expressed and progressively defined itself.[7]

Within the context of the birth and development of Hindu culture and system of sciences in the Vedic and classical period, a science regarding *dharma* arose and was elaborated. Certainly *dharma*, as we shall see, is such an overarching concept that to some extent everything can be reconnected to it in the Hindu tradition,[8] but in course of time there was a specialisation of discourse and of sciences dealing with this subject. The two sciences dealing specifically with *dharma*, even if with different aims and roles, were *dharmaśāstra* and *mimāṃsā*. This scholarly tradition represents in our view the core of

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6    Some sciences are significantly named "limbs of the Veda" (*vedāṅga*). For an introduction to Indian sciences see Flood (2003).

7    The anthropological literature on the relationship between practices and beliefs is huge; see, for instance, Geertz (1973) and the brief but challenging remarks of Wittgenstein (1979).

8    An original holism (Menski 2003) may be envisaged, as in other ancient legal cultures, and, as a result, many point of views are interconnected, from cosmology to theory of language, or from ritual science to law. By contrast, the specialisation of modern theories of law, particularly formalistic theories, may be noted.

Hindu jurisprudence. Their learned elaboration of discourse on *dharma* should not be assumed as the whole picture but, on the other hand, should not be underestimated (Halbfass 1990a; 1990b).[9]

The Sanskrit term *śāstra* may be meant as a science and a teaching (Pollock 1989). Olivelle (2005: 41) explains:

> 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.

*Dharma-śāstra*, in its wider sense, is the science and teaching of *dharma*, dealing with questions concerning behaviour that one should adopt and, thus, the way to carry on one's own life. The *dharma-śāstra*, meant in this broad sense, was part of a wider system of learning. In fact, following the *trivarga* scheme, a basic division in the *śāstra* is made between *dharma-*, *artha-* and *kāma-śāstra*. There was also a *mokṣa-śāstra* and actually every subject could be the object of a *śāstra*. Knowledge is selected, transmitted and diffused in a society, becoming culture (Cavalli Sforza 2004). Therefore, the *śāstra* may be viewed as a whole integrated cultural system, or, in other words, as an encapsulation of Hindu culture.[10]

Indian culture was very early a learned culture, and in course of time knowledge was certainly managed by consolidating it in written works. Similarly to Western traditions, and differently from other legal traditions, Indian thought developed an elaborated science of

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9  On the relationship between learned cultures and non-learned cultures see Rouland (1988). Every culture expresses a class of administrators of legal or religious knowledge. A separate study should be carried out on the internal rules of these classes and, particularly, on access to them. In Hindu traditions, broadly speaking, this is a privilege and a *svadharma* of Brahmins.

10  We will deal in more detail with this classification of the *śāstra* reflecting the conceptualisations of *trivarga* and *caturvarga* when we will deal with the concept of *dharma*. It is worth nothing that also *smṛti*, recollection or tradition, as well as *śāstra*, is a general term applied to different fields of knowledge.

duty. If certainly every society has its law, it cannot be said that every society developed a science of law. At least, different levels of elaboration are possible depending on the complexity of cultural and social environments.[11]

The *dharmaśāstra,* in a broad sense, is made up of a huge amount of texts, including different kinds of literary genres. More specifically, when we talk of *dharmaśāstra* we are used to making reference to a specific class of texts. However, in many cases the term *dharmaśāstra* is used as a more general term including also the *dharmasūtras*, which have specific features but in most contexts may be equated to the *dharmaśāstras*. On the other hand, this is a vast literature, including also texts such as the *grhyasūtras*.[12] A further distinction is made between *dharmaśāstras* and *bhāṣyas*, commentaries. The Indian tradition may be seen as a "commentary civilisation", that is to say a civilisation that evolved through continuous reference to previous tradition. A further and late category of texts is represented by the *nibandhas*, which arrange by topic texts of different works on *dharma*. In its broader sense the *dharmaśāstra* may be understood as including all these works dealing with *dharma*, irrespective of classification of literary genres. We will follow this use, wherever appropriate, because it allows us to see the *dharmaśāstra* as a whole. Particularly, in our view, it is misleading to make neat distinctions between *dharmaśāstra* texts and commentaries.

*Dharmaśāstras* have been often viewed as *legal* texts and as the *object* of interpretation, carried on primarily by commentators (Lingat 1998). In our analysis we will argue that the *dharmaśāstra* itself, as a

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11  See Sacco *et al.* (1999) for a discussion on the effects of social complexity on the evolution of learned legal cultures. In comparative law systematics a key indicator concerns the existence and characters of legal science (Mattei and Monateri 1997). It may be asked whether the Indian legal science has peculiar characters. Certainly, it is a highly formalised science, as shown by the hyper-detailed classifications that it has elaborated. However, it allows a large scope to informal processes of ascertainment of rules. Moreover, the "informal" aspects of Hindu jurisprudence should be distinguished from the informal aspects of Hindu law as a whole. In this sense, we can have a very formalised legal thought and very informal living laws, considering also the huge variety of local laws included in Hindu law.

12  On this literature see Kane (1962-1975) and Derrett (1973). Particularly, on the origin of *dharmasūtras*, the relationship with other ancient *sūtra* texts and the differences with *dharmaśāstras* see Lingat (1998: 18-19 and 73-77).

whole, is a kind of jurisprudential system, and particularly that the *dharmaśāstras* texts themselves have an interpretative character under two aspects.

First, they deal with *dharma* through the help of every means of knowledge deemed as authoritative, including also non-textual sources, and are conceived as the outcome of interpretation of other sources. As we will see in more detail later on, the term *dharmaśāstra* may include also practices and models of behaviour, meant as non-written and non-verbalised knowledge of *dharma*. However, the *dharmaśāstras* elaborated, taught and transmitted particularly what could be considered as worthy of reflection and preservation. For certain, the *dharmaśāstrins* themselves were aware that their work did not include all legal phenomena. Although sensitive towards customs, their aim was not to elaborate and teach every minute customary rule, but those rules, embodied in customs also, that to the highest degree could be considered authoritative and established, if not eternal.[13]

Secondly, *dharmaśāstra* are the outcome of the evaluation of dharmic questions carried out by learned men, experts of *dharma*. They are doctrinal works composed to state which are the dharmic rules of behaviour, always taking into account several views and opinions. An evolution of this literature may be envisaged considering the increasing complexity of these views and the arising of divergent voices (Olivelle 1999).[14] In this sense, the kind of work carried on by commentators is not neatly distinguished and distinguishable from the work of authors of *dharmaśāstra* texts.

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13  This seems a common character of doctrinal legal thought and may be seen also in European historical experience, particularly in the *ius commune* grounded on the *Corpus Iuris Civilis* and in natural law theories, including their modern manifestations. In other words, the legal science, as science, focuses on the "truth" of law, and then deals with its supposedly permanent characters. Interestingly, this attitude affects the teaching of law. However, this does not set out the great relevance that doctrinal works had for practical laws. For the relevance of doctrinal works for codification see Gambaro-Sacco (2002) and Cavanna (1982). For an extensive theoretical and historical analysis see Lombardi (1967).

14  See also the new edition of Manu by Olivelle (2005), where a historical approach to the text is suggested. For general stimulating remarks on the relationship between *dharma* and history see Davis (2004a), Piantelli (2000) and Glenn (2000).

The *mīmāṃsā* is strictly linked to the *dharmaśāstra* and their origins should be searched for in the same context of learning (Kane 1962-1975). *Dharmaśāstra* is the part of the *śāstra* dealing specifically with *dharma*, and the Mīmāṃsā is the philosophy whose peculiar subject of investigation is *dharma*. They carried out an ongoing process of elaboration of *dharma* both as rules and as theoretical instruments. Their extent and role, however, are different, and while *dharmaśāstra* is meant to teach about *dharma*, the Mīmāṃsā, as a more theoretical science, is concerned with the epistemological investigation into the nature of *dharma* and the ways to know it. In this sense it can be argued that Hindu jurisprudence, which in this context may be meant as the science of *dharma*, is made up of a theoretical and a practical jurisprudence.[15]

The Mīmāṃsā is one of the six philosophical systems in which Brahminical thought is organised.[16] The Sanskrit term used to denote a philosophical system is "*darśana*", which literally means "vision", "view". In this conception a fundamental unity legitimises different views of reality. As a result, even if the six philosophical systems deeply diverge on several points and inasmuch as discussions between philosophical traditions have always been very heated in the Indian context, they are conceived as connected in a whole or, at least, so presented in an attempt to systemise and organise views which could seem otherwise unconnected. From a different perspective, it may be held that the six philosophical systems represent as a whole a Brahminical tradition of thought and compete with other Hindu and non-Hindu philosophies, such as, on the one hand, the materialistic schools of the *nāstikas* and, on the other hand, Buddhist and Jain philosophies.

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15  Concerning the relation between *dharmaśāstra* and *mīmāṃsā*, it is possible to see a broad correspondence to the specialisation between *usul-al-fiqh* and *furu-al-fiqh* in Islamic law (Weiss 1992). In this perspective, the *mīmāṃsā*, meant as theoretical jurisprudence, seems closer to the *usul-al-fiqh*, while the *dharma-śāstra*, more concerned with rules, would be the *furu-al-fiqh*. In other words, the *mīmāṃsā* seems less concerned with the elaboration of rules but it lays down the theoretical groundings and the instruments used by other interpreters.

16  See Tucci (1981), Glasenapp (1988) and Radhakrishnan (1989). The term "*mīmāṃsā*" derives from the root "*man*" and means investigation, deep effort of reflection (Verpoorten 1987). This etymological meaning seems strictly connected to the meaning of other concepts in different traditions, such as *ijtihad*, interpretative effort, in the Muslim tradition.

The six philosophical systems are usually conceived as three couples: *Nyāya-Vaiśeṣika,* *Sāṃkhya-Yoga* and *Pūrva Mīmāṃsā-Uttara Mīmāṃsā.*[17] These are all complex philosophies but, summarising at the extreme, they are usually described in the following terms: *Nyāya* is characterised as the study of logic and reasoning, *Vaiśeṣika* deals with the classification of the experience's data, *Sāṃkhya* deals with the physical aspects of world constitution, *Yoga* developed techniques aiming towards liberation on the basis of a complex macrocosmic and microcosmic symbolism. The *Pūrva Mīmāṃsā* is philosophically connected to the *Uttara Mīmāṃsā,* best known as *Vedānta,* which, along with the *Yoga,* is the Indian philosophy that has received more attention in the West. Their relationship, as indicated by the very same name, is defined from the logical priority of the *Pūrva Mīmāṃsā,* former analysis, compared to the *Uttara Mīmāṃsā,* latter analysis.[18]

The two Mīmāṃsās, like all the orthodox *darśanas,* have a soteriological basis but a basic difference between the two is that in the first one the path towards liberation is ritual action (*karman*), while in the latter it is the knowledge (*jñāna*) of *Brahman.* This distinction is reflected in two alternative denominations, which are frequently used to denote the two systems: *Karma-mimāṃsā* and *Jñāna-mimāṃsā.* Having different perspectives, their views are normally conceived as not mutually exclusive, notwithstanding many divergences on several topics they deal with.

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17  On the origin of the six systems see Jha (1964: 1 ff.), according to whom this classification in six systems has been codified only in the XIV century. According to the same author, it would be more correct to distinguish only three systems, each one being a couple of two complementary systems. See also Raju (1985) and Radhakrishnan (1989).

18  As observed by Radhakrishnan (1989: 374): "The Pūrva Mīmāṃsā is so called because it is earlier (pūrva) than the Uttara Mīmāṃsā, not so much in the chronological as in the logical sense. Its central problem is ritual, even as that of the Uttara Mīmāṃsā is knowledge of the truth of things. The entire Veda, excluding the Upaniṣads, is said to deal with dharma or acts of duty, of which the chief are sacrifices. The performance of sacred rites is normally the prelude to the pursuit of wisdom. Even Śaṅkara, who insists on the radical opposition between karma and jñāna, allows that good karma, in this or in an earlier life, is the cause of the desire for truth". On the complex relationship between Kumārila and Śaṅkara see Jha (1964).

The *Pūrva Mīmāṃsā* specifically deals with *dharma*, particularly with its knowledge, and was elaborated within the reflection on the ritual and the interpretation of Vedic texts. According to Jha (1964), only in a late period did the Mīmāṃsā elaborate a complete philosophical reflection dealing with topics such as *mokṣa*, *ātman* and the existence of an external world. However, these themes were analysed in a perspective aiming to support the primary investigation into *dharma*.[19]

As with all the *darśanas*, the Mīmāṃsā is a *tradition* and it is formed by a set of schools. Certainly it is not the outcome of the speculative work of a single outstanding figure, inasmuch of course as major *mīmāṃsakas* are identified. It may be seen as a sort of self-nurturing *corpus*, continuously elaborated and innovated making constant reference to previous works. The oldest treatise is the collection of *sūtras* attributed to Jaimini, the *Pūrvamīmāṃsāsūtra*, which may be dated in the fourth-fifth century B.C. There is no doubt that Jaimini himself is the compiler and arranger of a system of thought previously developed.[20] Jaimini's *sūtras* are divided into 12 *adhyāyas*, partitions that may be meant as books or chapters. Each *adhyāya* is composed of usually four parts, which are called *pādas* (feet). Another internal division of *sūtras*, which was added to the original divisions by Śabara (Verpoorten 1987), is that of *adhikaraṇas*. An *adhikaraṇa* institutes a systematic relationship within a group of *sūtras*, by virtue of their joint consideration for the discussion on a specific issue.

The first *sūtra* of Jaimini's text, which may be translated as "Here starts the investigation into *dharma*", makes clear from the beginning

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19  According to Glasenapp (1988: 109) the main contribution of the Mīmāṃsā should be searched on the methodological level and concerns investigation and teaching. In fact, aiming to ascertain the meaning of texts, the Mīmāṃsā developed a method that represented the model for other philosophical systems. On the contrary, as concerns the content level, the aim of this school was simply to define the *dharmas*, the religious duties, as found in the Vedic injunctions. In this view, it was only later on that the attacks against the authority of the Veda, which constituted the ground of the whole system, led the *mīmāṃsakas* to deal with other philosophical questions.

20  On authors and works of Pūrva Mīmāṃsā, including the early phase, see Verpoorten (1987). According to Verpoorten, the work of Jaimini should be dated around 450-400 B.C. On the problem of the relationship of the Mīmāṃsā with the early *dharmaśāstrins* see Kane (1962-1975).

the subject of Mīmāṃsā's investigation.[21] The first *adhyāya* of the *Pūrvamimāṃsāsūtra* deals with the means of knowing the *dharma*. Particularly, we may find an analysis of ordinary means of knowing, where it is shown that they cannot be of any use with regard to the knowledge of *dharma*. The infallible authority of the Veda is then established as a source of knowledge of *dharma*. The other *sūtras* of the first *adhyāya* basically deal with the relations between sources of *dharma* and with the issue of the authority of different parts of the Veda. After this preliminary *adhyāya*, Jaimini proceeds in the following eleven to expose in detail the principles for the interpretation of Vedic texts.

The *Pūrvamimāṃsāsūtra* of Jaimini is the point of reference for further development of this philosophical system, which was progressively enlarged and detailed through much interpretative work. In fact, Jaimini's text is accompanied by a commentary (*bhāṣya*) composed by Śabara, probably belonging to the first century B.C., which in turn was commented on by Kumārila and Prabhākara, probably both belonging to the VII century A.D.[22] The *mimāṃsakas* develop their views on the basis of what was stated before them by the predecessors of the school. We have then a sort of double level of interpretation: the discussion on the principles of interpretation is carried on through the interpretation of the Mīmāṃsā *sūtras* themselves. Of course, this does not mean that Mīmāṃsā lacks creativity. Even within the bounds of tradition, the *mimāṃsakas* deeply innovated through the interpretation of *sūtras* and previous views. On the other hand, the extent of the debate within this tradition is shown by the fact that schools and sub-schools emerged.

The Mīmāṃsā method is prominently dialectic.[23] A subject under investigation is analysed through several steps: first of all, the issue is presented (*viṣaya*) and the arising doubts are laid down to provide a

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21  See Jha (1983). See also the commentary of Kumārila on this verse in the *Ślokavārttika*.

22  Their teachings created two different schools. For details about the two main school of Mīmāṃsā and information about the late commentators of Kumārila see Verpoorten (1987).

23  The formalisation of the steps of discussions that have to be undertaken is clearly a common feature of different theories. For instance, it could be interesting to compare the methods of glossators, on which see for instance Cavanna (1982: 142-143).

basis for discussion (*saṃśaya*). Then the discussion is developed through the exposition of a preliminary opinion, or *prima facie* view (*pūrvapakṣa*), the reply to the arguments adopted in the *pūrvapakṣa* that leads to a further deepening of the question (*uttarapakṣa*) and, finally, the conclusion, which presents the established view (*sid-dhānta*).[24] Actually, as observed by Verpoorten (1987: 9-10), this process may be viewed as basically dual. The *adhikaraṇa* begins with the *sūtra* and continues with the subject of the investigation (*viṣaya*), which in most cases is a quotation taken from the ancient literature about ritual. According to Verpoorten, the *viṣaya* is the real subject of the discussion, more than the *sūtra*, which is moreover a "title" to go into the discussion, but it seems more correct to say that the *sūtra* is interpreted recalling at the beginning of the discussion a series of examples that will be used during the discussion. In any case, the introduction of the discussion is normally very brief and the entire argumentative process is developed through the dialectics between *pūrvapakṣa* and *siddhānta*.

The *pūrvapakṣin*, who holds the preliminary view, presents one or more views of the problem to support his opinion, and the *siddhāntin*, who holds the established view, discuss them till the accepted con-clusion, which normally is the opposite of the preliminary view, even if some arguments may be accepted. In many cases arguments are interwoven and the process, although following codified lines is quite free and diversified.[25] Probably, the "preliminary opinions", which normally are considered as opinions of a "man of straw", are not manneristic opinions introduced simply to allow the argumentation to reach the final result, and may be seen as evidence of the existence of dissenting voices on certain points. Then they show the vitality of a philosophical debate with prominent dialectic features.

The Mīmāṃsā elaborated views and methods that have been used in other spheres also. Particularly, the Mīmāṃsā, having elaborated a complete theory of language, has many connections with the gram-marians' schools, as regards subjects as well as conclusions. In addi-

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24  See Lingat (1998: 149), whose analysis is based on Kane (1962-1975).
25  Usually *pūrvapakṣa* and *siddhānta* are embodied into different *sūtras* and the commentaries follow this exposition.

tion, it is remarkable that key Mīmāṃsā terms are key terms in grammatical science also.[26]

The Mīmāṃsā's peculiarity may be found in the context of Vedic ritualism and in the capacity of diffusion of ritual thought.[27] Jha (1964) remarks that all the examples are drawn from the ritual context and were well-known to students in the period in which the *sūtras* of Jaimini were composed, while, later on, the disappearance of many rituals condemned Mīmāṃsā to decline.[28] However, the principles for the interpretation elaborated by the Mīmāṃsā continued to exercise their influence in all matters involving the interpretation of authoritative texts with a normative character.[29] Lingat (1998: 149), elaborating on Colebrooke's remark according to which the very same method of discussion of Mīmāṃsā presents some close resemblances with method used from jurists to clear a point of law, observes that this could be enough to explain the fact that the Mīmāṃsā is the school from which and within which interpreters learned the forms and methods of argumentation.

Interpreters found in the Mīmāṃsā a collection of distinctions, rules of interpretation of terms and sentences, principles of systematic construction, which could be widely used in their arguments (Lingat

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26  For instance, *vidhi*, which is a rule, and *vikalpa*, which is an option. On Indian grammatical science and on mutual influence between branches of Indian culture see Staal (1982).

27  As concerns the origin of the Mīmāṃsā within the complex system of knowledge elaborated in connection to the Veda, Radhakrishnan (1989: 374) writes: "The beginnings of the Mīmāṃsā may be traced to the Veda itself, where it is used to denote doubt and discussion regarding the rules of ritual and doctrine... Doubtful cases led to the elaboration of rules that helped to a knowledge of the way in which the sacrifice was to be performed. The many problems about interpretation were discussed and decided as they arose, and these decisions are found scattered in the Brāhmaṇas". On the other hand, this focus on the ritual sphere has produced a lack of *appeal* in modern times, as is well shown by the opinion of Radhakrishnan himself (1989: 428-429), who criticises the centrality of ritualism and its mechanical character.

28  See Jha (1964: 8) for some attempts that have been made to explain the Jaimini principles (*nyāya*) through examples drawn from practices that were current among Hindus in a later period.

29  On this point, particularly as concerns legal literature, see some examples in Jha (1964: 323 ff.), particularly concerning the Privy Council, mentioned also by Ayyar (1952).

1998). Concerning the extension of these principles beyond the strict ritual sphere, Lingat (1998: 149-150) argues:

> It is true that the word *dharma* as understood in Mīmāṃsā is merely the ritual act, and that the Vedic injunction is only studied with a view to the correct execution of rituals; but the transposition of ideas was the easier for the fact that under the orthodox doctrine the rule of conduct which conforms to *dharma* takes its own source, directed or presumed, in the Veda. Likewise the Mīmāṃsā rules of interpretation found a domain of application ready-made in the *śāstras'* precepts concerning Good Custom and penances. But even in what concerns the rules of a specifically juridical character which go to make up the *vyavahāra* chapter(s), the extension of this method to the texts of *smṛti* was in no need of justification. The regulation of disputes is presented by the *dharma-śāstra* authors as a sacrificial act, or as if it were a sacrificial act, the rules of which must be scrupulously observed under pain of sin.

This passage depends basically on the fact that ritual, in Hindu contexts, is not a limited component of life, but a general model of existence. The conceptual structures elaborated with regard to rites may then be generalised and do not remain limited to the sphere of ritualism in a strict sense.

In fact, the tradition acknowledges great relevance to the Mīmāṃsā as concerns the elaboration of principles of interpretation and of the forms of legal or practical reasoning that were widely used by commentators.[30] Most modern authors hold that it is impossible to discuss problems concerning Hindu law without knowing the Mīmāṃsā system and that the *dharmaśāstrins*, experts of *dharmaśāstra*, are always *mimāṃsakas*, experts of *mimāṃsā*, even if there is a sort of differentiation by function, which on the other hand would be reflected in the composition of the *pariṣad*.[31]

Thus, many elements lead to think that the science of Mīmāṃsā was held as "an indispensable science for the interpreter" (Lingat 1998: 148). This indispensability may be justified through a sort of

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30  On the influence of Mīmāṃsā on commentators and authors of digests see Lingat (1998: 142-175). In Lingat's view interpretation is one of the factors explaining the passage from *dharma* to law.

31  See Lingat (1998: 148), who quotes Manu XII.3, Baudhāyana I.1.1.8 and Vasiṣṭha III.20. On the *pariṣad* and its functions as an assembly deputed to decide on doubtful cases see Ayyar (1952).

cultural bound, or, in other words, a bound of cultural coherence. The interpretative methods allowed that the texts of the *śāstra*, which are perceived as connected to Vedic revelation, can be elaborated only within the same cultural context.[32] Dealing with Medhātithi's discussion on criticism against the Veda we will see that an important distinction is drawn between legitimate investigation grounded on the acceptance of the authority of the Veda and investigations that, on the contrary, do not accept the authority of the Veda and, as such, are not legitimate.

However, the current perception of the *mimāṃsā* as strict hermeneutics of Vedic texts that came to be used by commentators is, in our view, a quite narrow and misleading perspective. Particularly, the opinion of Lingat seems misleading when focusing on the ritual character of the Mīmāṃsā and its concentration on textual exegesis. In this view, the Mīmāṃsā is basically a method elaborated to interpret Vedic texts and its specific role in the system of Vedic knowledge is to assure the proper accomplishment of sacrificial acts. This statement seems to be true only as concerns Jaimini. Mīmāṃsā had an internal evolution and it is not just an ancient fixed science, renewed by commentators. As we will see, in medieval Mīmāṃsā texts, examples have a much wider scope. In addition, from a methodological point of view, one should avoid thinking that only what was written in texts existed. After Jaimini, the *mimāṃsakas* themselves seem to consider on the same ground some rites having a Vedic origin and social practices they had before the eyes. On the other hand, also *dharma-śāstras* and commentaries retain in course of time a prominent ritual character.

Further, Lingat (1998) makes of *mimāṃsā* a science of interpretation that has been used by commentators working on *dharma-śāstra* texts, following in this sense the totally Western and modern scheme of the interpretation of statutes, and thus almost suggesting that interpretation became relevant only at a certain point of time. In

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32  In this regard, a very interesting point is the inherence of some interpretative principles to a corpus of norms. Could we say that, to the extent in which some ancient texts may have a modern relevance, the mīmāṃsā principles should be still applied? Are those principles operative in some way in modern judgements on Hindu law, pronounced by courts that have adopted other systems of thought? On this point some interesting general remarks may be found in Lariviere (1989b) and Fuller (1988).

our view, on the contrary, as we said – and this is one of the main theses we will argue – the *dharmaśāstra* texts are the outcome of interpretation and, letting alone the distinctions between literary genres, the whole *śāstra* is an interpretative enterprise.

Authors of *dharmaśāstra*, commentators, and authors of digests reflect in their work a *conceptual structure* that is basically that one elaborated by the Mīmāṃsā. In the *dharmasūtra* of Gautama (I.4), for instance, it is stated that when there is conflict between two equally authoritative texts it is possible to choose among them. This is plainly a principle elaborated and justified by the Mīmāṃsā. We may find many other examples of the fact that Mīmāṃsā underlies *dharma-śāstra* works.

As we are going to see, Medhātithi, one of the main commentators of the *dharmaśāstra* of Manu, commenting on verse II.6 concerning the sources of *dharma*, answering to a question about why Manu did not explain the reasons for which the entire Veda is a source of *dharma*, says that it was not the task of Manu to provide those explanations, given the nature of his work, and who wants to know the "why" and "wherefore" of those conclusions may be instructed by the Mīmāṃsā (Jha 1999: 187). This seems to be a confirmation of the purported concentration on texts. However, we will see that actually the Mīmāṃsā elaborated a theory of sources of *dharma* in which non-textual sources are fully taken into account.

## *Dharma* and law

The *dharmaśāstra*, as the science of *dharma*, aims to elaborate and transmit the knowledge of what has to be done on the basis of a definition of appropriate behaviour in different contexts. But, to what extent is it justified to speak of an Indian or Hindu *legal* science? To begin with, it may be remarked that inevitably different thoughts coalesce in legal discourse, even when purportedly it has been emancipated from religion and philosophy. As we said at the beginning, it is important to consider the reflection on *dharma* as connected to an entire culture. The *dharmaśāstra* texts embody philosophical views, which could hardly be considered as a separate corpus of knowledge, because *darśanas* were part of this very same culture. The

relevance of the *Mimāṃsā-darśana* is explicit and apparent, but also other *darśanas* permeate the works of the *dharmaśāstra.* For instance, the Sāṃkhya cosmology may be envisaged as the basis of the first *adhyāya* of Manu.[33] In addition, the Uttara Mīmāṃsā, and then Upaniṣadic thought, is present in *dharma-śāstra* works, particularly in those parts concerning *mokṣa.* This is to say that different cultural innovations where gradually included in the mainstream elaboration on *dharma* developed in the *dharmaśāstra.*[34]

Probably, asking whether the science of *dharma* is philosophy or theology or legal science is the kind of question that already conditions the answer.[35] Leaving aside on this occasion strict comparative cautions, the *dharmaśāstra,* meant broadly as the science, doctrine and teaching of *dharma* may be thought of as a parallel of *iuris prudentia,* meant as an "ars boni et aequi" (Piantelli 2000). Inasmuch as the definition of goodness may radically change in the Hindu context – as we will see, it is basically related to an idea of appropriateness –, the definition of righteous behaviour is a crucial and common task. Certainly, law may not be reduced to a set of philosophies of religions, but the *scholarly* elaboration of *dharma,* as well as of *ius* or *nomos* or even *shari'a,* was made of philosophies and religions, i.e. elaborated visions of life and action. They could, more or less, influence living law but in no case could they be deemed as unimportant. They did what they were meant to do in the legal

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33  Wendy Doniger (1991) has remarked that the cosmology at the beginning of the *Manusmṛti* is inspired by the views of this *darśana.* This fact points out the coherence between the *darśanas* and the *dharmaśāstra* and, in a different regard, the character of the *Manusmṛti* as a complex cultural text. On the other hand, Medhātithi in his commentary on Manu II.1 (Jha 1999: 157) states that what is included in the first *adhyāya* is of little use for the knowledge of *dharma.*

34  A cultural analysis should anyway show how different views emerged and closely related with each other, and how this culture was continuously elaborated and transmitted to future generations and diffused over competing cultures.

35  Interpretation and legal reasoning mirror the problem of definition of *dharma* as law or religion. Some authors, such as Glucklich (1988), speak of "religious jurisprudence". As concerns the relationship between religious interpretation and legal interpretation, it may be remarked that in both cases literary interpretation is particularly important, due to the tendency on the part of interpreters to treat legal texts also as sacred texts. On the contrary, typical tools of religious jurisprudence seem those aiming to extract rules from narratives. In this regard the interpretation of the *Mahābhārata* may provide many examples.

process. Moreover, legal science is one of the formants of law and may have different grades of relevance in different contexts.[36]

However, the question is whether or not the object of this science, that is, *dharma*, is law. Usually it is stated that there is hardly a coincidence between *dharma* and law. The problem of the relationship between *dharma* and law is an important theoretical problem, which on the other hand often leads to imaginary questions. The point is that the term "law" has always to be kept in one of its several historical dimensions, and, when we cope with the problem of the *dharma*-law relationship, we are somehow asking ourselves to manage an onto-logical concept of law (Allott 1980). There is no globally agreed definition of law (Menski 2006) but multiple kinds of laws, which interact and melt in different ways in different contexts. In this sense *dharma* may well be considered as a kind of law that, in various classical and modern Indian contexts, interacts with other kinds of law.

A further remark may be made concerning the problem of the meaning of *dharma*. The problem of meaning and translation is re-lated to the problem of definition, and this adds some more questions. First, comparative legal scholars (Gambaro-Sacco 2002) are aware of the fact that inter-cultural translation is a difficult task even for seem-ingly easy cases, such as the translation of the term *"contrat"* from French into the English "contract". Provided that the two terms clearly may be mutually used preserving their core meaning, in some cases they refer to different facts, so that a specific legal transaction would be a *contrat* but not a contract. Dealing with general terms such as law and *dharma*, which have received different conceptualisations in course of time, this aspect becomes even more relevant.

The wide semantic scope of the term *dharma* makes it hardly translatable into Western languages. The famous translation of Manu's treatise on *dharma*, the *Mānavadharmaśāstra*, presented by Bühler in 1866, has the title of "The Laws of Manu", and the French translation by Loiseleur-Deslongchamps, "Lois de Manou" (1833). Wendy Doniger in her recent translation (1991), which preserves the title of Bühler's translation, translated the term *dharma* depending on

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36   As regards the existence of a class of jurists in ancient India, see Kane (1962-1975). On the meaning of "jurisprudential law", meant as "doctrinal law", see Lombardi (1967) and Sacco (1991).

the context, using several English terms, such as "religion", "law", "justice", "duty", "right", "religious merit".[37] It may be argued that in any context all these meanings are present, even if one of them can emerge as primary and the others remain in the background of the complexity of the semantic spectrum.[38] Patrick Olivelle, whose translation of four important *dharmasūtras* is presented as a translation of "The law codes of ancient India", justifies his choice to translate *dharma* as "law" with the following words:

> The term *dharma* may be translated as 'law' if we do not limit ourselves to its narrow modern definition as civil and criminal statutes but take it to include all the rules of behaviour, including moral and religious behaviour, that a community recognizes as binding on its members. (Olivelle 1999: xxi)

These examples show the difficulty, both linguistic and cultural, of the concept of *dharma*. Even if there are some difficulties that cannot be

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37 As explained by the translator herself, this choice is justified from the exigency to provide to English readers a readable text, translating every Sanskrit word. As concerns the complexity of the semantic spectrum of the term *dharma*, Doniger (1991: lxxvi) observes that "As for the many other meanings of *dharma*, one would really need a Venn diagram, encompassing all of human life, to do justice to it; let me at least remind the reader of A. K. Ramanujan's wise caution (in his essay, 'Is there an Indian way of thinking?') that words, particularly Sanskrit words, particularly words like *dharma*, are always context-sensitive".

38 As we will see, Medhātithi explains the term *dharma* making reference to two basic meanings, including religious merit. An interesting question that could be further investigated in connection with the meaning of the term *dharma* is the relationship between primary and secondary meanings of terms, which is a topic widely analysed by Indian philosophers. For instance, according to the Mīmāṃsā's theory of meaning, an 'inclusive' hierarchy exists between the different meanings of a word, so that, even if a specific meaning is the appropriate one in the context of a specific sentence, the other meanings are not totally set aside and may help in the interpretative process. From a different perspective, it may be remarked that, according to the theory of meaning elaborated by the Mīmāṃsā, a term denotes an individual through a class. This means that, even if many or endless individuals may be denoted through the same term, the use of that specific term denotes them under a common aspect. In our view, it is possible to hold that the term *dharma* defines different actions through a common aspect, which could be "what has to be done and is conducive to welfare" or "what protects". In this sense, it appears that *dharma* could be seen as a qualification of actions.

overcome in Western languages, it has been remarked (Menski 2003) that the translation of the term *dharma* as "law", despite the critical awareness of scholars, tends to convey the misleading message that the concept of *dharma* is identical to the concept of law and that texts on *dharma* are "law codes", and, thus, to suggest and justify, even unintentionally, a positivist interpretation of Hindu law.

The problem of the relationship between *dharma* and, on the one hand, the law, and on the other hand religion, is made complicated by the difficulties to define, even in Western contexts, what is law and what is religion. It is not surprising that a term of such cultural relevance and wide semantic scope as *dharma* is hardly definable, as well as the term "law" can mean so different things. In any event, when the problem of the relationship between *dharma* and law is laid down, it is important to be aware of the concept of law that is assumed in this comparison. For instance, Lingat (1998: x) neatly distinguishes between *dharma* and law, but he grounds his discussion on a defini-tion of law as "the totality of precepts or rules of conduct to the observance of which it is permitted to constrain a person by exterior or physical coercion",[39] a very restrictive definition that could be ques-tioned in the very same Western traditions.

The "classical" problem of the definition of *dharma* as law is that many difficult issues arise if we consider the relationship between law, strictly meant, and other normative orders. A reason for the difficulty in the understanding of the concept of *dharma* is that it is necessary to make a distinction between definitions that may be provided from a scholar analysing the meanings in which the term is used in texts, which necessarily elaborate somehow on the relationship between *dharma* and several normative orders, i.e. religious, ethical, social and legal orders, and the definitions elaborated within the tradition itself, in which those distinctions have no sense at all, while they indicate other distinctions whose relevance is often hidden and difficult to grasp. In other words, the difficulty to define *dharma* derives both from the fact that "it disowns – or transcends – distinctions that seem essential to us" and from the fact that "it is

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39   Lingat (1998: x, at note 1) borrows this definition from Aubry and Rau.

based upon beliefs that are as strange to us as they are familiar to the Hindus" (Lingat 1998: 3).[40]

In this cultural context, the different spheres of human action, that is, the ritual, the ethical and the social spheres, are not distinguished. However, in ancient traditions law always coalesces with other normative orders. As observed by Olivelle (1999: xxxviii),[41] these spheres appear as separated only to the modern mind, while it was not so in the Indian traditional way of thinking, where the ritual, moral, and social spheres are seen as a *"continuum"*. As a result, in normative texts, the term *dharma* is used with a wide "spectrum of meanings":

> It is dharma that provides the guidelines for proper and productive living and for social organization and interaction. It includes social institutions such as marriage, adoption, inheritance, social contracts, judicial pro-cedure, and punishment of crimes, as well as private activities, such as toilet, bathing, brushing the teeth, food and eating, sexual conduct, and etiquette. (Olivelle 1999: xxxviii-xxxix)

In this regard, it may be remarked that this normative *continuum* is held together through the fundamental idea of appropriateness, according to which every individual, acting on the basis of his or her own *dharma* meant as the appropriate action for a given person in a given context, takes part in the conservation of order, and gains for himself or herself a spiritual benefit. Lingat (1998: 4), referring to the ethical conception embodied in *dharma*, writes:

> Its foundation and its sanction are religious, but it is essentially social in 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.

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40  Even if the concept of *dharma* is an overarching concept it has to be remarked that, dealing with *dharma*, theorists elaborate other distinctions such as that between *vaidika* and *laukika* acts, which can be understood only within this peculiar context.

41  Olivelle (1999: xxxviii) writes: "Like the related term *karma* ('action'), *dharma* was at first, and in the Brahmanical tradition continues to be, associated with the ritual. As *karma* is primarily ritual action, so *dharmas* are the rules of correct ritual procedure. As the semantics of *karma* widened to include moral/immoral actions, so *dharma* came to include norms of correct behaviour within both the ritual and the moral/social spheres".

However, there are, broadly, two different views on the relationship between *dharma* and law. In one view, it is highlighted that, considering the extension of the concept of *dharma*, it is improper to distinguish between legal norms and other kinds of norms. In this sense, law, in a strict sense, is part of *dharma*. In the other view, *dharma* is, so to say, the origin of laws, and remains extra-legal. In this regard, the description of the relationship between *dharma* and law provided by Lingat (1998: x-xi) is very interesting. In a long but important passage he writes:

> In building up their law the Hindus have not taken as their starting-point that element which has served in the West as a foundation for a specific discipline, namely the coercive element, which characterises a legal rule and distinguishes it from other rules which also control human activity. They have derived it from a more general notion which exceeds the domain of law in many respects without actually comprehending it entirely: duty. They did not attempt specially to define rules which people may be constrained by an external or physical sanction to observe and which amount to specifically juridical duties. They relied on religious concepts peculiar to the Hindu world, and they taught people the rules of conduct which they ought to observe by reason of their condition in society – and amongst these rules the rule of law has to be found. The word *dharma* which is translated here "duty" in effect expresses conformity with what Hindus regard as the natural order of things, and this explains its association with law. But the rule of *dharma* can only become a rule of law by a process beyond the expression of it, a process which enables it to enter society armed with a power of constraint which is not inherent in it.

Thus, *dharma* is an inclusive concept but, nonetheless, something more is required for the passage from *dharma* to law, that is, a coercive character. As we will see, in Lingat's view, *dharma* becomes law through the work of interpreters, political power and customs.[42]

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42  Other opinions may be quoted in this regard. In the Indian traditional society, which was characterised by a continuity of normative spheres, there was a unitary conception of the science of "righteousness" (Derrett 1994) or of the "whole of the duties of man" (Jha 1964). According to Derrett, it is fallacious to reduce *dharma* to law in a strict sense but it would be fallacious also to create an arbitrary distinction between these two concepts, making them theoretically two

Generally speaking, a common view is that in the Hindu tradition an equivalent of law should be searched for in the concept of *vyavahāra*, meant as legal procedure, or in that of *artha*, meant as polity, providing the most proximate concept to the modern secular concept of law. However these views are debatable to the extent in which they aim to draw too neat distinctions. As we will see, *artha* is connected to *dharma*,[43] and, even more significantly, with the concept of *rāja-dharma*, the *dharma* of the king.[44] In *dharmaśāstra* and *arthaśāstra* we find the same conception of the duties of the king. Therefore, the relevance of *dharma* for *arthaśāstra* is clear. The point here is that the opposition between secular and religious law, in this context, is misleading (Menski 2002).[45]

In our view, these theoretical problems should be dealt with considering that what we call law is part of a wider framework related to human behaviours and forms of life. A firm starting point is to assume, as a basis for the analysis, the rules and to consider phenomena of origin of rules and questions such as "how to decide what to do" or "who decides what for whom". In this way it becomes easier to consider the historical separations and conceptualisations of rules as law, ethics and religion. Law, meant as a coercive instrument, is a historical emergence in definite traditions. It is not something ontologically different, but rather a further specialisation of a system

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separate bodies. However, the elaboration of *dharma* makes other distinctions providing an internal organisation to the subject. The basic one is that between *ācāra, vyavahāra* and *prāyaścitta*.

43 The relationships within the *caturvarga* has not to be underestimated. In this view we have a coherent learning on the four aims of man, which is made of several parts but is actually perceived as a whole. On the other hand, a hierarchy is possible only between parts of the same system.

44 *Dharmaśāstras* such as the *Manusmṛti* include some parts of the *arthaśāstra* (Olivelle 2005). In this regard, the aspiration to totality of Manu may be considered, and then the intention to include all the relevant knowledge. This aspiration to totality parallels the aspiration to universality, as we will see dealing with the problem of universal or particular authority of *smṛti* texts.

45 It should be remarked also that the centrality of the concept has the effect that in many contexts it is assumed, implicit (Menski 2003). From a different perspective the conceptual underpinnings of *dharma* could be assumed as "legal postulates" in the sense of Chiba (1986), whose relevance for comparative law is specifically emphasised in connection with Asian and African legal systems by Menski (2000). For a comparative approach to other cultural concepts underlying traditional laws see May (1985).

of rules, which makes sense in the light of definition of law as a set of norms laid down by a State. *Dharma* may be seen as a culture-specific concept of normativity (Menski 2000; 2003), a peculiar manifestation of law, which conceptually and historically interacts with other kinds of laws.

Apart from its all-encompassing nature, a further reason of the highlighted difficulty in the understanding of the concept of *dharma* is that is has been the object of many elaborations in different epochs and in different cultural environments. In fact, its relevance is not limited solely to Hinduism, being on the contrary fundamental indeed also in Buddhism and Jainism.[46] Further, the concept of *dharma* presents several different aspects within Hinduism itself, given its internal variety both diachronically and synchronically (Halbfass 1990a; Olivelle 1999).

The plurality of cultural elaborations that the concept of *dharma* has received makes arise the problem of the existence or less of a basic central core in its meaning. In this regard, an influential view is that of the prominent Indologist Wilhelm Halbfass (1990a: 333), according to whom:

> We cannot reduce the meanings of *dharma* to one general principle; nor is there one single translation which would cover all its usages.

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46  Buddhism and Jainism are two prominent philosophical and religious traditions in Indian history. In the work of Kumārila and in the commentary of Medhātithi on Manu there are many references to Buddhism; the pan-Indian centrality of the concept of *dharma* constituted in this case a factor favouring communication. The centrality and primacy of the concepts of *dharma* resulted in a variety of elaborations depending on different philosophical schools or social groups (Olivelle 1999: xxxvii). Thus, one thing is the *dharma* of *bhakti* and a different thing is the *dharma* of orthodox Brahmanism. In addition, one thing is the *dharma* as elaborated in the Nyāya School of philosophy, and a different thing is the *dharma* of Mīmāṃsā, at least in the details of their elaboration, which nonetheless may have far-reaching consequences. Of course, this variety may be observed also diachronically. For instance, there is a shifting of meanings from Jaimini to Śabara. The result is that the wide semantic scope is amplified by the different elaborations of the concept. For a comparison of the elaboration of the concept of *dharma* in the Mīmāṃsā and in other schools see Maitra (1978). A very relevant issue is that of influences and mutual recognition between different contexts in which the concept of *dharma* has been elaborated, and moreover of the resulting internal evolutions of the concept. On the influence of Buddhism on Brahmanism in this regard see Olivelle (2004).

> Nevertheless, there is coherence in this variety; it reflects the elusive, yet
> undeniable coherence of Hinduism itself, its peculiar unity-in-diversity.
> There is no *one* system of understanding *dharma*, but a complex net-
> work of interactions and tensions between different usages. Various
> groups and movements ... have reinterpreted it in different ways, and
> they have used it in order to challenge the "orthodox" core of the
> tradition ... It is easy to argue that *Mīmāṃsā* and *Dharmaśāstra* do not
> represent the totality of the Hindu tradition; but it is also easy to
> underestimate their central and paradigmatic role.

The dharmic system, in Mīmāṃsā and *dharmaśāstras*, as we will see
in more detail later, is certainly rooted on the existence of a
supersensuous effect of actions.[47] At least in this context the concept
of *dharma* cannot be separated from the concept of *karman*. However,
the strength of *dharma*, as a central concept in Hindu law, lies in the
fact that it is a concept of order that influences human behaviour even
if purified from the neatly soteriological implications, which it re-
ceives in the prominent elaboration of *dharmaśāstra* and Mīmāṃsā.

The idea of the appropriateness of action depending on the
context, as well as the idea of the existence of a series of relations in
which men have to carry on their own life, has a cultural specificity
involving also those who do not believe in the mechanism of *karman*,
or in the identity between *Brahman* and the Self, nor adhere to one of
the many devotional movements, or sects, of *bhakti* which prevail in
contemporary Hinduism.

Hinduism is hugely inclusive and may express a series of
religious laws, meant as expression of religious communities, which
may be largely different and regulate all a series of behaviours, from
food rules to sexual intercourse rules. The elaboration of the concept
of *dharma* by Brahmanism has to be viewed as one among the many
possible elaborations, even if culturally relevant. What is really impor-
tant is the unifying capacity of the concept of *dharma* in Hinduism.

In this book we will focus on the elaboration that the concept of
*dharma* has received in the Mīmāṃsā and in the *dharmaśāstra*, as a
coherent whole at the basis of what we call here Hindu jurisprudence.
Moreover, we will deal with a series of problems concerning the

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47  In fact, the key to understand the Mīmāṃsā is probably a theory of action. On the
    implications of the theory of action on Mīmāṃsā's theory of interpretation see
    Matilal (1971).

knowledge of *dharma* and the system of the sources, having as reference the elaboration they received in the works of some specific, although prominent, *dharmaśāstra* and Mīmāṃsā authors. However, in our view, this should not be considered a historical subject. In fact, starting from a very *specialised reflection*, carried on within a tradition that was culturally dominant in ancient India, it is possible to understand the progressive elaboration of ways to think about legal experience that arrives directly into the contemporary epoch.

Even if Hindu law, as based on the concept of *dharma*, is perceived as a law of saints and gurus without any influence, if not a negative one, in a modern society, it is grounded on a conceptual structure that goes well beyond the relevance of a specific manifestation of Hindu religiosity. Modern Hindu law, which is an official component of the Indian legal system, is not completely detached from traditional Hindu law. Therefore, the problems we are going to analyse affect modern Hindu law as well. Moreover, although different opinions exist in this regard, the concepts we are going to analyse play a wider role in the reflection concerning the modern Indian socio-legal system.[48]

## At the roots of Hindu jurisprudence

After the above introductory remarks, we may introduce the main topic of this study. The subject of this book is the theory of sources of *dharma* as developed in Hindu jurisprudence. Authors of works belonging to Sanskrit juridical literature, such as *dharmaśāstras*, commentaries and *nibandhas*, and, more generally, all the interpreters dealing with questions concerning *dharma*, assume in their work a theory of the sources of *dharma*. This theory is the outcome of an in-depth investigation into the basis of authority of different sources, the actual relevance of each source in the process of ascertaining *dharma*

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48  An extensive analysis is developed by Menski (2003). As a matter of fact, the concept of *dharma* is referred to in Indian modern public discourse. An example is provided by a speech Indira Gandhi held in 1975 (quoted in Naipaul 1977). After having stated that law has to be an instrument of social justice, she added that this was clear in the past, when forefathers stated that society had to uphold *dharma* so that *dharma* could uphold society.

and the issues arising from their relations, for instance in case of conflict. Therefore, the principal aim of this work is to analyse the concepts and methods that are at the roots of the work of interpreters and, more generally, of the functioning of Hindu law.

*Dharmaśāstra* texts simply state which are the sources of *dharma* and do not make explicit the theory underlying these lists. However, an extensive discussion on these themes may be found in commentaries on *dharmaśāstra* verses where the sources of *dharma* are expounded. For instance, Medhātithi deals with the theoretical problem of the authority of the sources of *dharma* while discussing the meaning of Manu's verses II.6-15.

An even more detailed discussion of questions concerning the sources of *dharma* may be found in the works of the Mīmāṃsā, whose system of thought underlies śāstric works. In fact, in the commentary of Medhātithi on Manu II.6 (Jha 1999: 187) we find the following statement: [49]

> It might be asked why no reason has been given [by Manu, why and how the entire Veda is the root of Dharma]; but our answer is that this is a work in the form of Precept, and as such states well-established conclusions; and those persons who seek after the 'why' and 'wherefore' of these conclusions are instructed by *Pūrvamimāmsā*. We have already said that this work is addressed to persons who are prepared to learn things from Precept alone.

We will analyse the theory of sources of *dharma* as reconstructed mainly through an analysis of Medhātithi's commentary on Manu II.6-15 and of the *smṛtipāda* of the *Tantravārttika* of Kumārila Bhaṭṭa, a

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49  The fact that Medhātithi says that works such as the *Manusmṛti* are devoted to persons who are able to learn from precept alone makes arise a difficult issue as regards the addressees of this work. In fact it seems that according to Medhātithi such works, being made of well-established conclusions may be deeply understood only by persons who have an adequate learning of underlying concepts and problems, including the Mīmāṃsā. Therefore the *smṛti* literature, at least in the case of dharmaśāstra should be seen as a scientific work in which, so to say, the main "scientific results" are consolidated in a concise way. On the other hand, Medhātithi states that these works are devoted to those who cannot know the *dharma* from Veda. A way to cope with this seeming conflict is to state that also cultured people, particularly in modern times, may be in the position of the patient with regard to Vedic revelation.

pivotal text in the Mīmāṃsā philosophical tradition. The *smṛtipāda* is the section of the *Tantravārttika* dealing with the authority of *smṛti*, but including a discussion on the authority of other sources and of other theoretical questions having a large relevance to understand the functioning of Hindu law as a whole. Other relevant *dharmaśāstra* and Mīmāṃsā works will be taken into account.

Then, which are the sources of *dharma*? In Hindu normative texts several lists of the sources of dharmic rules may be found.[50] Among these lists, those included in the verses II.6 and II.12 of the *Manusmṛti* are probably the best known, due to the prominent importance of the text in which they can be found. Another very relevant list is that provided in Yājñavalkya I.7.[51] These lists, which are very similar but not identical, recognise four sources of *dharma*: Veda, *smṛti*, *sad-ācāra* and *ātmanastuṣṭi*.

In the next chapters we will deal with the meaning of these sources and their cultural elaboration. Nonetheless, a brief description of the basic meaning of those terms may be provided here. Veda is the *śruti*, literally: what has been heard, which may be meant as revealed word. The form of Vedic direct revelation is hearing by some inspired and mythical people, the *ṛṣis*.[52] *Smṛti* literally means "what is re-membered", and is thus conceived as recollection or memory of the revealed truths. Texts belonging to this category constitute what is usually called Tradition. To the *smṛti* belong, first of all, *dharma-*

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50  The lists of sources of *dharma* may be found in most cases in *dharmaśāstra* literature which is a part of the wider literature included under *smṛti*. For a collection of verses relating to the sources of dharma, see the comparative adhyāya in Jha (1999). What is called the traditional system of sources of *dharma* has been developed in course of time from Vedic period to its modern reformulation, starting from the colonial period. For modern sources of Hindu law, including traditional sources of *dharma,* see Desai (2004) and Diwan (1993).

51  For a short description of *Manusmṛti* and *Yājñavalkyasmṛti* see Lingat (1998: 77-100). Specifically on the *Manusmṛti* see now Olivelle (2005) and also Doniger (1991: lviii-lxi).

52  All the quoted texts make reference to the Veda, while other lists, such as Manu II.10, speak of *śruti*. The term Veda as such means "valid knowledge", while *śruti* means what has been heard, and thus cannot be properly viewed as synonyms. However Veda, meant as text, is the *śruti*, meant as Revelation, and the two terms are equivalent in most contexts, even if sometimes *śruti* is under-stood as a more general concept than Veda.

*śāstra* and *dharmasūtra* texts. Properly belong to the *smṛti* also *itihāsas* and *purāṇas*, which nonetheless sometime are assimilated to Vedas. *Ācāras* and *ātmanastuṣṭi* are the non-written level of sources of *dharma*. The *sadācāras* are normally seen as customs, practices of virtuous men who are learned in the Vedas and normally act according to the Vedas. This source is basically made of models of behaviour held to be normative by reason of qualities of persons who live according to those models.[53] *Ātmanastuṣṭi* is properly the sense of inner satisfaction, contentment, approval deriving from appropriate action in a given context. This inner contentment of the self is viewed as evidence of the act being dharmic.

The Sanskrit term for "source of *dharma*" is *dharmamūla*.[54] Literally we should talk of "roots of *dharma*", but the metaphor of sources is widely used and prevalent. The way in which this term must be understood is made clear by Medhātithi in a passage in which he states that "root" must be interpreted as something that "makes known" (Jha 1999: 180). The rule of *dharma*, in this view, may not be created but may be only known. Therefore, *dharmamūlas* are properly means of knowing the *dharma*, or sources of knowledge of *dharma*. As a result, the discussion concerning the *dharmamūlas* is properly an epistemological question.[55]

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53  As we will see, a complex interpretative issue exists on the difference between *ācāra*, *sad-ācāra* and *śiṣṭa-ācāra*.

54  The term *"dharmamūla"* does not occur in Manu II.12, where we find *lakṣaṇa*. *Lakṣaṇa* is also the word we find in Jaimini I.2, which, in my opinion, could be viewed as an equivalent of Manu II.12. The term *mūla* is also impaired with the term *pramāṇa*, which is adopted in an epistemological context.

55  Analysing in more detail the definition of source of *dharma*, and of source of knowledge of *dharma*, it has to be remarked that in general jurisprudence a distinction is made between two meanings of "source of law". In a first sense, a source is that which creates a rule, while in a second sense a source is that through which knowledge of existing rules may be obtained. In the context of our analysis the expression "source of knowledge" should be considered as a peculiar one. The rule of *dharma* is not created and may be only known, but the knowledge of dharmic rules may have two aspects, one resembling the creative phase and the other resembling the information process. In other words, a *smṛti* rules could be seen as a source of knowledge of a *śruti* rule, which by turn is a source of knowledge of *dharma*, but in a different sense. Adopting a pragmatic point of view, however, a *smṛti* text may be viewed as a source that creates rules while stating that it simply recollects an ever-existing rule that was revealed in a distant past through the Veda.

A second aspect should be distinguished as concerns the authority of sources of *dharma*, that is, the authority of *specific* texts or practices. In fact, if the accepted *mūlas* may be three or four, texts belonging to *smṛti*, for instance, are a huge literature having different values. Further, as we will see, from a certain point of view every single injunction (*vidhi*) could be considered a *mūla* by itself. The total amount of texts held to be authoritative in a given moment in a certain context may be held as the Hindu canon. In this regard two remarks may be made. First, the peculiar relationship between *smṛti* and *sadācāra* would suggest inclusion of dharmic practices themselves within the canon. Secondly, this canon was conceived as open and differentiated. Belonging to one of the *dharmamūlas* may be under discussion, as in the case of *Atharvaveda*, which was not universally accepted as belonging to *śruti*, or of *dharmaśāstras* that were actually composed by some authors but not accepted as authoritative. Therefore, if the *smṛti*, for instance, is held to be authoritative generally *as a source of knowledge* of *dharma*, the interpreters had to cope with the establishment of what could be actually viewed as belonging to authoritative *smṛti*, and further to ascertain different levels of authoritativeness within a single *smṛti* or the totality of this literature.[56]

Lists of sources of *dharma* may present some variations which, in any event, in the *dharmaśāstra* literature never affect the Vedas. For instance in Baudhāyana's and Āpastamba's *dharmasūtras* there is no mention of *ātmanastuṣṭi* and the principal role is recognised to customs.[57] The tradition elaborates and transmits not only the rules of behaviour but also the accepted indicators of those rules. Therefore, an extremely important issue in the Hindu context, as well as in other contexts, is *who* decides what is authoritative and what is not, who

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56  Processes of cultural transmission involve mechanisms for some texts to gain a major authoritativeness in certain contexts and, as such, become strong attractors, while other texts, or also practices, which may have had some relevance in certain contexts could be set out in course of time. As concerns the *dharmaśāstra* literature these processes are strengthened, in our view, by the fact that some texts include substantial parts of other texts. In this regard, it is also interesting that Parāśara states that his *smṛti* aims to supersede other previous *smṛtis* (see Lingat 1998: 158-159).

57  See Olivelle (1999). On the other hand, the fact that the *ātmanastuṣṭi* is not explicitly listed does not involve necessarily that it was disregarded.

establishes which are the sources of *dharma*, and on the grounds of which arguments. This is one of the main tasks of Hindu jurisprudence.

In the following chapters we will start analysing in more detail the concept of *dharma* and the general problems concerning the knowledge of *dharma* (chapters 1-2). Then, we will analyse the arguments that are discussed in order to establish the authority of each source (chapters 3-5). Special attention will be paid to the authority of *smṛti* and *sadācāra*, which are the two crucial sources in the practical functioning of the system. In the chapter dealing with the authority of Veda, we will analyse the basic features of the interpretative method developed by the Mīmāṃsā. We will also consider distinctions between *smṛtis*, particularly the heterodox *smṛtis* of *Bauddhas*, and the conditions that are laid down to recognise the actual authority of a specific work belonging to the *smṛti* or of a specific *sadācāra*. Then, we will consider the problem of conflict between different sources of *dharma*, and this will be also a way to further deepen the question of authority of sources in the practical functioning of this system (chapter 6). Finally, we will deal with the problem of the universal or particular authority of sources and, at the end of our analysis, we will try to broaden our view and take into account some more aspects of the complexities of Hindu law as a whole (chapter 7).

# PART I

# THE SEARCH FOR *DHARMA*

Chapter 1

# A dharmic cosmology

## Sustaining the world

The problem of the knowledge of *dharma* is clearly connected to the way in which *dharma* is understood, for the means of knowing depend on the characters of what has to be known. Certainly *dharma* is not a stipulative concept at its origin. It is a conceptualisation based on the perception of order of things and human self-understanding.[1] This conceptualisation has been developed through progressively differentiated and complex views. As a result, many views and learned elaborations of *dharma* have been developed in India. Mīmāṃsā and *dharmaśāstra* offer a specific, yet prominent, elaboration of the concept of *dharma*, which is reflected in the theory of knowledge of duty they elaborate.

Therefore, it is necessary to highlight the conceptual foundations of *dharma*, grounded on cosmological assumptions that we will analyse beginning with the description provided by classical Indology.

Given the many difficulties involved in the definition of the concept of *dharma*, a good starting point for its understanding has been assumed to be its etymological meaning. The term *dharma* derives from an Indo-European root *dhṛ-*, which expresses the action of sustaining, upholding. From the same root derived, for instance, the Latin *firmus*, "firm", "stable". Halbfass (1990a: 317) remarks:

> The meaning "upholding", "maintenance" can certainly not account for all specific usages, and for the historical changes and ramifications

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1 An investigation into the conceptions of normativity could not avoid taking into account the way in which they derive from cosmological intuitions. Different early conceptualisations in ancient cultures could be assumed as a basis for the analysis of the origins of cultural diversity.

associated with the concept of *dharma*. But if there is a source of mean-
ing, or a semantic focus towards which the various usages converge,
then it is the "etymological" meaning of "upholding". This basis also
accounts for a certain elusive coherence of the various functions of
*dharma* in such different areas as cosmogony and ethics, ritualism and
ontology, and in the different traditions of Hinduism, Buddhism and
Jainism.[2]

On the basis of this etymological meaning, according to Lingat (1998:
3), the most general definition of *dharma* is "what is firm and durable,
what sustains and maintains, what hinders fainting and falling", and,
particularly with reference to the universe, the "eternal laws which
maintain the world" (*id.*). Therefore, *dharma* would consist of an ob-
jective order, inherent to the nature of things themselves, an order
necessary to the preservation of the world. In this sense, the dharmic
order is superior to the deities themselves, who have no authority and
are subjected to it as well as humans.[3]

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2    Halbfass (1990a: 317), remarking that in the Ṛgveda we may find several
     expressions deriving from the root *dhṛ-*, which makes reference to the idea of
     separation, adds: "The idea of a primeval opening, separation, holding apart is of
     extraordinary importance in Vedic cosmogony, and it remains a significant,
     though often forgotten presupposition in later developments".
3    Also Piano (1996: 22) defines *dharma* recalling the etymology of the term:
     "[dharma] is at the same time something fixed, stable, firm, which does not
     change and does not end, and the 'form' of things, their very same nature, i.e.
     that force which makes them as they are and not in a different way. *Dharma* is
     thus something similar to what we call 'law of nature', it is the eternal 'norm'
     and 'order' of both cosmos and individual and social life of human beings" [my
     translation]. Both Piano and Lingat (1998: 3) make reference to a passage in the
     *Mahābhārata* (XII.109.10-12) where the term *dharma* is explained as connected
     to the protection and maintenance of the universe. In this sense, Piano remarks
     that the etymology of Western scholars coincides with the Hindu traditional
     etymology of the word. The opinion of Lingat is explicitly criticised by Halbfass
     (1990a: 316-317), according to whom "the etymologizing interpretation, which
     explains *dharma* through *dhāraṇa*, 'supporting,' 'maintenance,' does not warrant
     R. Lingat's assertion that *dharma*, when applied to the universe, refers to 'the
     eternal laws which maintain the world' ... In the verse of the *Mahābhārata* to
     which Lingat is referring, *dhāraṇa* does not mean a supporting principle that is
     inherent to things, but rather a 'maintenance' and 'preservation' which is
     incumbent to man. In particular, this involves the ideal of *ahiṃsā*, of 'non-
     injury,' or 'the sparing' of living beings, which is here presented as the core and
     the essence of *dharma*".

The concept of *dharma* may be seen as a specific concept of "order". The way in which order is conceived may significantly vary in different cultural traditions and *dharma*, as a Hindu conceptualisation of order, has its specificity and peculiarity depending on some general characters of this culture. Malamoud (1998) has highlighted that in the thought of Brahminical India, sacrifice provides an *explanatory scheme of the order of the world*. In fact, Vedic authors, trying to interpret rituals, are led to built paradigms and classifications, rules and metarules. Specifically, some Indian philosophers have investigated the meaning of "ought" starting from the ritual formulas and, in the context of Vedic ritualism, have elaborated a concept of man as the only being who can be an agent in sacrifice. Therefore, the rite provided and provides an interpretation of reality. In connection with the rite were deepened some conceptions that preserved their cultural importance even in non-strictly ritual contexts. Thus, the reflection on *dharma* was carried on primarily in the ritual context and from this fact derives the specificity of the concept of "order" elaborated in the Hindu tradition.

From the Vedic to the contemporary epoch, the Hindu concept of order has been developed around the idea of a net of relations and interconnections on the macrocosmic and the microcosmic level. The Vedic original concept of order is *ṛta*, while *dharma* emerges as a central concept in a later period. The concept of *ṛta* is based on the perception of a natural order of things and is the macrocosmic order that manifests itself in the regularity of the cycles of the nature, in the succession of day and night, in elements perceived as constant in the manifestation of the world. The opposite of *ṛta* is *nirṛti*, disorder, the dissolution of connections that sustain the world and assure its conservation.[4] Malamoud remarks that *ṛta* may be defined as "absence of deficiency", "exact ordering", "differentiated plenitude", while *nirṛti*, the disorder, resides in intervals, in holes, in the absence of relationship, in the ending of differentiation and, then, in confusion.

The concepts of *ṛta* and *dharma* are grounded on a cosmological foundation. In this regard it is remarkable that the first chapter of the *Manusmṛti* presents a cosmological description that inserts the

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4   See Malamoud (1998: 55-56). The roots from which derives the word *ṛta* is the same one from which derives the adverbial form *aram*, "sufficiency".

teaching of *dharma* in a cosmological horizon.[5] The universe manifests itself through the differentiation of the undifferentiated absolute and tends to be reabsorbed into it, giving origin to a continuous cycle of manifestations and dissolutions. Therefore, in the cosmic process, the ordering is connected to a process of differentiation, while disorder, meant as confusion, preludes to return in an undifferentiated absolute. Man is not only an integral part of the cosmic order, but also an *active* part, in the sense that his actions contribute to the maintaining of that order.

On the other hand, we need to consider that the concept of order is understood not as static, but as a dynamic one, as a continuous "making order" rather than adaptation to a pre-existing and unchangeable order. Categories of eternity and unchangeableness are not related to the order but to the divine principle underlying the universe, which manifests itself as differentiation. Macrocosm and microcosm are intimately linked and the order of human actions is understood within the very same conceptual structure of the cosmological order. This unity is reflected in the rite, meant as an image of the universe and as a paradigm of "making order". It is through this *ritual* action, which can be meant as a way to communicate or be in relations with sacred spheres, that – it is held – man can influence the course of things and take part in the conservation of the world.[6]

In this conception, every man is immersed in a net of macro- and micro-cosmic relations and has to maintain the order through action. In this sense order is autonomously controlled by the individual, and this means that everyone has to do what is up to him to contribute to the maintenance of order. Therefore, properly order is continuously produced, it is the outcome of human activities. Order is conceived as *dynamic* because, differently from other natural law conceptions, it requires the activity of man for its very same existence.

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5    This cosmogonic introduction may be seen as evidence of the ambition and cultural complexity of the *Manusmṛti*. On the other hand, shorter and less ambitious texts on *dharma* belong to the same cultural environment, and, arguably, presuppose the same concepts.

6    In this sense, we can describe *dharma* as a natural order of relations in which every Hindu perceives himself as an active part, thus having a cosmic responsibility (Menski 2003).

In the most ancient Vedic texts the term *dharma* usually appears in the plural form and denotes certain activities and qualities.[7] As we said, in the context of Vedic ritualism there is not an "objective" world in which men live but rather a series of interconnections between every part of the cosmos. These connections are not given once for all – because the cosmos tends towards dissolution – and are built and nurtured from the activity of man, who in the ritual act works for the differentiation and the preservation of the cosmos. The idea of the existence of reciprocity between macrocosm and microcosm is a prominent one: cosmic and natural phenomena are perceived as connected to the ritual activities of man, and later on to his social activities also. Therefore, the concept of *dharma* is strictly connected to the concept of *karman*.

The concept of *dharma*, which is centred on the action of man, substitutes in the post-Vedic period the concept of *ṛta*, having more impersonal characters, while this latter assumes more specifically the meaning of truth. Even if it is difficult to trace the ways and the moments of this passage leading to ascribe to the concept of *dharma* some characters previously referred to *ṛta*, it could be argued that it occurred within the reflection on ritual. The dharmic action that produces the order tends to take an objective form and *dharma* comes to mean also order as the result of the action and order as the set of duties having the aim to maintain the order.[8] Moreover, in our view, the concept of *dharma* becomes objective and general because starting from *dharmas* of individuals it was capable to refer to the *sum* of dharmic positions. In this sense, *dharma* as a singular and general concept is the sum of peculiar *dharmas*. Therefore, the concept of

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7    See Halbfass (1990a). Olivelle (1999: xxxviii), following Halbfass, observes that in Vedic literature the term *dharma*, in the plural, is referred to the rules connected to the continuous upholding of the world and therefore "... it did not refer to any overarching cosmic order or natural law, which is comprehended by the term *ṛta*".

8    In this regard it is interesting the definition of *dharma* provided by P. Hacker (quoted in Halbfass 1990a): "First of all, dharma is the *religious law* or the *religious order*. Yet this does not just comprise the cultic and the moral, but beyond this the entire legal order as well as an abundance of conventional customs and habits ... Secondly, dharma is also *order in performance*. All activity which corresponds to the order of dharma is dharma. Thirdly, dharma is also *order after performance*, i.e., that which is called 'good karma'".

*dharma* remains basically grounded on individualised context and may be defined as "what has to be done" in a net of macrocosmic and microcosmic relations in an everlasting process of maintaining the world.

This fundamental conception is generalised to the entire human activity and is dominant even beyond the strictly ritual sphere of sacrifice. In this cosmological foundation we find a peculiar aspect of the Hindu conception of normativity. In fact, the importance of the role of every individual in maintaining the cosmic and social order is at the root of the idea of an order to some extent controlled or at least influenced by individuals, anyway at a local level. In other words, here we find the concept of "self-controlled order", which remains a basic principle in later evolutions of Hindu law (Menski 2003).

We saw that the ritual is the image of the macrocosm and of the universal making order. The making of order requires that man acts in this net of relations according to a law of *appropriateness*.[9] As concerns this concept, it is interesting to observe that, as Clooney pointed out (1981: 180-182), in the *sūtras* of Jaimini the term *dharma* means:

> ... that which characterizes some thing, word or text, person, or action in the ritual context. One's dharma is the way one is treated, acted upon, related to, during the sacrifice ... in most places in Jaimini's text, dharma indicates a functional description of some element of the sacrifice. To know the dharma of something is to know what it does, what is done to it, what is related to, when it appears and disappears. For the most part too it does not overlap with the notion of a property, a *guṇa*. This latter is rather what is part of something in its ordinary, *laukika* existence, and such a property may or may not be relevant to the decision of whether the thing or person enters the ritual world at all.

The *ritual structure* defines a series of meaningful relations within the rite. The very same identity of an object is defined through the relations with other elements in this structure. In the first texts on ritual, the term *dharma* is referred to the qualities that makes something a certain thing and not something else, and this meaning of the term, connected to the concept of identity, is preserved in the fol-

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9    Appropriateness is a prominent character of Hindu thought on normativity. However, it is clearly important in other traditions also, for instance to the extent in which it merges with equity, meant as justice in context.

lowing elaborations, where the idea remains crucial that there is a
proper way to relate to others, depending on their particular position
and role. Once again, it seems that the ritual context provides and, by
turn, reflects a far-reaching and long-standing conception.

The concept of *dharma* is strictly linked to the idea of the retri-
bution of actions according to the law of *karman*. The connection
between *dharma* and *karman* is undeniable, even if it is more prob-
lematic than usually recognised (Halbfass 1990b). The basic meaning
of *karman* is simply action, or more properly the action viewed along
with its consequences. In the ritual sphere, *karman* is the ritual action
producing a supersensuous effect and, progressively, its prevalent
meaning becomes the *result* of an act, in other words the merit or
demerit connected to the action.

One of the problems widely discussed in the Mīmāṃsā is how is
it possible that a supersensuous effect follows a ritual act. In other
words, what does connect the accomplishment of a ritual act, defined
in time and space, to a supersensuous result that could come into
effect after years and also in a following life? This question, even if it
may appear very distant from practical problems, is indeed crucial in
this legal cosmology. In this view, the efficiency of an act is due to a
power, a force originated by the accomplishment of that act, which
persists till the realisation of the effect. This force is called *apūrva*, a
term that refers to the fact that this force comes into existence only
through the accomplishment of the act.[10]

The question of the existence of the *apūrva* is dealt with under
*sūtra* 2.1.5 and is argued on the basis of the existence of the injunction
itself. An injunction such as "Who desires Heaven has to sacrifice"
(*yajeta svargakāmaḥ*) would have no meaning at all if the *apūrva*
would not exist.[11] In fact, the sacrifice, by itself, is a delimited act,

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10  On the concept of *apūrva* and its relation with *dharma* see Halbfass (1990b). The
    concepts of *apūrva* and *phala* are extremely important for the theory of actions
    underlying the theory of interpretation. In fact, as we will see, the result of the
    action is a criterion to distinguish between different kind of actions. Clearly,
    these philosophical views are not detached from technical aspects.

11  "Who desires Heaven has to sacrifice" can be seen as the paradigmatic *apūrva-
    vidhi* (Piantelli 2000). The attaining of Heaven (*svarga*), which is a temporary
    condition, is different from *mokṣa*. The Pūrva Mīmāṃsā, as we saw, provides a
    soteriology based on ritual acts and devotes little space to liberation, differently
    from the Uttara Mīmāṃsā.

because its existence is limited to the time of the performance of the act. The result consisting of "Heaven" could not be produced if the accomplishment of the sacrifice would not put in existence something else, a force that continues to operate till the moment in which the final result of "Heaven" is produced. On the other hand, if the accomplishment of the sacrifice would not produce this force, it would be impossible to explain the production of results after a lapse of time.

The concept of *dharma* is then connected to the idea that an effect on the supersensuous level follows to the accomplishment of an act. *Dharma* is a quality pertaining to the principal or accessory action or to another element of the sacrifice, but it does not pertain to their ordinary form. In fact, even if an action may be perceived by the senses, the capacity of that action to produce a supersensuous result, which is its dharmic quality, cannot be perceived.

Kumārila explains *dharma* as that which is conducive to desirable results.[12] An action from which positive effects derive is dharmic, while it is adharmic when negative effects follow. This meaning is reflected also in the commentary of Medhātithi on Manu II.6. In fact in Medhātithi on Manu II.6 (Jha 1999: 181) we may read:

> [dharma] is that which a man should do, and which is conducive to his welfare and of a character different from such acts as are amenable to perception and the other ordinary means of knowledge.

Medhātithi remarks the distinction between a dharmic rule, which has not a visible purpose, and rules of behaviour concerning for instance land-cultivation.[13] According to him, *dharma* is what a man has to do

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12  See *Ślokavārttika*, 13-14 (Jha 1993: 23): "Later on we shall prove that the character of 'Duty' belongs to the Material, Action and Accessory (of the Sacrifice, collectively). And though these are amenable to Sense-perception, yet it is not in their ordinary form, that the character of Duty belongs to them. (14) Because, of these, the capacity of bringing about auspicious results is cognised always through the Veda; and it is in this form (of being the means of auspicious results) that the character of Duty is said to belong to them. And as such Duty cannot be said to be amenable to Sense-perception".

13  From the fact that *dharma* is properly the act which produces a supersensuous effect derives that not everything is *dharma*. See Medhātithi on Manu II.6 (Jha 1999: 181): "Land-cultivation, services, &c., also are conducive to man's welfare; but this fact of their being so beneficial is ascertained by means of positive and negative induction, and as regards the sort of cultivation that brings a good

in view of health and welfare, to be meant in the most general meaning, as *svarga*, celestial beatitude, but also as positive effects in the worldly life, the avoidance of suffering, disease and poverty. Medhātithi makes reference also to the fact that some people consider as "health" only the attaining of the liberation.[14]

In another passage, Medhātithi distinguishes two uses of the term *dharma* in the authors of *smṛtis*. The term *"dharma"* is used sometimes to refer to *acts* constituting the object of injunctions and prohibitions and, sometimes, to refer to the peculiar force deriving from the accomplishment of an act.[15]

The Vedic injunctions included in the *brāhmaṇas* are mainly ritualistic and regard acts that are accomplished aiming to particular results, from heaven to rainfalls. Acts are classified under different headings. A basic distinction is made between compulsory and non-compulsory acts. Some acts are *kāmya* and this means that they are accomplished aiming to definite results, but there is no duty to accomplish them. In other words, the dharmic rule in this case is that to obtain a given result a certain action has to be performed and not that a specific action is obligatory. On the contrary, there are other actions that are obligatory (*nitya*) or obligatory in specific circumstances (*naimittika*).

The Mīmāṃsā elaborates a theory of dutifulness that is independent from a specific result. According to Medhātithi, when an injunction indicates an action that has to be performed during the entire life and does not mention any result, the act has to be meant as compulsory. In fact, it would be incorrect to assume a result by way of

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harvest of grains, this is ascertained by direct perception and other ordinary means of knowledge. On the other hand, the fact of sacrifices being conducive to welfare, and the manner in which they are beneficial, through the intervention of the 'Apūrva' – all this is not amenable to perception or other ordinary means of knowledge".

14  See the following passage in Medhātithi (Jha 1999: 181): "'Welfare' is that which is, in its most general form, spoken of as 'pleasure', consisting of the attaining what is desirable, in the shape of Heaven, landed property and so forth, and also (b) the avoiding of what is generally spoken of as 'pain', which consists of illness, poverty, unhappiness, Hell and so forth. Others regard the attaining of the Supreme Bliss only as 'welfare'".

15  See Medhātithi on Manu II.6 (Jha 1999: 201). Significantly, the text reiterates the view according to which this force, which produces a result, may be known only on the basis of scripture.

interpretation, considering that words plainly indicate that the action has to be performed, independently from a specific result. The same could be repeated as regards the prohibition of killing Brahmins or of drinking wine. In these cases, the point is that to disobey the injunction is by itself sinful. Thus: "the avoiding of the prohibited act is not for the purpose of any reward, but simply for the purpose of avoiding something sinful" (Jha 1999: 182). This theory of actions helps to explain the conception of normativity embodied in the dharmic system.

Purohit (1994) makes a parallelism with Kant's philosophy. Both conceptions have a deontological character and hold that a duty has to be performed independently from a specific reward on the basis of the inherent rewarding character of appropriate action.[16] However, the problem of the binding character of Vedic *vidhis* (or *codanās*) has to be analysed more in-depth to clarify the relationship between binding force and cognitive character. The dharmic system may be seen as a *map of actions*. To know *dharma* actually means to know the effects of action and, in this sense, the inner constitution of reality and the laws of macro- and micro-cosmic connections. The fundamental *vidhi* which states that "who desires Heaven has to sacrifice" does not involve that it is mandatory to sacrifice but states what could be seen as a causal connection.

The *śāstra*, as knowledge of *dharma*, highlights a series of cosmic connections, a web of actions, designing a territory, a landscape, in which men move. In this conception several dharmic paths co-exist. In fact, different effects derive from different courses of actions, and men may move within this map of actions according to their inclinations. Moreover, who behaves in an adharmic way will choose a path leading to some (negative) results. This idea of a map of human actions could be connected to the *vikalpa*, which, as we will see dealing with conflicts between sources of *dharma*, is the option between equally authoritative courses of action having different effects. In other words, in many cases it is possible to choose which *dharma* to follow on the basis of the expected and desired results. The cognitive character of *codanās*, resulting from the fact that to know the *dharma* means to know how an action is connected to the whole, is

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16  However, different views on this point exist in different Mīmāṃsā Schools. See also Piantelli (1976) and Halbfass (1990b).

even more prominent in other Hindu conceptions, for instance in Śaṅkara's thought, where it is held that the *śāstra* make us know but do not make us act.

But, in which sense is this a normative knowledge? Normativity is grounded on a cosmological foundation and on a global view of the world and human actions. It may be argued that the acceptance of this cultural system is what properly prompts to adopt some behaviour and to adjust one's own conduct to this cosmic plan. In this sense, the knowledge of the effect of the action compels to act is a certain way. The source of normativity is not God's will, which one must *obey*, but the impersonal law of *karman* to which one should *adhere*. The *impersonal* law of *karman* is conceived as the source of obligation (Purohit 1994).

This conception is very important to understand the way in which Hindu jurisprudence considers the problem of authority of sources, which is properly a question of cognitive authority. As we will see in more detail, the Veda is authoritative on the ground of an epistemology. Only the Veda may state which is *dharma* in a peculiar context, that is to say, which are the consequences of an action. It must be remarked that the paramount authority of Veda regards particularly the knowledge of *apūrva*. The language of the Veda is provided with an inherent compelling force (Purohit 1994) and, in addition, the truths revealed from the Veda cannot conflict with common experience because they regard the supersensuous effect of actions. As a result, in this view, there is nothing that could "falsify" the Vedic injunctions. However, we will see that Medhātithi takes into account several critiques of this view.

Provided these cultural underpinnings, a peculiar way to conceive the binding character of norms emerges, particularly in the classical period. Men are compelled to act in a dharmic way by cosmic sanctions and also by social sanctions to the extent in which the protection of *dharma* is a matter of interest of the whole community. This is a very important view for comparative jurisprudence, because it points out an internalised conception of obligatoriness that is largely independent from an external coercive force.

## The differentiation of *dharma*

Being founded on the concept of appropriateness in a net of macrocosmic and microcosmic relations, *dharma* is inherently diverse and is defined on the basis of different space and time situations, of the personal conditions of the actors and of the addressees of the action, and of the specific characters of the action also. In this sense, the dharmic system may be seen as a set of several dharmic systems made up of different duties. As we will see, to have different duties means in this context to have different identities.

    A first differentiation of the duties of men is defined on the basis of social categories (*varṇa*) and stages of life (*āśrama*). *Varṇadharma* and *āśramadharma*, combined, constitute the *varṇāśramadharma*. The *varṇāśramadharma* has been described as a "model of the Hindu society". Lingat (1998: 29) writes:

> While the theory of the four *varṇas* seeks to define the positions of individuals in space (their relations with different social groups parallel to their own), the theory of the four *āśramas* follows them throughout their existence and lead them progressively to their final goal. Thus the two theories in combination provide a two-dimensional view of society, the former along the horizontal or static plane, the latter vertically or diachronically. Life itself is organised, in its individual and its social aspects, through the coordination of the two.

The *varṇa* are four and may be briefly described in the following way. The first one is the *varṇa* of *brāhmaṇas*, the sacerdotal class. Then, there are the *kṣatriyas*, the warrior class, the *vaiśyas*, common people, and the *śūdras*, servants. Their mythical origin is recognised in the sacrifice of the *Puruṣa*, the "primordial male" (*Rgveda* 10.90). *Brāhmaṇas* would be born from his mouth, *kṣatriyas* from arms, *vaiśyas* from legs and *śūdras* from feet. In this conception, Brahmins are principally characterised by the right and duty to devote themselves to teaching and by the duty of accomplishing certain sacrifices reserved to them. The *kṣatriyas* are characterised by the duty to fight and protect others. In this regard, it has to be remarked that, according to the orthodox theory, kings belong to the class of *kṣatriya*. The *vaiśyas* have specifically the duty to deal with productive activities, trade and farming. Lastly, *śūdras* have the duty

of serving the superior *varṇas*. The *āśramas* also are four: *brahmacarya*, the period of religious studentship, *gārhasthya*, the period of family life, *vānaprasthya*, the period of hermitage at the fringe of worldly activity and progressive detachment from the world, and *saṃnyāsa*, the moment marked by the complete renunciation to the world.[17]

This may be seen as a theoretical model, which nonetheless is grounded on actual social differences. This classification represents a first level of differentiation of duties and is used in the texts on *dharma* as a general scheme to describe the duties falling upon each person, adopting as paradigmatic the model of Brahmins (Olivelle 2005). These duties are further differentiated on the basis of the belonging to a caste (*jāti*), which is connected to *varṇa* even if the former does not identify with the latter, for a single *varṇa* may include different castes. These are further divided into sub-castes (*upajāti*).[18]

What has to be pointed out is that the rules of behaviour are different on the basis of the belonging to one or the other class. In fact, a given behaviour may be prohibited for a certain person in a specific context and, on the contrary, be permitted if the agent or the addressee changes.[19]

Another important distinction is that between common *dharma* (*sāmānya-* or *sādhāraṇa-dharma*) and particular *dharma* (*viśeṣa-dharma*). The first one includes a series of behaviours that are held as common to all men and may be reduced to a list of general virtues such as non-violence, forgiving, compassion, inner discipline, while the second one is basically the complex network of duties defined from the *varṇāśramadharma* and from the belonging to a certain

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17  For details on the *āśramas* see Olivelle (1993).
18  For a discussion of several theories related to the origins of *varṇas* see Lingat (1998: 29-45).
19  Ramanujan (1989: 45) argues: "One has only to read Manu after a bit of Kant to be struck by the former's extraordinary lack of universality. He seems to have no clear notion of a universal *human* nature from which one can deduce ethical decrees ... To be moral, for Manu, is to particularize – to ask who did what, to whom and when. Shaw's comment, 'Do not do unto others as you would have they should do unto you. Their tastes may not be the same' will be closer to Manu's view, except he would substitute 'natures or classes' for 'tastes'". This passage is quoted by Doniger (1991: xlvi), according to whom the awareness of the context-sensitive character of *dharma* is essential to deal with the problem of consistency in Manu.

caste. As we will see at the end of this chapter, the relationship between the two levels of *dharma* is such that the general *dharma* represents a *residual* category, rather than a set of basic principles from which one should derive the rules to regulate his own behaviour. Only if a specific norm of behaviour, based on one's own peculiar *dharma*, cannot be found, one should act according to those principles. In other words, those principles may be derogated by one's *svadharma*.

In this perspective, one can also maintain that the very same model of *varṇāśramadharma* presented in *dharmaśāstras* actually remains at a certain distance from practical life. In fact, it is still a very general model and arguably one could determine which is his own duty only moving further down to the rules of castes, sub-castes and other social groups, and considering also the specific circumstances of the case.[20] Normally these rules are not written rules and in many cases they are not even well-established rules. As a result, dharmic rules are determined in a multilayered process, carried on at different levels, in which different sources of knowledge, both textual and non-textual, are taken into consideration. However, this internal variety and this flexibility do not affect the fundamental unity of *dharma*, because *dharma* remains *one* system, although internally differentiated.[21]

There is an aspect more to underline. The dharmic order is often represented as a set of duties. For instance, Robert Lingat (1998: 4) observes that the meaning of the term *dharma* in *dharmaśāstra* literature is in most cases:

> ... the totality of duties which bears upon the individual according to his status (*varṇa*) and the stage of life (*āśrama*) at which he stands, the totality of rules to which he must confirm if he does not want to "fall", if he is anxious about the hereafter.

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20  As observed by Piano (1996: 33) the fragmentation arrives to the point "in which there is a *dharma* for each individual, a proper way for every man to reach a harmony with nature and human society" (my translation).

21  As we shall see better when we will deal with the problem of antinomies, this system, which is not based on a rule of equality between subjects, explicitly allows that opposite models of behaviour could be both valid.

Lingat remarks that this is the meaning of the term in the famous passage of the *Bhagavadgītā* where Arjuna is persuaded to fight by Kṛṣṇa, who reminds him that to fight is his own duty (*svadharma*) as a *kṣatriya*. However, even if the dharmic order may be represented as a set of duties, one should avoid to totally reduce *dharma* to a specific set of duties. In fact, *dharma* has an open content. It expresses the idea of an action that, once accomplished, sustains the cosmic and social order but it does not say anything fixed with regard to the content of those duties. Just like law, it may assume multiple forms.

Thus, the centrality of the concept of *dharma* in the Hindu tradition should be caught independently from what may be concretised from time to time as a dharmic action. The actual dharmic order may vary, even sensibly, depending on the context and the circumstances, but, in any case, *dharma* is the conceptual point of reference around which is developed the search for appropriate behaviour for every man in a series of macrocosmic and microcosmic relations, through which the individual takes part in the process of maintaining order, realising by this his own duty and procuring to himself a spiritual benefit.

We saw that *dharma*, as an inclusive and pervasive order of human activities, is beyond the distinctions between the sphere of ethical action and the sphere of legal action. In other words, the Hindu tradition did not elaborate the concept of *dharma* on the basis of those distinctions. However, there are other peculiar distinctions that are important to understand the place of *dharma* within human experience and also to show how *dharma* can assume very different meanings.[22]

A fundamental distinction developed within the system of thought of orthodox Brahmanism is the distinction between the aims of man (*puruṣārthas*). In this regard, *dharma* is not presented as an inclusive order but as one of the aims of human existence. Aside from *dharma*, there are *artha* and *kāma*. *Artha* is the useful, the interest, and is relevant mainly in the sphere of politics and economics. *Kāma*, on the contrary, is the desire and its satisfaction, the pleasure. Aside from *dharmaśāstra*, that is to say, the science of *dharma* that is expounded

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22  As a result, the concept of *dharma* has to be cleared necessarily from many points of view. The *trivarga* and *caturvarga* classifications we are going to describe represent a peculiar way to approach the definition of *dharma*, which provides a more extensive understanding of this term in the Hindu tradition.

in a series of treatises on *dharma*, there is also *arthaśāstra*, which tends to assume the meaning of science of politics. The works belonging to the *arthaśāstra* were mainly addressed to the sovereign and aimed to transmit practical knowledge that could help him to manage the difficult matters of governance. Some parts, for instance those concerning the settlement of disputes, are closely connected to the content of *dharmaśāstras* on the same subject.[23] Similarly, there is a *kāmaśāstra*, a science of desire, with its specific works.[24] Therefore, the reflection on *artha* and *kāma* is part of the same cultural context of *dharmaśāstra*.

Dharma, *artha* and *kāma*, considered as a whole, form the *trivarga*, "triple group". The conceptual relations woven between these three aims of man are very complex. One of the simplest aspects that can be pointed out is that from *dharma* to *kāma* one goes from a maximum to a minimum of objectivity and sociality (Malamoud 1998). Even if each of the three ends has its specific value in the life of a person, a hierarchy between them is established, for *dharma* is undoubtedly recognised as the principal aim of man. Moreover, *dharma* is seen also as a larger category, encompassing the other aims. These aims belong to every man, even if in the Brahminical elaboration every person has a privileged relationship with one of them depending on his status.

To the *trivarga* a fourth aim is added, that is, *mokṣa*, liberation, constituting then a fourfold group (*caturvarga*). With the concept of *mokṣa* we meet one of the most complex and distinctive aspects of Hinduism. In our discourse, this fourth aim is especially interesting because this concept defines a limit, and thus may allow a better understanding of the concept of *dharma* and its place in human life. *Mokṣa* represents a way of salvation, which is not realised through the ritual action (*karmamārga*) but through the knowledge (*jñānamārga*), and more precisely, at least in main elaborations, through the knowledge of the identity between *Brahman* and *ātman*, absolute and self.

Although the theoretical elaboration of *mokṣa* may seem conflicting with what we said with regard to *dharma*, it has to be high-

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23   For a first introduction to this literature see Kangle (1997). On the connections between *dharmaśāstra* and *arthaśāstra* see Olivelle (2005).
24   For a first introduction to the literature on *kāma* see Doniger (2002).

lighted that the concept of *mokṣa* finds a place, explicit or implicit, in the works on *dharma*. In the *Manusmṛti*, for instance, there are many references to liberation. Particularly, in the last part of the text, the exposition of *dharma* is concluded by the treatment of the attaining of the "supreme good".[25] Renunciation was a model conflicting with the Vedic system of values, but in the classical period it was integrated within Brahmanism, which in this regard also shows its capacity to affirm itself as a culturally dominant model.[26] On the other hand, the respect attributed in modern times to renouncers is evidence of the deep cultural relevance of those elaborations.

*Mokṣa* is opposed to the *trivarga* considered as a whole, in the sense that it transcends the other aims of men and belongs to a completely different order. *Mokṣa* is not only beyond the *trivarga* but also the *varṇāśramadharma*. In this regard, the view according to which who knows the Self transcends the *varṇas* and the *āśramas* is very interesting; there are no injunctions and prohibitions for such a person.[27]

We can understand in which sense to reach liberation means to transcend *dharma* recalling the cosmological foundations we saw at the beginning of this chapter. Malamoud (1998) has remarked that the concept of *phala*, as connected to dharmic and adharmic action, is related to the conservation of the world and of individuals. In fact, the balance between positive and negative deeds would result in a residue that origins re-birthing.[28] The order of *dharma* is conducive to supersensuous effects, as spiritual merit and demerit, and therefore ties man to the chain of rebirths. Through the observance of *dharma* the condition of supreme beatitude cannot be reached, which in Indian

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25  See, for instance, Manu XII.82-85.
26  See Doniger (1991: xxxiv ff.).
27  See, for instance, the *Jīvanmuktiviveka* of Vidyāraṇya.
28  Malamoud (1998: 18-19) writes: "... the concept of remains ... manifests itself most clearly in the Purāṇic and Epic cosmogonies, precisely because these are not creations in some absolute sense of the term, but, rather, re-emergences that follow upon reabsorptions (*pralayas*), which themselves mark the end of each cosmic eon (*kalpa*) ... What is true for the cosmic *saṃsāra* is equally true for the fate of individual ... Thus, the notion of a residue, of an outstanding balance, plays a foundational role in the ceaseless' re-firing of the motor of *karman*". An intriguing hypothesis is the possible application of the scheme 3+1, which is typical of *caturvarga*, to *śruti, smṛti, ācāra* and *ātmanastuṣṭi*.

thought is generally recognised in the condition of who has been able to free himself from the world.

In this conception, there is a strict link between the macrocosmic and the microcosmic levels. As we said, according to Malamoud (1998), the Hindu conception of order is grounded on a dynamics between fullness and emptiness. In addition, it has to be remarked that *guṇas* and *dharmas* derived from a cosmic spreading, which is seen as a differentiation of the absolute reality, an emergence from an emptiness that is, at the same time, fullness because it contains everything. In other words, the cosmos arises as differentiation from a non-differentiated absolute, which could be seen as emptiness but in which everything is present in a sleeping state. *Dharma*, as related to difference, is in a philosophical sense what protects the relationship between things that came out from emptiness and as such is a concept of order. *Adharma* is actually a melting of things. But this is a cyclic process, and the cosmos goes towards a new absorption. In this view, every *yuga* has its own *dharma*, depending on a new manifestation. Moreover, in many elaborations every epoch has at its origin a new Manu, that is, a new normative revelation.[29]

Now, on the microcosmic level, to reach liberation means to return to a non-differentiated state. It is a well-known fact that, according to Dumont (1966), in this context the renouncer represents the only example of individualism. In fact, by renunciation a person chooses a path that leads to freedom from the net of dharmic rules regulating one's life. However, from another point of view, it may be observed that this path towards being an individual is actually a path pursued through de-individualisation. In this system of thought the individual is *defined* through relations. To go beyond these connections, that is to say, to place oneself beyond *dharma*, means to replicate in the microcosmic dimension that process of re-absorption into the undifferentiated absolute that is typical of Indian cosmogonies.

The interesting problem, in our perspective, is the relationship between duty and differentiation. The differentiation of *dharma* is related to differentiation of individuals and, in a broader perspective, of everything in the world. The cosmological foundation of differentiation, as reflected also in the relationship between *varṇāśrama-*

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29   The conception of *manvantara* seems to be the origin of many misleading conceptions of Manu as a lawgiver (Menski 2003).

*dharma* and *mokṣa* we saw above, leads towards a dharmic ontology, or in other words to connect *dharma* and identity. In this sense, *dharma* provides a normative definition of an individual, that is to say, a definition of identity in normative terms. Therefore it seems more appropriate to say that an individual *is* a set of duties, rather than to say that an individual *has* a set of duties.

The basic concept here is interlinkedness. Interlinkedness means basically that every individual is conceived as connected to other individuals, either human beings or other entities. In other words, we want to suggest that in this context the individual cannot be conceived independently from his relationships with other individuals. Duties are defined within this net of relations, as appears from the very same concept of *varṇāśramadharma* and also from intertemporal duties towards past and future generations.

This means also that men are defined through duties and ways of life rather than beliefs, and here we can find an instance of the importance of orthopraxis rather than orthodoxy in Hinduism. Man is what he does, or better what he has to do.[30] A further observation is that this way to conceive the dharmic nature of man is non-essentialist. A prominent view in Western doctrines of natural law is that some duties and norms may be *derived* through reasoning from the nature, or essence, of human being. In this context, on the contrary, *dharma* is not derived from the nature of man but defines the nature of man.[31] However, in a deeper sense the "real" nature of man is the eternal, divine and non-differentiated principle, while *dharma* is simply its manifestation.

As a conclusion, on this very general philosophical level, *dharma* is not the paramount value, because what is paramount is actually *mokṣa*, which is beyond *dharma*-as-order. Interestingly, Lombardi Vallauri (2002) highlights that the dharmic system is based on a *lacuna*, it comes from a void, an emptiness, and in this sense it provides to general jurisprudence an example of a legal system having emptiness as its fundamental source. As a conclusion, *dharma* is the outcome of cosmic differentiation, and the complex theoretical

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30  In this regard is also important the concept of *adhikāra,* meant as being entitled to accomplish certain acts.
31  For an analysis of this doctrine and a discussion of the related problem of naturalistic fallacy see Lombardi Vallauri (1981) and Finnis (1980).

relationship between fullness and emptiness that is elaborated by Indian philosophies helps to understand a peculiar Hindu way to conceive order and its cosmological foundation.

## *Dharma* and natural law

In this chapter we have made reference to the relationship between *dharma* and natural law more than once. Particularly, we saw that *dharma* can be viewed as a natural order that has peculiar characters depending on its conceptualisation as a dynamic process of making order more than as a pre-established and fixed order of things. Some other remarks may be made here. Natural law theories are present in different cultures and were the dominant views particularly in ancient cultures.[32] All these conceptualisations share some basic characters. It would be misleading to try a comparison of *dharma* and natural law as if they were two different things. This fault would depend on the possibly unaware assumption that natural law as such is a Western-specific concept. On the contrary, what can be usefully investigated is the relationship between some conceptualisations of *dharma* and some conceptualisation of *ius naturae* and the way in which these conceptualisations share the same features that reflect the basic perception of law as a natural order.[33]

The concept of natural law is usually connected to two qualifications: eternality and universality. The conceptualisations of *dharma* are widely concerned with these two characters. First of all, one of the main ways to refer to *dharma*, that is to say, *sanātana-dharma*, means eternal *dharma*. In other words, *dharma* as an ordering principle is perceived as eternal. Does this mean that *dharma* is made up of unchangeable rules and principles? In this regard, the crucial point is the tension between the eternity of *dharma* and its multiple manifestations.

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32  For an analysis of different elaborations of the concept of natural law see Menski (2000; 2006).

33  On the relationship between *dharma* and natural law see Menski (2003) and *contra* Davis (2006b), who criticises the view according to which *dharma* may be seen as a form of natural law.

As we saw, this tension is inherent to the very same Indian cosmology and is central for many Indian philosophies. Broadly speaking, the understanding of cosmos as a manifestation of a divine principle ties together the permanent and the impermanent, the eternal and its changing manifestations. In other words, the concept of manifestation is coherent with the concept of eternity, because the contingent nature of things depends on different manifestations of the same eternal principle.[34]

As concerns particularly *dharma*, it is an outcome of the manifestation of cosmos and is inherently changing. This changing nature is not conflicting with its eternal character because every dharmic manifestation may be seen as a manifestation of an eternal principle or reality. In other words, *dharma* as an eternal ordering principle allows different *dharmas*.

*Dharma*, being eternal, pre-exists to every revelation (Menski 2003). In this conception revelation is considered as inherently partial, for only a part is manifested and visible while other parts remain invisible. This problem is linked to the eternity of the Veda, which, as we will see, is elaborated in the Mīmāṃsā as a question concerning the relationship between language and world. Moreover, revelation is not someone's revelation, has not a definite beginning and in many views should be considered as an everlasting process (Halbfass 1990a).

As concerns the character of universality, or universalism, of natural law, this is based on the fact that natural law is often supposed to be equal in every part of the world and for everyone. However, this is a quite abstract and modern conception of natural law. Halbfass (1990a) pointed out that *dharma* is not conceived as a universal law applying to the Hindu society and to other societies as well. In fact, *dharma* regards *āryas* while *mlecchas* are excluded. Then the concept of *dharma* is strictly connected to a xenology:[35]

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34  Broadly speaking, cosmogonies based on "manifestation" are structurally different from those based on "creation", where a major division occurs between the eternal divine principle and what is created.

35  This xenology and the resulting separations within Indian society could also explain other phenomena, such as the persistence of tribal laws. A prominent role in defining the "other" is played by Sanskrit language. Interestingly, the *adhikaraṇa* I.3.6 of the *Tantravārttika* is devoted to the words used by *mlecchas*.

> Regardless of its original Vedic or etymological meaning, in traditional
> and "orthodox" Hinduism, *dharma* appears as an essentially anthropo-
> centric, sociocentric, and, moreover, Indocentric and Brahmanocentric
> concept. *Dharma* is the differentiated "custom" and "propriety" which
> constitutes the Aryan form of life, which upholds the identity of the *ārya*
> and distinguishes him from the *mleccha*, and which also legitimizes the
> privileged position of the Brahmins as the teachers and guardians of the
> *dharma*. (Halbfass 1990a: 319-320)

This is not only a problem of xenology with regard to parts of the
world that do not belong to the *āryāvarta* but also a highly sensitive
issue within Indian culture, which has multiple identities. On the other
hand, every culture has to cope with the claimed universal truth of its
views and the centrality it attributes to itself. However, within the
social groups that recognise themselves as part of orthodox Hinduism,
*dharma* is universal. In fact, the sources of *dharma* have a universal
authority and this means that they apply to Hindus who live in
different parts of the country, irrespective of their acceptance of those
rules. This is a quite complex issue, once again involving the typical
Hindu tension between unity and diversity, and we will deal with it
in more detail at the end of this book.

The concept of natural law is often opposed to the concept of
positive law. The basic difference is that natural law is a pre-existing
law while positive law is posited by someone. This broad distinction
has an important effect on the problem of knowledge of law. *Dharma-
mūlas* have to be meant as sources of knowledge, for *dharma* is
recognised and not posited. However, Olivelle (1999: xxxix) remarks
that the theological definition of *dharma*, which makes of *dharma* the
content of Vedic injunctions, "clearly defines it as positive, albeit
revealed, law, rather than a cosmic or natural order which can be gath-
ered through investigation, introspection or deductive inferences".[36]

In fact, natural law theories, especially modern theories, normally
involve the view according to which law may be known through
reason. *Dharma*, at least in the *mimāṃsaka*'s view, cannot be known
through reason but only through revelation, although independent

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36  However, as we will see, the concept of *ātmanastuṣṭi*, in our view, may be meant
as a case of intuition and, in some sense, *recta ratio*.

from God's will. However, *dharma* remains a natural law that is not posited by Vedic revelation, even if it may be known only through it.

In which sense and to which extent is it possible to speak of an Indian positivism? On this point we will see a very relevant discussion concerning the prohibition of killing in Medhātithi's commentary, where it is argued that what makes something dharmic is Veda, and thus if the Veda states that to kill is *dharma* in a specific context, this cannot be criticised stating that to kill is clearly adharmic, that is to say, that its adharmic nature may be known independently from the Veda. This discussion is also relevant as concerns the idea of a content unity of norms, which should be an outcome of the rational nature of law, because in Medhātithi's view the act of killing may be *dharma* in some cases and *adharma* in other cases.

The problem of the possibility to know *dharma* through reason is linked to another important issue, that is, the view of a normative system as a rational system that allows to derive rules from other rules and in which a prominent role is played by general principles. Concerning *dharma*, there are not properly general principles from which it is possible to derive rules. Actually, general principles that would be capable to provide a foundation to other rules exist and a prominent case is that of *ahiṃsā*, which is a *sādhāraṇa-dharma*. However, in this regard it is very interesting to consider the following remark by Ramanujan (1989: 48) that:

> each addition is really a subtraction from any universal law. There is not much left of an absolute or common (*sādhāraṇa*) *dharma* which the texts speak of, if at all, as a last and not as a first resort. They seem to say, if you fit no contexts or conditions, which is unlikely, fall back on the universal.[37]

It seems that *sādhāraṇa* (or *sāmānya*) *dharma*, the general common level of *dharma*, has simply a supplementary function, that is, a relevance only in those cases that cannot be regulated at the *viśeṣadharma* level. However, this view should be analysed more in-depth. *Ahiṃsā*

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37 Doniger (1991: xlvi), quoting Ramanujan's text, comments: "Thus the fragmented history and form of the [Manu] text do not preclude an integrated worldview. The text encompasses as much as possible; its goal is not applicability but totality, like the culture itself".

and truthfulness are general principles that have a huge cultural relevance in this context. Therefore, they could have a cultural role in the legal process and their role should not be limited to general principles that can be used only as a last resort.[38]

Hindu jurisprudence certainly allows to derive rules from other rules. For instance, from the *vidhi* "who desires heaven has to sacrifice" other *vidhis* may be derived by way of interpretation. However, it seems true that there is not one content unity in *dharma*. A content-relationship and coherence between norms, that is a static unity in a Kelsenian sense, seems to be alien to the systemic construction of the Mīmāṃsā. On the other hand, this seems to derive from the diversity, and even contradictoriness, that is inherent in *dharma*.[39]

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38  A prominent example of the relevance of principles is provided by the edicts of the Buddhist king Aśoka.

39  Dealing with apparent contradictions in Manu, Doniger (1991: lvii) remarks that: "Despite the relativity of *dharma*, its context-sensitivity paradoxically guards Manu from the dangers of true relativism. He is not 'pro-choice' like a modern American liberal. He believes that, in any given circumstances, there is only one thing to do".

Chapter 2

# The knowledge of *dharma*

## Knowing how to know

As a matter of fact, every culture has to cope with the problem of the knowledge of duty. Many different views have been developed in different cultures and also within a single culture in course of time. In the Indian context, the question of the knowledge of *dharma* is multifaceted. In fact, it is possible to distinguish at least two main problems Hindu culture had to cope with. The first question is how it is possible to reach a valid knowledge of *dharma*, considering that it is conceived as being beyond human means of knowing. This question is properly placed on an epistemological level. The second question is how to ascertain what is *dharma* in a specific context. In this case the addressed problem is primarily which are the actual *processes* carried out by individuals to ascertain *dharma*.

The two questions are certainly interconnected and even overlapping, but the perspectives are quite different. In fact, the first question requires an epistemological analysis, while the second question has a more practical bearing, for it concerns the ways to ascertain rules of behaviour in specific contexts. The epistemological underpinnings are reflected in the ascertaining of dharmic rules but they stand at a certain distance from the concrete lives of Hindus.

In the Hindu tradition, the epistemological problem of the knowledge of *dharma* is mainly discussed by the Mīmāṃsā, which, although focusing on *dharma*, developed a complete theory of knowledge dealing with topics that were crucial in other Indian philosophies also. The outcome of Mīmāṃsā's analysis is that *dharma* may be known only through Vedic injunctions (*codanās, vidhis*). The Vedic primacy, as concerns the knowledge of *dharma*, does not mean that the concrete

process of ascertainment of *dharma* in a given context would make direct recourse to the Veda essential. However, Veda is established as the epistemological grounding of all other sources of knowledge of *dharma*.

The elaboration of *dharma* is first of all a question of thought and only secondly a question of power. *Dharma*, as a natural law pertaining to the inherent structure of cosmos, has to be *known*. This is the reason why *dharma* is the subject of a science concerned with epistemological questions. *Dharma* is not at the disposal of men. Even the Hindu ruler himself has no power in front of it and is subject to his own *dharma*, the *rājadharma*.[1] Secondly, he has not properly a legislative power and his decrees cannot affect *dharma*, although it seems possible to acknowledge that he takes part in the process of concretisation of *dharma* in society.[2] The position of the sovereign with regard to *dharma* is defined mainly as a duty of "strengthening" or assuring the respect of *dharma*, also through the power of administration of justice, although a non-exclusive one, which the dharmic model itself attributes to him.[3] In this regard, Menski (2000: 164) writes:

> ... the Hindu ruler is still not the creator of legal rules. Fulfilling his special obligation to act conducive to cosmic order, in classical Hindu legal theory, he first of all makes no law, he *administers* what his people perceive to be their law, seeking to ensure thereby that morality is not disregarded, and that the individual perceptions of rights and duties remain within the overriding ambit of dharma in its macrocosmic and microcosmic dimensions.

It is worth noting that *dharma* is not even at the disposal of gods. A *vidhi* is normally seen as an injunction and we will adopt this linguistic use. However, we remarked in the previous chapter that *vidhis* are prescriptions conceived basically as knowledge units rather than as

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1   On the relationship between *rājadharma* and *kṣatra* see Lingat (1998: 207-215). The *rājadharma* may be seen as the basis of the Hindu concept of sovereignty, similarly to other concepts that in different cultures concern "political theology".

2   See Lingat (1998: 224-232) on the cases of conflict between *dharma* and royal decrees.

3   This could explain also, at least in the ideal model, the hierarchical primacy of *brāhmaṇas* over *kṣatriyas*.

commands. Moreover, we have to remark that the term "injunction" could be misleading if interpreted as an expression of God's *will*, because in this context there is not a personal God.

But how is it possible to know *dharma*? To act in accordance with *dharma* concerns the process of maintaining cosmic and social order and the quality of one's present and future life. At the same time, particularly in Brahminical thought, *dharma* is conceived as something beyond human autonomous means of knowing.[4] Therefore, an appropriate knowledge of *dharma* is at the same time crucial and difficult to reach. An instance of the Hindu attitude towards the knowledge of *dharma* is provided from a famous statement in Āpastamba's *dharmasūtra*: "The Righteous (*dharma*) and the Un-righteous (*adharma*) do not go around saying, 'Here we are!' Nor do Gods, Gandharvas, or ancestors declare, 'This is righteous and that is unrighteous'".[5] The vision of *dharma* as beyond easy reach may be envisaged also in the invocation we find at the beginning of the *Manusmṛti* (I.2-3):

> (2) Sir, please tell us, properly and in order, the duties of all (four) classes and also of the people who are born between (two classes) (3) For you, lord, are the only one who knows the true meaning of what is to be done in this whole system made by the Self-existent one, that cannot be imagined and cannot be measured.[6]

From this invocation clearly appears that the teaching of Manu is meant to indicate what would be otherwise difficult if not impossible

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4    The view according to which the *ṛta-dharma* complex is beyond human reach is common to many Hindu traditions and, as such, does not entail the Vedic prima-cy, which is prominent in Brahmanism. In this regard, Menski (2003) highlights that an outcome of this conception is the open character of Hinduism, which hardly suggests that some views are absolute truths.

5    Āpastamba 1.20.6 (tr. P. Olivelle) (*na dharmādharmau carata āvam sva iti. Na devagandharvā na pitara ity ācakṣate 'yam dharmo 'yam adharma iti*).

6    See Jha (1999). Olivelle (2005: 87) translates: "Please, Lord, tell us precisely and in the proper order the Laws of all the social classes, as well as of those born in between; for you alone, Master, know the true meaning of the duties contained in this entire ordinance of the Self-existent One, an ordinance beyond the powers of thought or cognition".

to know for common people.[7] The first *adhyāya* of the *Manusmṛti* includes a cosmogony, because, as we saw, there is a close relationship between duties and cosmos, between what has to be done and the fact that things are the way they are. The second *adhyāya* properly starts the teaching of *dharma* and includes the verses we are going to analyse concerning the sources of *dharma*. In fact, the authority of this teaching has to be grounded on the established means of knowing *dharma*. In other words, elaborating on dharmic rules *dharmaśāstrins* and *mimāṃsakas* have also to establish and teach which are the sources or indicators of *dharma* (*dharmamūlas*).[8]

The authorities for the knowledge of *dharma* are thus established through reasoning. It is noteworthy that in modern positivist legal cultures the sources of law, as well as legal rules, are established by State authority. The "revolution" that occurred in continental Europe during the age of codification basically concerned the establishment of authoritative sources of law by the State. In the Hindu tradition, as well as in other legal traditions, the establishing of the authority of sources is not, once again, a matter of will or power.[9] Sources are not posited but have to be recognised. To be clear, the authority of *smṛti* or *sadācāra* cannot be decided by a ruler and can be only justified through reasoning.

However, we have to distinguish. As we will see in more detail later on, in a sense authoritative sources are already there. A Hindu will rely on the authority of certain *sadācāras* because he will learn that those models of behaviour are deemed as authoritative within his or her community. He does not need to scrutinise the groundings of this authority. Nonetheless, especially *mimāṃsakas* need to legitimate the authority of certain sources and to negate the authority of competing sources. Therefore, this elite elaboration aims to provide a

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7    Nonetheless, as we will see, the recollection of Manu, as well as of other authors, is meant as a non self-sufficient means of knowing and is considered as authoritative to the extent in which it is founded on the Veda.

8    Olivelle (1999) highlights that all the authors of *dharmasūtras* ask themselves where to find the guidelines for appropriate behaviour, that is to say, which are the sources of *dharma*.

9    However, the theory of sources in the modern State was justified by philosophical and ethical views and, on the other hand, a pragmatic approach suggests to take into account the fact that questions of allocation of social power were necessarily involved also in the theory we are describing.

legitimation to sources of *dharma* that were already there, but doing so it helped to define and further elaborate what should be a proper source of guidance for a Hindu and thus also what norms could be accepted as dharmic.

This question has two sides. On the one hand, every legal culture needs to found itself and to justify its main assumptions. In our view, most of the arguments we are going to analyse could be seen as answers to *real* doubts, even if in some cases we can admit that a manneristic way to cope with this problem emerged in course of time. The second side concerns the relationship with competing views, such as the Buddhist one, and the defence of a core of beliefs and practices from outsiders' criticism through a restatement of their rational and practical justification.

## *Nyāyamūlatva*

*Nyāyamūlatva* means founded on reasoning and the overall system of sources of *dharma* is the outcome of a perusal of the authority of each source, including the Veda, carried on through rational discussion. This fact may be highlighted through the analysis of the commentary of Medhātithi on Manu II.6, which starts with an objection, at first surprising, concerning the very same sense and usefulness of a verse stating which are the sources of *dharma*. As usual in this kind of literature, arguments are expounded dialectically through *pūrvapakṣa* and *siddhānta*: a doubt is presented in order to open the discussion of alternative opinions on the questioned point and to reach the established conclusion.

The centre of the objection is that verse II.6 is not relevant in a work, such as Manu, whose aim is the exposition and teaching of *dharma*, of what should be done. In fact, in this view *dharma* may be known only through injunctions and Manu II.6 may not be meant as an injunction. The fact that the Veda is the source of *dharma* cannot be the content of an injunction, which would have the following form: "Veda should be considered the source of *dharma*", because this is a truth established through reasoning. In other words, according to this argument, Manu II.6 is irrelevant because the authority of Veda as a means of knowing *dharma* does not need to be established by Manu or

other authors but may be ascertained on the ground of several argu-
ments (Jha 1999: 172).[10]

If the function of Manu II.6 cannot be soundly to lay down that
the Veda is authoritative, one could ask what actually its function is. A
first hypothesis taken into consideration in the commentary of
Medhātithi is that the verse, by making reference to the authority of
the Veda, actually aims to point out the Vedic grounding of the
authority of the *smṛti* of Manu and of other *smṛtis*. However, this
hypothesis is rejected because the Vedic grounding of *smṛtis* also may
be known through reasoning and therefore there is no necessity to
state it in a verse. Similarly, further hypotheses are that the statement
that *smṛtis*, as founded on the Veda, are sources of knowledge of
*dharma* aims to exclude the authority of heterodox *smṛtis*, or that the
aim of the verse would be to state the authority of *sadācāras* and
*ātmanastuṣṭi*. However, the conclusion is that the lack of authority of
heterodox *smṛtis* and the authority of *sadācāras* and *ātmanastuṣṭi* may
be equally established through reasoning (Jha 1999: 172).[11] Therefore
this quite repetitive discussion makes clear that in this view the
authority of all sources is established through reasoning, that is to say,
is *nyāyamūlatva*.

The overall discussion may be seen as bearing, so to say, on the
authority of the list of authorities. A different perspective is presented
in this regard. The authority of the sources of *dharma* cannot depend
on the teaching of Manu because, in this case, the problem of the
authority of the verses that state which are the sources of *dharma* will
remain unresolved and unresolvable. In other words, Manu II.6 would
be a *smṛti* verse stating the authority of *smṛti* and then its very same
authority, and this would lead to circular reasoning. Furthermore, in
this case there would be a *regressus ad infinitum* because, at the end
of the day, also the authority of Veda could not be based on a Vedic
passage affirming the authority of Veda, if any, considering that this is
what has to be demonstrated. Therefore, the real criterion to establish
the authority of sources must be a logical – we could say an extra-
textual – one.

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10  That is to say, the arguments concerning the eternity of the Veda, etc. we will
    analyse in detail in the part devoted to the authority of Veda.
11  Arguments mentioned in this discussion to state the authority of sources will be
    analysed in detail in the following chapters.

The above arguments are held by the objector to establish the lack of usefulness of verse II.6. Medhātithi (Jha 1999: 176) accepts that the ground for authority is ascertained through reasoning and that the verse II.6 cannot by itself establish what is authoritative and what is not. However, he does not agree on the uselessness of the verse. In his view the sense of Manu II.6 is to *remember* the authority of sources of *dharma* for people who cannot ascertain it autonomously. This is *smṛti* in its proper sense.

Persuasively, Medhātithi overcomes the limitation according to which *dharmaśāstras* should be made up only of injunctions. On the contrary, according to Medhātithi, the *dharmaśāstras* are composed to transmit the knowledge of *dharma* to persons that are not learned in the Vedas. In this view, authors of *smṛtis* know through the Veda that ritual acts, for instance the *aṣṭaka*, must be accomplished and they insert this injunction in texts they compose aiming to transmit it to others.[12] Similarly, as concerns sources, and this is the central argument of Medhātithi, the verses stating the authority of Veda, *smṛti*, etc. are included in *smṛti* works, even if they are truths established through reasoning, to transmit this knowledge to persons who are not able to ascertain these truths through reasoning. Therefore, Manu II.6 should be actually understood as saying that the fact that Veda, as well as other sources, is the source of *dharma* has been duly ascertained and their authority should not be denied (Medhātithi on Manu II.6; Jha 1999: 176).

To strengthen this view, Medhātithi makes a parallelism with the case of a patient accepting indications by a physician. The physician in the example is similar to the author of *smṛti* because both teach what they learned through other means of knowing. The author of *smṛti* knows *dharma* through the Veda and transmits this knowledge to those who cannot gain this knowledge through it, while the addressees of the work accept the teaching as true, without the need of further deepening the question, because they recognise the author as *trustworthy* (Medhātithi on Manu II.6; Jha 1999: 176-177).

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12  It is worth noting that in this passage Medhātithi makes no mention of the theory of the lost Veda we are going to explain in the next pages and refers, more generally, to the transmission of the knowledge of *dharma*, which is obtained through Veda, to persons that are not learned in the Vedas, independently from the possibility of finding an explicit Vedic text.

Therefore Medhātithi, dealing with the specific issue of the function of Manu II.6, makes two points that are extremely interesting in general terms. From the view according to which the teaching of *dharma* contained in texts belonging to the *śāstra* serves to transmit normative knowledge to persons who do not have direct knowledge of the Veda or the capacity to understand it, clearly emerge the two senses in which it is possible to talk of "knowledge of *dharma*". From an epistemological point of view the only valid knowledge is that derived from the Veda but, considering actual mechanisms of transmission of normative knowledge, *dharma* is not known directly through the Vedas, but through the teaching of persons held to be trustworthy. As we will see, this line of reasoning is far reaching and concerns also other sources.

Secondly, stating that the verse II.6 has not to be meant as a precept and, nonetheless, is coherent with the function of *smṛti*, Medhātithi's commentary provides valuable insight about what a *dharmaśāstra* text is conceived as made of. According to Medhātithi (Jha 1999: 177), this section of the *Manusmṛti* is based on logical facts. This is not the only case because also sections devoted to procedures are held to be based on purely logical facts and not on truths revealed in the Vedas. Therefore, arguably *dharmaśāstra* texts have a composite nature, being partly based on Vedas and partly on reasoning. Moreover, these texts in many cases include description of practices, explanations, so-called eulogistic or praising parts, such as the cosmological section that opens the *dharmaśāstra* of Manu. As a result, they may be viewed as the outcome of an effort of systematisation of normative materials. This seems to confirm that the very same *dharmaśāstras* are the work of interpreters. They aim to transmit a composite corpus of knowledge relating to *dharma*, including both logical facts and rules. *Dharmaśāstras* are not made up simply of positive and negative norms and embody in a tacit way the culture from which those rules of behaviour derive.[13]

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13  On Manu as "an encapsulation of the whole culture *in nuce*" see Doniger (1991: lviii). In general, it may be remarked that *dharmaśāstra* literature is more ambitious and encompassing than *dharmasūtra* literature.

## Reasoning and orthodoxy

The fundamental role played by reasoning in the establishment of sources of *dharma*, and of course in the elaboration of dharmic rules, raises the problem of the characters that reasoning should have to be held as valid. In this regard, a matter under discussion is the relationship between orthodox and heterodox reasoning. The works we are considering make often reference to the views of Buddhists and Indian materialistic schools, generally speaking the *nāstikas*, who negate the authority of Vedas.[14] In this case, reasoning aims to shake the authority of the Veda altogether and cannot be allowed. In other words, the very same reasoning and critical discussion leading to the knowledge of *dharma* has to be respectful towards the value system of which the interpreters feel to be protectors.[15]

Medhātithi deals with this point in the commentary on Manu II.10. This verse states that:

> The Veda should be known as the 'Revealed Word', and the *Dharma-shāstra* 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)

Medhātithi clarifies that criticism has to be meant as the raising of objections and doubts or the exposition of views that are contrary to those held in Veda and *dharmaśāstra*. This does not mean that any discussion is prohibited, because what is not allowed is such criticism that is grounded on a preliminary negative view on the authority of the Veda. Then, Medhātithi states that this Manu verse does not concern

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14  See Olivelle (2005) on the possible indirect influence of competing views on the composition of *dharmaśāstras* such as Manu.

15  Orthodoxy in this conception is simply the Vedic rootedness of this learning, as elaborated in *smārtadharma*. This view historically showed a tendency towards generalisation and cultural unification, and was indeed successful in certain historical periods and geographical contexts. Nonetheless the pluralism of the South Asian context suggests to avoid any generalisation of this culture, which acted through cultural diffusion by interplaying with other cultures and sometime linking itself to the power of rulers, becoming the official doctrine of *dharma* and providing at the same time a political theology and a learned elaboration of legal rules.

the discussion aiming to ascertain the meaning of Veda, through *pūrvapakṣa* and *siddhānta*. In fact, in this case the raising of doubts or contrary views is part of a hermeneutical process that still recognises the authority of the Veda. There not being a "lack of respect", the *pūrvapakṣin* who proposes arguments to hold the preliminary opinion that the Veda is devoid of any authority should not be considered an "infidel" (*nāstika*). In this regard, Medhātithi makes reference to a *Manusmṛti* verse (XII.106) stating that a genuine knowledge of *dharma* may be reached only through reasoning.[16]

The analysis developed on Manu II.11 points out other aspects concerning this question. This verse contemplates a penance for those who refuse the authority of Veda and *smṛti*:[17]

> If a twice-born person, relying upon the science of dialectics, should disregard these two sources, he should be cast out by good men,--the detractor of the Veda being an infidel. (Jha 1999: 216)

Medhātithi (Jha 1999: 216-217) explains that "science of dialectics" here means the works of Buddhists, Cārvākas and atheistic schools, who believes that to act in accordance with Veda is actually sinful and thus deny at its root the authority of Veda. A person who, once advised on the fact that his behaviour is sinful because it is prohibited in the Veda, ignores this warning and negates that Veda and *smṛti* have any authority, should be seen as an "infidel" and should be cast out. Furthermore, in Medhātithi's view, the thought that the Veda has no authority is sufficient, and thus no concrete act is required to be cast out from among good men, which means to be excluded from sacrifice, teaching and all those acts that are suitable to good men.

This passage is a perspicuous evidence of interaction and communication between different co-existing views, although a troublesome one. It is hard to assess what the view expressed in Manu II.11

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16  To strengthen this view an example concerning the act of killing is made to highlight the contradictory position of those who criticise the Veda, on which see Jha (1999: 212-213). Other interesting passages on the nature of criticism may be read in the commentary on Manu II.11 (Jha 1999: 217).

17  As we will see in the next paragraph the practices of virtuous men as well do not deserve to be criticised. Criticism towards approved practices is a very important and scarcely analysed topic. The starting point of Medhātithi's discussion is actually justified only from the previous discussion.

involved in practical terms. In fact, generally speaking, the *dharma-śāstras* provide guidelines that could be more or less followed in a specific context. On the other hand, it may be easily understood that Brahminical and *smārtadharma* circles laid down some distinctions with all the persons who refused the authority of the Veda. In this sense, the acknowledgement of the authority of the Veda, also meant as the following of practices legitimated as Vedic, was a criterion to define the identity of a group and the belonging to it and the casting out was likely an appropriate reaction to protect the cultural unity of a social group.[18] However, barriers existing between different cultural or social groups could be coherent with a social organisation that necessarily allowed a prominent pluralism. We possess much historical evidence of cultural debate in India and many texts on *dharma*, particularly commentaries and *mīmāṃsā* texts, explicitly include philosophical disputes. In this context, the task of interpreters was not only to define the authoritative texts of tradition but also to protect their authority from strong competitors of Brahminical orthodoxy.[19]

## Forms of the Veda

Medhātithi's discussion specifies that what is explicitly said with reference to the Veda applies to other *dharmamūlas* too. First of all, he specifies that in Manu II.11 the passage where reference is made to

18  See Rouland (1988) for a general discussion, which may be replicated in different social groups, including Buddhism. In a Hindu context ritual purity was an important criterion to distinguish between different social groups. The inclusion-exclusion dynamics certainly was very differentiated and more or less rigid in different contexts, given the internal pluralism of Hinduism. In any event, so to say, the *rate* of orthodoxy was not without consequences to define the place of different person and groups within this society. Against the view of a Vedic core, see Menski (2003) and Flood (1996). Therefore, the inclusiveness of Hinduism makes the concept of orthodoxy quite complex in this context.

19  See Verpoorten (1987). Also the flourishing of *nibandhas* during the Muslim period may be an example of the basic mechanism of preservation of a culture and of the usefulness of conceiving the history of *dharmaśāstra* as a history of origin, transmission and diffusion of conceptions and rules from the Vedic period to the modern age. On the other hand, the fact that the opinions of others are explicitly discussed, trying to show their deficiencies, is evidence of cultural interaction and competition.

the "detractor of Veda" actually concerns also *smṛti*. This view is based on a "systematic" reason, for, in this context, the discussion regards both sources. In addition, according to Medhātithi, both sources are on the same level and then, in principle, what is said with reference to one of them may be referred to the other also (Jha 1999: 217). The arguments concerning reasoning and orthodoxy gain remarkable relevance in Medhātithi's interpretation. In fact, unexpectedly, he links Manu II.12, which contains a second list of *dharmamūlas*, to Manu II.10-11 and, by this, provides an interesting explanation of the relationship between the Veda and the other three acknowledged sources.

Generally speaking, Manu II.12 raises a systematic problem, because it is very close to verse II.6 and its content may be seen as equivalent, although not identical, for both present the list of four accepted *dharmamūlas*. Then, why two similar verses in the same place? Several views are expounded in Medhātithi's commentary. An explanation of repetition could be that the second verse has to be meant as the *marker* of the end of the part devoted to sources of *dharma* and, at the same time, as a way to sum up the discourse. This way to organise texts is quite common, and Medhātithi provides some examples from Nyāya and grammarians' works (Jha 1999: 219). A general remark may be made in this regard. Texts such as Manu have been criticised as "hotchpotch of inconsistency" in some Western approaches (see Doniger 1991: xliv ff.). Medhātithi's commentary shows that actually they were considered well-done works and were interpreted according to sophisticated rules recognising structural markers. In other words, repetition here is not a flaw of the text but a meaningful element.

Medhātithi takes into account this view but he holds that Manu II.12 has to be understood as meaning that the prohibition of criticism against the Veda and the sanction resulting from its violation, contained in verses II.10 and II.11, applies also to criticism against *smṛti*, *sadācāras* and *ātmanastuṣṭi*. The reason for this is the fact that all the four sources describe *dharma* as based on the Veda. Typically in commentary literature, the discussion of competing views concerning very specific problems involves general ideas, which provide valuable insight into the underlying conceptions which interpreters

were used to.[20] Medhātithi's interpretation could seem debatable, but in our perspective the important point is the theory of the relationship between the sources of Veda that is explained in this regard.[21]

In principle, in this view, what is said with reference to the Veda concerns all the four sources of *dharma* because the whole of *dharma* is based on the Veda. Medhātithi explains that, in verse II.12:

> In the compound '*Chaturvidham*', '*fourfold*', the term '*vidhā*' means *kind, form*. As a matter of fact, Veda is the only source of knowledge of Dharma, and *Smṛti* and the rest are only so many *forms* of the Veda. (Jha 1999: 219)

Therefore, the literal expression according to which Veda, *smṛti*, *sadācāras* and *ātmanastuṣṭi* are four means of knowing *dharma* is reformulated to say that there is only a means of knowing *dharma*, which has four forms. This reformulation may be meant as making explicit a basic underlying conception. In the commentary on verse II.6, Medhātithi (Jha 1999: 195-196) states that it is an acknowledged fact that *dharma* rests on four feet and that only a small part of *dharma* is prescribed directly in the Veda, but the connection of *dharma* to Veda, even in indirect form, is inevitable.

This is perfectly orthodox from a *mimāṃsaka* point of view and is based on a specific epistemological theory. In this view, only the Veda has a self-sufficient authority as concerns the knowledge of *dharma*. The problem here is the possibility to reach a valid knowledge of *dharma*, which, as we said, by its nature is beyond the reach of man.

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20   This was the case also for the interpretation of Manu II.6. Likely these views were basically shared views and in some cases remained implicit. In the specific case of the interpretation of Manu II.12 the theory of the forms of the Veda seems to be a traditional well-established view, grounded in the teaching of the Mīmāṃsā. It could be further investigated if at the time of Medhātithi there were competing views on this topic.

21   Other arguments can be mentioned concerning the very specific and limited interpretation of the functional meaning of Manu II.12 as aiming to extend the prohibition of criticising the Veda to the other sources of *dharma*, considering that they are founded on the Veda. This interpretation is criticised because, if so, it could have been possible to state it in an explicit form in a single verse (Jha 1999: 218). On the contrary, according to Medhātithi, verse II.12 explains what may be understood through the preceding verse by a person who does not need many words.

Thus the Mīmāṃsā proceeds to an assessment of the cognitive bearing of the single acknowledged means of knowledge with reference to *dharma* and identifies in the knowledge through word (*śabda*) the only possible means.

In other words, *dharma*, pertaining to the sphere of "ought" and relating to invisible results of actions, cannot be perceived or inferred and may be known only through language. The fact that the Veda is viewed as the only means to know *dharma* is then the result of a negative analysis carried out on the possibility to know *dharma*, through perception and other ordinary means of knowledge based on perception. At this stage, what is pointed out is firstly the epistemic authority of *śabda*.

Moreover, clearly not any word can be considered authoritative, but only the authoritative word of the Veda. In fact, the second step is the demonstration of the reliability, truthfulness and absolute authority of Vedic *śabda* as a means of knowing *dharma*. This is done making recourse to the concept of intrinsic validity of knowledge, to the theory of the eternity of Veda, and to that, very important, of lack of a Vedic author.

We will analyse these peculiar theories in more detail in the next chapter. What is important to point out here is that the view according to which the Veda is the only valid means of knowledge of *dharma* strictly refers to the epistemological level of discourse. If, on the contrary, we consider the problem of knowledge of *dharma* under the aspect of the ascertaining of *dharma* for a specific individual in a given context, if, in other words, we consider the problem from the perspective of an interpreter, a qualified or not qualified interpreter, we have a totally new perspective: to the oneness of the Veda a plurality of sources of knowledge of *dharma* is substituted.

The epistemological primacy of the Veda underlies the theory of sources we are analysing. In fact, the other sources of *dharma*, having a human origin, have no self-sufficient authority and can find their authoritativeness only in their foundation on the Veda. In most cases the establishment of the Vedic foundation is problematic. Normally, the authority of other sources is recognised stating the existence of supporting Vedic texts, even by way of mere presumption.

For instance, authoritative *smṛti* texts are held to have a Vedic text as support, and when this text cannot be found, it is held that the

Vedic text has been lost. In this regard, it is worth remarking that in this view there is not a general-particular relation between Veda and *smrti*. The *smrti* norm is conceived to be the same of the *śruti* norm, for everything contained in the *smrti* or in other sources is actually Veda in a different form. In other words, *smrti* rules are not derived from general principles contained in the Veda, which could be also a way to connect *smrti* to Veda, but they are assumed to be originally Vedic rules. Similarly, it is held that *sadācāras* are based on lost Vedic texts. However, as concerns *sadācāras* and particularly *ātmanas-tusti*, the Vedic foundation could be assured by personal qualities. In fact, according to this specific viewpoint, only the practices and self-satisfaction of virtuous men, that is, those who usually behave in keeping with the Veda are authoritative sources of *dharma*.

Veda is represented in this context as a sort of *Grundnorm* of the entire system of sources of *dharma*, because the authority of all other sources is deemed as founded on the Veda. As a result, in principle, one could argue that the Veda itself states that *smrtis*, *ācāras* and *ātmanastusti* are sources of knowledge of *dharma*, but this is not the case. The authority of these sources is founded on the Veda but is established by reasoning.[22] There is not a dynamic relation or a *Stufenbau* (Kelsen 1970) between different authorities.

As we will see dealing with the arguments used to establish the authority of sources, the theory of the lost Veda is crucial. In this regard, Olivelle (1999: xli) remarks:[23]

> The theory of the 'lost Veda' is used as a hermeneutical strategy to theoretically derive all *dharma* from the Veda, while in practice providing for other sources. The customs from which some elements of *dharma* are derived are actually based on lost vedic texts, which can be

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22 The Veda cannot state its own authority because in that case there would be the same logical clash pointed out in the case of *smrti*. The possibility of a Vedic list of sources of *dharma*, that is a verse establishing in explicit words the authority of other sources is discussed in the *Tantravārttika*. We will consider some of those arguments in the next chapters.

23 Olivelle in this case makes reference to Āpastamba. The theory of the lost Veda is a common one and we find it in the Pūrva Mīmāṃsā works, as well as in commentators like Medhātithi. However, some different opinions appear with reference to a complete loss or to a mere difficulty to find the texts at support considering that there are different recensions, as we will see dealing with the authority of *smrti*.

'inferred' from the existence of these customs ... Thus we have the distinction between 'explicit vedic texts' (*pratyakṣaśruti*) and 'inferred vedic texts' (*anumitaśruti*). This hermeneutical principle permitted Āpastamba to recognize the customs among good people as a guide to proper living, that is, as *dharma*, while maintaining the theological fiction of the Veda as the sole source of *dharma*.

Following the suggestion of the last part of the quotation by Olivelle, this theory of sources is properly a theory of legitimation. The rules that come to be legitimated establishing a Vedic foundation were already existing and commonly accepted. Therefore, by saying, for instance, that a given practice has to be founded on the Veda because otherwise its common acceptance would be inexplicable, interpreters were actually carrying on a cultural process of assimilation and integration.

On the other hand, this Vedic focus could lead to envisage a prominence of texts but this would be misleading. In fact, when it is stated that in addition to *smṛti* works, even practices and self-satisfaction are forms of the Veda, the affirmation of the primacy of the Veda cannot be understood in legalistic terms to mean the marginality of non-written sources. The statement of the exclusive authority of Veda for what concerns the knowledge of *dharma* must be placed on the epistemological level and it does not affect the question of the relevance, i.e. authority in practice, of single sources in the concrete process of ascertaining *dharma*.[24]

In this sense the peculiar way in which the relationship between the four accepted sources is recognised suggests not to draw neat distinctions between them. The Veda goes far beyond existing Vedic texts. All sources, including *ātmanastuṣṭi*, are seen as parts of a single process leading to the knowledge of *dharma* and this is the deep sense in which all four are the feet or the roots of *dharma*, that is, that from which derives the knowledge and in some sense the very same life of *dharma* in history.

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24  The fact that in this view the Veda is considered as the only true source of knowledge of *dharma* probably emerges from the very same structure of Manu II.6, which could be also interpreted as a synthesis of the progressive acknowledgement of the authority of different sources. In fact in the Mīmāṃsā, the first step is the authority of Veda while the second step is the establishment of the authority of non-Veda.

# The Vedic foundation: Cultural representations and historical analysis

What we said above helps to manage the tensions emerging in the Hindu tradition between the prominent place of the Veda and the other sources of *dharma*. Some other remarks can be made, considering the "theological" definition of *dharma* and, secondly, what actually means to be "Vedic". In this regard, it is important to distinguish between cultural constructs and underlying historical facts.

Olivelle (1999: xxxix) highlights that in Mīmāṃsā the definition of *dharma* is so strictly tied to epistemological questions that it is provided directly by stating which are the means of knowing it. In this view "*dharma* is the content of vedic injunctions" (*id.*). *Dharma* and Veda are often presented as correlative terms, the one defining the other, circularly. In other words, Veda is the means of knowing *dharma* and *dharma* is what is known through the Veda.[25]

Concerning the problem of the relationship between *dharma* and Veda, a fundamental *sūtra* is Jaimini I.1.2, which presents this theological definition of *dharma*. This *sūtra* states: *"codanā-lakṣaṇo 'rthodharmaḥ"*. A standard translation could be *"dharma* is what is denoted by a (Vedic) injunction".[26] However, considering the typical meaning concentration of *sūtras* and the wide semantic scope of all used terms, it is not easy to interpret the above *sūtra*. In fact, the term *artha* may have many meanings, and in this context at least "purpose", "object" and "referent". *Lakṣaṇa* is what indicates and designates or also what characterises.[27] The interpretation of the term

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25  This explicit, theological definition of *dharma* makes plain sense in the original ritual context. Olivelle (1999: xxxix) remarks that: "Beyond that explicit and theological definition, however, in their usage of the term our authors reveal an implied or working definition of *dharma* that greatly expands its semantic range... There is, then, a dissonance between the theologically correct definition and epistemology of *dharma* and the reality of the rules of *dharma* encoded in the Dharmasūtras".

26  Mohan Lal Sandal (1980) translates "The duty is an object distinguished by a command". Jha (1983) translates: "Duty is a purpose having Injunction for its sole authority (means of conceivability)".

27  *Lakṣaṇa* is the term used in Manu II.12 for source of knowledge. It is a crucial term and allows different interpretations. Aside those suggested above, it seems to me that there could be scope for a view according to which *dharma* is the

*codanā* is particularly important. It derives from the root *cud-*, which has the meaning of "prompt to", and, by extension, "demand" and "enjoin". Piantelli (1976) remarks that the term *codanā* cannot refer to a simple description of a behaviour and introduces an "emotional and pragmatic" dimension. In this sense, according to him, the *sūtra* introduces from the beginning the deontological perspective of the Mī-māṃsā.[28]

Usual translations identify *codanās* and Vedic injunctions and this explains why *dharma* becomes the content of Vedic injunction. However, in my view, what happens here is that the focus is not on Veda but on injunctions. In other words, the definition contained in Jaimini I.2 says that *dharma* is what has to be done, it refers to "ought", and as such is indicated by prescriptions. This would be also in keeping with the fact that Jaimini I.4 establishes that *dharma* cannot be known through perception, because it is not a fact. Probably, it could be possible to go further and to translate "*dharma* is what is characterised from being normative" or "*dharma* is what one should do".

In any event, also in the translation that seems more plausible, for *dharma* is the object of a Vedic injunction, there is no need to focus on "Vedic" rather than "injunction". In other words, there is no doubt that, according to the Mīmāṃsā, the valid means to know *dharma* are the injunctive passages of the Veda, but this should not lead to interpret Jaimini's *sūtra* I.2, so to say, starting from conclusions and then superposing on the text a Vedic focus that could be lacking at that stage. The epistemological interrogation we find in the *Ślokavārttika* is evidence of the fact that the authority of the Veda as concerns *dharma* is the outcome and not a preliminary assumption.

The primacy of the Veda seems to involve also that to know *dharma* means to investigate into the meaning of the words of Veda. Particularly, as concerns the role of Mīmāṃsā, to state that only the Vedic injunction is a valid means of knowledge of *dharma* means that

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universal through which an individual is signified or qualified. From a comparative perspective, an analysis of the concept of "indicator" in Muslim law may be found in Weiss (1992).

28   Piantelli (1976: 494) writes: "Jaimini, considering the *codanā* as the element of individuation of *dharma*, certainly understands this latter as norm ... In no case a proposition expressed by a *codanā* could be felt as merely descriptive" (my translation).

the only way to know *dharma* is to understand the meaning of Vedic injunctions. According to Jha (1964), the proper meaning of Jaimini I.1 is that after the study of the Vedas one has to carry on the investigation into the *meaning* of Vedic texts, aiming to the correct accomplishment of acts prescribed in the Vedas. However, the first of Jaimini's *sūtras*, introducing the entire work, says that it is devoted to the investigation into *dharma* and not into Veda. In this sense, the Mīmāṃsā is clearly concerned with *dharma* and, as well as *dharma-śāstra*, deals with the understanding of *dharma*.

Mīmāṃsā is not simply, as often assumed, hermeneutics of Vedic texts but a complete investigation into *dharma*, as results from the very same etymology of the term, which means deep effort of understanding. To define it as a school of Vedic exegesis is basically correct, but it could be misleading to conclude that it deals only with texts. Actually all the possible means of knowledge of *dharma* are considered and critically investigated on the basis of their major or minor reliability. Therefore, everything is finalised to the valid knowledge of *dharma* and in this sense *interpretation is nothing but knowledge of dharma*.

From a broader perspective, the theoretical fiction of the lost Veda serves to connect new norms to the Veda.[29] The Vedic texts, on the other hand, hardly present an extensive dharmic regulation. *Brāhmaṇas* include norms on ritual, but in the *saṃhitās* genuine injunctions are very few. However, to be a source of rules does not mean necessarily to state rules. Veda embodies the cosmological structure which is at the basis of the Hindu conception of normativity (Menski 2000; 2003). Hindus do not regard the Veda as simply *saṃhitās* or texts. In many cases they refer to the Vedas as the entire knowledge. Existing Vedic texts are considered as a partial expression of this knowledge. Some texts could have been lost or, more significantly, a part of this knowledge could be hidden or not yet revealed. In this regard, Lingat (1998: 8) writes:

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29  It is noteworthy that the reference to the Veda is a way to strengthen the legitimation of a text in a given environment. An evidence is the fact that the author of the *Manusmṛti* states that everything that is contained in the text may be found in the Veda also.

> ... when a Hindu affirms that *dharma* rests entirely upon the Veda, the word Veda does not mean in that connection the Vedic texts, but rather the totality of Knowledge, the sum of all understanding, of all religious and moral truths, whether revealed or not. These truths are not human entities; they are imposed upon man who must simply submit to them; they exist by themselves and have always existed. They form a kind of code with infinite prescriptions of which only the Supreme Being can have perfect knowledge. This eternal code was revealed by Him to certain chosen ones, and that is what is called *śruti*. But only a part of that Revelation could be communicated to mankind; a good deal of it has been lost, moreover due to the weakness of human memory. Therefore the Vedic texts are far from representing all the Veda. When a rule of *dharma* has no source, we must conclude that it rests upon a part of the Veda which is lost or somehow hidden from view.

This explanation by Lingat describes a cultural elaboration of the relationship between Veda and *dharma* that is variously elaborated in several Hindu philosophies. For instance, the Mīmāṃsā conceives both as eternal and eternally connected, as language and reality.[30] Moreover, in some views, Vedic language has a role in the manifestation of the cosmos. In other words, Veda is not a description of the world but a part of the inner constitution of the world. Therefore, it is not conceived as the word of God but as a manifestation of the undifferentiated divine principle that is at the roots of cosmos. In other terms, the Veda is not uttered by the Divinity but it *is* the Divinity. Vedic words and the world are eternal by their nature and their historical manifestations do not affect their eternality.[31] The visible cosmos is linked to an invisible being (*dṛṣṭa* and *adṛṣṭa*). The same is true for the Vedic word, of which only a part is manifested.

Purohit (1994: 117)) has remarked on the peculiar attitude towards interpretation deriving from these theories of Vedic language:

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30  It is noteworthy that the first *sūtras* of Jaimini deal with these aspects.
31  Interestingly, the view of an eternal code is present in the South-East elaboration of *dhammasatthas*. Lingat (1998: 267), explaining the cultural appropriation of Manu in this tradition, writes that the authors of *dhammasatthas* "imagined that that Sage was raised into the celestial regions and reached the *cakkavāla*, the wall which surrounds the world and which bears, carved in letters high as a bull, the law which rules it. It is this very text of the law which, rehearsed from memory by the hermit Manu, is set down in the *dhammasatthas*".

> Legal interpretation is then an aspect of cosmic lila or maya or '*kama*', of dynamic reality, as extended to the sphere of human actions controlled by law. Interpretation then becomes necessary to know the meaning as far as possible which is contained in language ... The revealed truth or dharma of Vedas come through the medium of words. But the exploration of words is not so easy ... only one part out of three parts is visible to the ordinary human beings. Hence one has to perform the difficult task of interpreting the language ... of the Vedas in order to get the right knowledge of its prescriptions.

This multi-faceted cultural elaboration on the relationship between *dharma* and Veda, which we have simply sketched, points out the cosmological bearing of normative concepts and some specific ways on the part of interpreters to think of *dharma* and of their own role.[32] However, considering that it is a *cultural* view of the grounding of normativity and of the role of Veda meant as foundation, the founding character of the Veda, and then language, as a true source of normativity should be seen also from an analytical *historical* perspective.

In this regard, a common view is that the role of the Veda in Hindu culture has been widely overstated, because it represents a cultural construct with limited reach in reality.[33] A good starting point to approach this question may be provided by the debate concerning the antiquity of Hindu law. Generally, Hindu law is viewed as the most ancient legal system having relevance in the modern world.[34] This argument is based on the fact that the conventional origin of this system may be placed around 1500 BC, which is broadly the date of composition of the main Vedic texts, although a debated one. Assuming the Veda-as-text as the starting point, two prominent comparative law scholars, Zweigert and Kötz (1998: 315-316) have criticised the purported antiquity of Hindu law because Vedic texts are not legal texts and, then, cannot be assumed as evidence of the beginning of a legal tradition. Following this view, we could speak properly of a legal tradition only starting with the much later appearance of

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32  In this view it makes sense also to argue the conception of interpretation as a continuation of differentiation and manifestation (Halbfass 1990b), which is a relevant contribution of some Hindu views to the definition of the role of interpreters.

33  For a discussion of this problem see Heesterman (1978) and Halbfass (1990b).

34  See Derrett's introduction to Lingat (1998).

*dharmasūtras*. Zweigert and Kötz (1998: 315) make reference to the little impact of Vedic texts on law arguing a very common view:

> [A]lthough the Hindus regard the Veda as a divine revelation and as the source of their religion and law, its practical influence on the spiritual life of the Hindu population has been very slight for many centuries; it cannot be said that the Veda has had much impact on the development of Hindu law, especially as it contains very little material with a specific legal content.

However, the point is which consequences should be drawn from this remark. First, a periodization of Hindu legal history based on the peculiar characters of texts expressed by the tradition is provided of an internal logic but at the same time is not sufficient. In fact, following this criterion, the very same appearance of *dharmasūtras* would not provide a basis to envisage the beginning of a legal tradition. Secondly and more significantly, the identification of law on the basis of the existence of legal texts could lead to negate the existence of law in certain societies. Therefore, in our view, the question is: assumed that Vedic texts are not legal texts by any standard, what law was the law of the Vedic period?

The peculiarity of law in the Vedic period should be understood considering that it was grounded on customs and chthonic concepts.[35] Menski (2003: 86 ff.) has pointed out that the Veda does not contain norms but is an expression of a complex cultural system, concepts and myths, at the root of this ancient legal system. In this sense, there was a law that could be said to be truly Vedic, even if it was not verbalised in Vedic texts as we know them. Therefore, even if Brahmanism carried out the *cultural operation* to put the Veda at the apex of the normative system, as it is in the theories of our concern, in a late period, nonetheless in the Vedic period there was a set of beliefs and practices that was truly Vedic, although not included in Vedic texts.

In fact, the term "Vedic", even in the texts we are analysing, may well refer to Vedic culture as a whole more than to Vedic texts. Moreover, it could make reference to the community of those who accept the Veda, and this makes sense if we consider that the authority of

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35  See Piantelli (2000) and Menski (2003). On chthonic concepts see also Glenn (2000).

*smṛti* and *sadācāras* is accepted basically on the ground of the argument that they are followed by the followers of the Veda. In other words, a peculiar practice is Vedic if it is followed by those belonging to a tradition that accepts the authority of the Veda, rather than if it has a Vedic text as support. In this sense, the lost Vedic text is a fiction, which provides the theoretical justification of a rule of behaviour, but at the basis of this fiction there is the exigency to define the identity and the boundaries of a tradition.

Rules are elaborated through an evaluation of different possible actions. This particular evaluation in this context is made through the concept of *dharma*, so that we would speak properly of dharmic and adharmic actions, which is a different way to say approved or disapproved actions. In this sense, *dharma* is a qualification of actions. Then we have a dynamic between emerging sets of behaviour and their dharmic evaluation, which is nothing different from an evaluation in terms of justice or – better in this context – appropriateness. This dynamics makes it improper to consider *dharma* as a set of fixed norms of behaviour, for the dharmic system allows for change within continuity. In the context we are considering, to be "Vedic" means to be dharmic and this explains why everything is connected to the Veda.

Finally, we can provide a different answer to the question about *who* decides which are the sources of *dharma*. In one sense, we can say that interpreters do, but in a deeper sense sources are there and interpreters organise them in a framework of cultural legitimation.[36]

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36  Theories of sources of law are not description and therefore they take part in the making of law influencing the interpreters. Nonetheless, they express the self-understanding of a tradition.

# PART II

# THE AUTHORITY OF SOURCES

Chapter 3

# The authority of the Veda

## Establishing the authority of the Veda

In the previous chapter we saw that the Veda is conceived as the
source of knowledge of *dharma* providing a foundation to other
sources also and that its authority is established through reasoning. In
this chapter we deal with the particular arguments that are used to
establish the authority and then the reliability of the Veda as concerns
the knowledge of *dharma*. Then, analysing some views of Medhātithi
we describe an insider definition of the Veda in order to investigate,
on the one hand, how the Vedic canon is defined, and, on the other
hand, which parts of the Vedas are considered as authoritative for the
knowledge of *dharma*. Finally, we will try to outline the way in which
interpreters proceed dealing with the task of organising actions, and
then we will briefly describe the Mīmāṃsā's principles of inter-
pretation. Our aim is to point out the cognitive hierarchy that underlies
the task of interpreters in their efforts towards guiding the knowledge
of *dharma*.

    The authority of the Veda as a means of knowing *dharma* is es-
tablished through reasoning on the basis of complex epistemological
arguments. The epistemology elaborated by the Mīmāṃsā distin-
guishes six means of knowledge (*pramāṇa*): perception (*pratyakṣa*),
inference (*anumāna*), verbal testimony (*śabda*), comparison or analo-
gy (*upamāna*), presumption (*arthāpatti*) and non-apprehension, that is,
knowledge of absence (*abhāva*). The Mīmāṃsā analysis of the six
means of knowing, although dealt with from the point of view of an
investigation into *dharma*, is very detailed and has a prominent stand-
ing in Indian epistemology.[1] Different connected questions have to be

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1    The term *pramāṇa* may be used to denote both the means of knowing and the
     result. For a detailed analysis of the means of knowledge in Indian philosophy

investigated. First of all, which of the six acknowledged means of knowing is appropriate as concerns *dharma*. This analysis will lead to the conclusion that Vedic *śabda* is the sole possible means to know *dharma*. Secondly, it is necessary to establish to which extent Veda is a reliable source of knowledge and, thirdly, the cognitive bearing of different parts of the Veda as concerns the knowledge of *dharma* has to be analysed.

*Pratyakṣa* is defined as that cognition which is obtained through the contact with sense organs.[2] Excepting *śabda*, the other means of knowing are based on perception. In fact, knowledge is obtained through *anumāna* when, on the basis of an established invariable concomitance between two events, the perception of one of them leads to know that the other event occurred, even if the latter is not perceived.[3] In the case of *upamāna*, the perception of an object produces the cognition of another object, which is not before senses, by way of resemblance with the perceived object.

We have *arthāpatti* when a fact that does not fall before the senses is presumed because a known fact could not be explained

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see Bhatt (1989) and Sinha (1996). The views we are going to describe are basically Bhaṭṭa views and may have slightly different elaborations in different schools or authors. For instance, the autonomy of non-apprehension as a means of knowing is not generally accepted in Indian philosophy and in some *mīmāṃsaka* view. Kumārila deals with this subject mainly in the *Ślokavārttika*.

2     The literal meaning of the term *pratyakṣa* is "what is before the eyes". Perception is defined in Jaimini's *sūtra* I.1.4 (Bhatt 1989: 147) in the following way: "That cognition by a person, which appears when there is contact of the sense organs, is perception and it is not a means (of knowing *dharma*) as it apprehends only things existing at present time". Interestingly, Kumārila criticises the view according to which *dharma* may be known trough perception by *yogins*. This is an evidence of the fact that the epistemological groundings of the Mīmāṃsā are developed through criticism not only towards Buddhists, which are clearly external to the Hindu tradition, but also towards competing Hindu views. On the critique of *yogin* perceptions, as a true perception and as a means of knowledge of *dharma* see Taber (2005).

3     Bhatt (1989: 204), on the basis of the view of Śabara, formulates the concept of inference in the following way: "When the perception of one term of a well-known relationship leads to the cognition of the other term of that relationship, which latter is not in contact with the person's sense organs, this second cognition is called inference". This *pramāṇa* is based on a necessary relationship between two facts.

without the former.[4] In the Mīmāṃsā's view, non-apprehension, as a means of knowing, consists in the knowledge of non-existing things. *Śabda* is the cognition through words, and then through linguistic means. Thanks to the signifying power of words it is possible to gain a knowledge of something that is not directly perceived, as in other cases also, and more significantly of something that is not perceptible by its nature, which is the peculiarity of this means of knowing.

However, *śabda* implies perception of words through which knowledge is conveyed. According to Kumārila, verbal testimony is a statement producing in the mind of the listener, who knows the meaning of words, the knowledge of facts that are beyond the scope of perception. A proposition provides the cognition of a fact through the meaning of words and it is a valid means of knowledge to the extent to which the knowledge is *new*. In Mīmāṃsā epistemology a true *pramāṇa* has to provide new knowledge, otherwise it should be treated as recollection.

Within this epistemological theory the only possible way to know *dharma* is *śabda* because it is held that perception and the other means of knowing based on perception cannot lead to the knowledge of something having a dharmic character. In fact, perception works only with reference to things that are present and before sense organs, while *dharma* by its nature does not exist in the present and cannot come into contact with sense organs. In this regard, a fundamental philosophical distinction has to be highlighted, that is, the distinction between *siddha* and *sādhya*. The first term refers to what is before the senses, being an accomplished entity, while the second refers to what has not yet been accomplished. More precisely, *sādhya* is something that may be accomplished and must be accomplished. *Dharma* belongs to the sphere of *sādhya*. Piantelli (2000: 79-80) remarks that this is a deontological sphere, conceived as totally separated from the sphere of facts. In this context, that *dharma* belongs to the sphere of

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4     An example could be the following: the fact that a person is not in his house leads to the presumption that he is outside. This scholastic example could seem a sort of truism, but this impression is set aside from the virtuosic use of this means of knowing made by *mimāṃsakas*. As we shall see dealing with the authority of *smṛti* and *sadācāra*, *arthāpatti* is crucial for the theoretical legitimation of those sources.

*sādhya* means that it cannot be known through perception, which may reach only something that actually happened.

We can find a clear exposition of this question in Medhātithi's commentary on Manu II.6. According to Medhātithi (Jha 1999: 190), it is impossible to hold that Manu and the other authors of *dharma-śāstra* directly perceived *dharma*, because "what has to be done" is not an accomplished entity, a *siddha*, and there cannot be a contact with sense organs and then perception. Furthermore, answering to a view supporting the possibility of knowing *dharma* by inference, Medhātithi states that the cognition of a cause-effect relationship may lead, in the case of the occurrence of the cause, to the cognition of the accomplishment of the effect, even if it is not directly perceived, but what is apprehended is still a fact. On the contrary, in no case the cognition of a given fact may lead to the cognition that another fact *has* to be accomplished, and it may lead simply to the cognition that it was eventually accomplished.

Once established that *dharma*, as *sādhya*, may be known only through *śabda*, the second step of this reasoning is to ascertain the reliability of this means of knowing as regards *dharma*. On this point the Mīmāṃsā elaborates a theory that presents some original features also within the context of Indian philosophy. According to the Nyāya philosophy, "verbal testimony" may be defined as the statement of a trustworthy person and the reliability of the person making the statement is a condition to assure the validity of the knowledge so obtained. Kumārila and the other Mīmāṃsā philosophers do not accept this theory because it presupposes that all the verbal utterances should be done by persons, while, in their view there are statements that are not made by anyone. This is the case of the Veda, as we are going to see.

While, according to the Nyāya, the Vedic statements are God's statements, according to the Mīmāṃsā, which is a non-theistic school, there is no God and Vedic statements are therefore not divine work.[5] Vedic language has an inherent power of signification and the existence of an author of these statements is not necessary. On the other hand, the possibility that the Veda is the work of a *human* author is

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5     A further difference between the theories of *śabda* developed by Mīmāṃsā and Nyāya is that the former identifies *śabda* and authoritative words. In other terms, *śabda* is authoritative by definition.

rejected on the basis of a very practical argument. In fact, if the Veda had a human author, it would be impossible that the memory of this author has been lost. Under this respect, reference is made to the examples of Buddha and of the very same Manu, whose names have been transmitted along with their teaching, while there is not any author whose name has been transmitted in connection to the Veda. Therefore, the Veda has to be considered as *apauruṣeya*, without an author, a human author as well as a divine one.[6]

The theory of the Veda *apauruṣeya* is connected by the Mīmāṃsā to another peculiar epistemological theory, that is, the intrinsic validity of every cognition (*svataḥprāmāṇya*). In a general way, Mīmāṃsā philosophers distinguish two wide classes to classify cognitions, meant in this case as the result of a cognitive process: valid cognitions and invalid cognitions. To the first class belong the cognitions that directly bear upon their object, while within the second category the cognitions bear on their object only in an indirect way.[7] Thus, a first character required for the validity of a cognition is that it bears directly upon the object.

A second character concerns the relationship between the cognition-as-result and the cognition-as-process, because the validity of a cognition would depend on some qualities of the cognitive process. In this view, a cognitive process is influenced by the subjective qualities of the "author" of the cognition. The classical example provided in philosophical texts is that if a person, who is affected by an eye disease, sees a certain object as yellow, this knowledge, which is in principle valid, is flawed by the defect of the agent of the cognition. The problem is if a cognition-as-result should

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6    Piantelli (1976) highlights that the theory of *apauruṣeyatva* has also important ethical aspects, concerning the problem of divine justice. For an analysis of the philosophical meaning of this theory see Gächter (1990), D'Sa (1980) and Bilimoria (1988). Particularly Gächter makes reference to Heidegger's philosophy. As we saw, in main Hindu cosmologies creation is substituted by the manifestation of the eternal being. The world and the word, which is part of the structure of the world, manifest themselves progressively and the word is divine as a manifestation of Brahman.

7    To this classification corresponds a second distinction, the one between *anubhūti*, apprehension, and *smṛti*, recollection, which, as we shall see, has great relevance in the elaboration of the relationship between the sources of *dharma*. According to Prabhākara all the apprehensions are valid and all recollections are not valid.

be considered *intrinsically* valid; in this case invalidity would depend on the ascertainment of a flaw in the cognitive process, or if it should be considered intrinsically invalid, that validity would depend on ascertaining the absence of flaws in the cognitive process.[8]

According to the Mīmāṃsā, the second view cannot be accepted. In fact, if the validity of cognition was due to the efficacy of its source, from what would the validity of the cognition of the efficacy of this source derive? This could derive only from a further cognition of the efficacy of the source of this second cognition, and so on. As a result, there would be a *regressus ad infinitum*. On the contrary, accepting that validity belongs to the cognition in itself, there is no need of a further cognition and this becomes a sufficient reason to hold that a cognition is valid *as* cognition. Therefore, this validity may be negated only when a defect is found in its source.[9]

The hypothesis according to which the validity of a cognition will depend on the efficacy and reliability of the author of the cognition would be very problematic. In fact, considering that the Veda has no author, the result would be that the Veda could not be considered a valid source of knowledge of *dharma*. On the contrary, accepting the theory according to which all the cognitions are valid by their very same nature, for it is the invalidity that has to be established by recognising a flaw in the cognitive process of the subject, the Mīmāṃsā makes a fundamental point favouring the authority and

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8    The question of the intrinsic or extrinsic validity of a cognition is analysed by the Mīmāṃsā taking into consideration the four views which could be conceived on this point, thus asking whether the invalidity should be considered inherent and validity external, or validity intrinsic and invalidity external, that is depending on the author, and also if validity and invalidity should be considered both inherent or both external to the cognition. The first two hypotheses are the most relevant. As concerns the other two, the established view may be described in the following terms. The hypothesis according to which both validity and invalidity are inherent to the cognition should be disregarded because two incompatible qualifications could not belong to the same cognition. The case of the externality of both validity and invalidity could not be accepted as well, because in this case the cognition would be devoid of any qualification, which is deemed impossible.

9    See Jha (1964: 75 ff.). On this point Piantelli observes that the Mīmāṃsā philosophers following the teaching of Kumārila "negate the ultimate validity of an objective *test* of knowledge ... the new act of knowing produces this invalidity *ex nunc*, rather than ascertaining it as existing *ex tunc*" (1976: 509-510) (my translation).

reliability of the Veda. In fact, the absence of an author in this case means that nothing could invalidate Vedic knowledge and, as a result the knowledge of *dharma* obtained through the Veda is absolutely certain.

Interestingly, in this context, the authority of the revealed text is built in absolutely impersonal terms and then, differently from other religious traditions, not on the ground of the divine and perfect nature of its author.[10] In other words, in this normative system the standing point is not provided by a personal God. The Veda is authoritative not because it is the expression of the will of a paramount divine authority, but on the contrary, ironically, because *it is not* the work of an author, either human or divine.

The theory of the Veda *apauruṣeya* involves the absence of a definite origin and is then connected to a doctrine on the eternity of the Veda. This doctrine may be seen as a cluster of three theories concerning the eternity of words, the eternity of objects and the eternity of the relationship between words and objects. The main argument presented by the Mīmāṃsā on the eternity of words is that a specific word remains the same word although uttered by different persons in different moments. In other terms, a single act of utterance does not create the word but makes it manifest, there being a relationship of the type-token kind. According to the Mīmāṃsā, it would be otherwise impossible to conceive the phenomenon of understanding. In fact, if the word was different at every utterance, no stable relation between the word and its denoted object could be possible.

As concerns the eternity of the denoted object, this is based on strong realistic assumptions according to which the word denotes a universal, which by its nature is not perishable, and not an individual, which on the contrary is perishable (Piantelli 1976). Finally, the Mīmāṃsā conceives the relationship between word and object as

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10  As fictitious as it may be, this theory is significantly connected to the need of a foundation, which is shared in different cultures. In Hebraism and other religions founded on the personality of God, for instance, the problem of reliability of Revelation is related to the perfection and infallibility of God. Plenty of theoretical devices have been formulated to state the reliability of Revelations on the part of the author or the recipients. In this latter regard, an example in Hebraism is the theory according to which the recipients of Revelation were purified from any human attribute, which could have caused a flaw in the Revelation.

eternal and rejects the idea of a conventional origin of meaning. Particularly, the Mīmāṃsā, which does not accept the existence of a personal God and of a creation, refuses that the relationship between word and denoted object was fixed by God at the moment of creation (Jha 1964).

The above theses are developed within a remarkable theory of meaning that we may consider here only under some limited aspects.[11] A word is defined as a unity resulting from the whole set of phonemes composing it. These word-components, combining themselves, lead to the cognition of the denoted object. This is the core of the *sphoṭa* theory of meaning. A basic problem is if the word denotes a universal or an individual object. Jha (1964: 128) remarks:

> The practical purpose of the present enquiry lies in the fact that if all words denoted *only* Individuals, then there could be no differentiation of Rules into *General* and *Special* (the General Law and its Exception), and thus it would not be possible for the former to be set aside by the latter, and this would give rise to much confusion.

The Mīmāṃsā theory of meaning holds that the expressive power of words concerns the universal, although the universal can be apprehended only along with the individual. Thus, the word indicates an individual denoting it through a universal. In other words, the individual may be indicated only through a "qualifying factor" provided by a universal. Taking the example of the word "cow", when this word is uttered, the cognition of the universal cow is already present, and only through this cognition is it possible to know the individual cow. Further, the word supplies a cognition that does not include all the possible characters of a determined object, as may be seen from the fact that, if a person is commanded to bring a cow, any cow will satisfy this command, unless otherwise indicated from circumstances that a specific cow was meant.

To strengthen this theory, it is argued that to hold that, on the contrary, the word denotes an individual would lead to absurd consequences. In fact, in such a case, there would be only three possibilities, namely that all individuals are denoted by a single word, or that what is denoted is the *set* of all individuals, or what is denoted is a single

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11    On these themes see Shastri (1959) and Sharma (1988).

individual. As concerns the first hypothesis, it is held that it is impossible that a single word denotes all individuals for several reasons, among which the most interesting is that in the case of a Vedic Injunction such as "The sacrifice of an animal has to be accomplished", it would be impossible to sacrifice every single animal and this impossibility would lead to the lack of authority of the single injunction and of the entire Veda.

As concerns the hypothesis according to which the word could denote the set of all individuals, this should be rejected as well, because it would be impossible to accomplish a sacrifice using the set of all individuals, for a set has no form, and then the Vedic injunctions would lose their authority.[12] Finally, the third hypothesis has to be rejected because a word, if referring to a specific cow, would not have a meaning before the birth and after the death of that specific cow, and, as a result, the relationship between word and denoted object would not be eternal. Furthermore, there should be neither plural nor dual, and the idea of a common quality, which certainly on the contrary exists, could not be explained.

This entire discussion has been carried out by the Mīmāṃsā with reference to the word, but the meaningful unit for the knowledge of *dharma* is not the word but the sentence. Thus, to recognise the authority of the Veda as absolutely reliable a further passage is necessary: the description of the relationship between the meaning of words and the meaning of sentences, which is established on the ground of several arguments.[13]

The above Mīmāṃsā views are fundamental to establish the authority of the Veda as *dharmamūla*. Medhātithi, commenting on Manu II.6, makes reference to the Mīmāṃsā but does not provide an

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12　Furthermore, as regards the first case, being the individual perishable, the very same relation between word and denoted object would be perishable. As regards the second case, being all the components perishable, their set also would be perishable and the relation between word and denoted could not be eternal. Full discussion may be found in Jha (1964).

13　For instance, Jha (1964: 134) observes that according to the Mīmāṃsā: "... the meaning of the *Sentence* is based upon the meanings of its component *words*; it is not baseless; nor is it based upon Convention. Hence the Vedic Injunction cannot be an unreliable source of knowledge regarding *Dharma*".

analytical treatment of the question.[14] As we saw, the initial part of the commentary of Medhātithi on Manu II.6 states that the authority of the Veda cannot be the object of an injunction of Manu and other authors and can be known through reasoning:

> ... in fact the authoritativeness of the Veda regarding matters relating to Dharma is as self-evident as that of Direct Perception,–being based upon the facts that (1) it brings about cognitions that are never sublated, (2) that it is not the work of any person, and as such is entirely free of any suspicion of falsity that might be due to the defects of such authors, and (3) that the words of the Veda itself are free from all defects. (Jha 1999: 172)

In the commentary on Manu II.10 we find a different perspective on the authoritativeness and reliability of the Veda. Here, Medhātithi (Jha 1999: 213-214) argues for the authority of the Veda discussing the criticism against untruthfulness, contradiction and repetition, which are flaws potentially leading to establish the non-authoritativeness of the Veda as a means of knowing *dharma* and then the legitimacy of contrariness to the Veda.[15] For certain, untruthfulness, inconsistency and repetition are three strong arguments against the authority of the Veda, which could be set out as an unreliable source of guidance. The discussion on criticism towards the Veda has a general bearing and regards the problem of orthodoxy and normative coherence.

The existence of repetitions in normative texts is seen as a problem in many cultural contexts. The necessity to overcome what cannot be accepted as a flaw of the text is often an occasion for virtuosic interpretations.[16] In Mīmāṃsā exegesis, repetition is trans-

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14   Kumārila extensively deals with the epistemological foundation of the authority of the Veda in the *Ślokavārttika*. We will limit ourselves to the analysis of Medhātithi. On the *Ślokavārttika* and its relationship with Buddhist epistemology see Taber (2005).

15   Dealing with these problems, which affecting the epistemological authority of the Veda are of Mīmāṃsā's concern, Medhātithi (Jha 1999: 214) makes explicit reference to the Mīmāṃsā in connection with the view for *agnihotra* is 'one and the same act' in different recensions, which is seen by the opponent as an evidence of repetition.

16   This text-related virtuosic interpretation, on the other hand, could be deemed as an argument to envisage an Indian legalism. We could ask why repetition is perceived as a problem in this context. As a hypothesis, from the perspective of

formed into a meaningful element that has to be preserved. The rule is that in case of repetitions it must be meant that the accomplishment of as many acts as repetitions is prescribed.[17] Criticism against the purported untruthfulness of the Veda shows a sort of modern sceptical attitude. In fact, what is criticised is the very same conception of the ritual as an action having effects on the world and on life, and then the very same *dharma* as elaborated within Brahmanism. In this case we have probably a *nāstika* criticism against the core of Brahmanism.

According to the laws of *karman*, the result of a given act may come into existence years after its accomplishment. Criticism concerning the non-production of the desired results, which is a cause of confusion, is set out because what is known through the Veda is that a result will follow and not when it will follow. Moreover, the Veda cannot be falsified, for *dharma* belongs to the sphere of "ought" and it would be impossible to find a contrary evidence starting from perceptible facts. With reference to the problem of untruthfulness, and not of inconsistency as one would have expected, the case of ritual killing is also considered, explaining different views about its nature and possible axiological conflicts, as we will analyse in the next paragraphs.[18] We will deal with the problem of inconsistency in the chapter on conflicts.

## The definition of the Veda

The question of the authority of the Veda as *śabda*, and thus as an authoritative means of knowing *dharma*, should be distinguished from the question of the authority of specific Vedic texts or passages. In fact, once established that *dharma* may be known through the authoritative word of the Veda, it has still to be clarified what actually is the Veda and, particularly, which texts and passages have an authority on *dharma*. Vedic literature has been widely analysed by Indological

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the *pūrvapakṣin*, repetition could be considered as a flaw on the basis of the theory according to which only new knowledge is valid knowledge.

17 This method is explained making reference to the *agnihotra*.

18 On axiological conflicts see Doniger (1991). This discussion, as well as the discussion on repetition, is very interesting as concerns the question of Indian positivism.

scholarship, which has duly described Vedic *saṃhitās* and recensions. However, internal definitions of the Veda *dharmamūla* within Sanskrit literature are based on assumptions and point of views that may be different from those underlying external definitions as could be provided by Indological scholarship.[19]

The argumentative character of this tradition of thought dealing with problems relating to the authority of sacred texts is crucial for the understanding of Hindu jurisprudence. As we will see, even if the Vedas are seen as texts revealed to the *ṛṣis*, the role of tradition in defining the extent of revelation is prominent. In this regard, an important role is played by the scholarly work aiming to establish the criteria for ascertaining what can be included in the authoritative tradition.[20] The abstract term 'tradition' could be in this context substituted with the more concrete reference to those who in course of time were considered as the authorised bearers and interpreters of the tradition and to the community at large, whose acceptance of a text as authoritative is crucial.[21]

It is then tradition, in its wider sense, to choose the authoritative texts belonging to the Vedic pale. In other words, the fundamental criterion to recognise authority in this tradition is, so to say, the very same tradition. Vedic texts were diffused in a large variety of Hindu contexts and, as a result, specific texts could be more accepted or less, or be more or less important, depending on a series of circumstances.[22]

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19  An important but slightly different distinction is that concerning internal and external points of view or attitudes as elaborated in legal scholarship, for instance by Hart (1961), and more broadly in anthropological scholarship, for instance by Geertz (1973).

20  This aspect is shared in many cultures and a parallel can be made, for instance, with the theories elaborated in Islamic law as concerns the transmission of *sunna*. On this aspect see Weiss (1992).

21  In our view, even if the role of Brahminical thought has been overestimated leading seldom to the non-acknowledgement of the basic fact that every Hindu is an interpreter and a bearer of the tradition, the authority of learned men can be maintained as a peculiarity as concerns their social role and particularly their social perception. In fact, the importance of learned men in this context could be seen in the fact that a social authority derives from their special position and the respect they receive, which makes virtuous and learned men highly authoritative in this context as expounders of *dharma* with their life and words.

22  From a historical perspective, it is worth remembering that the diffusion of this culture occurred over the course of time, crossing different languages and different interacting cultural environments.

The acceptance of different texts as authoritative sources was also a factor of differentiation and specification of sub-traditions. More generally, a major separation occurs where the authority of the Veda is denied, as in the case of *nāstikas*, who nonetheless are Hindus, or in the case of Buddhists and Jains, who separated themselves from Brahmanism.

In Medhātithi's commentary on Manu II.6 an extensive part is devoted to the definition of the Veda. This definition, provided in the context of a discussion on the sources of *dharma*, may offer some useful insight on the definition of the Veda from the point of view of interpreters. First of all, Medhātithi (Jha 1999: 177) states that Veda means in this context *Ṛgveda, Yajurveda* and *Sāmaveda*, along with their *brāhmaṇas*. Therefore, at this stage of definition of the Veda *dharmamūla,* the *Atharvaveda*, on the one hand, and *upaniṣads* and the *āraṇyakas*, on the other hand, are excluded.

However, Medhātithi acknowledges the *Atharvaveda* as part of the Veda answering to an objection on the inclusion of the *Atharvaveda* within the discussion concerning the variety of Vedic recensions. According to this objection, "no one regards the Atharva as a *Veda* ... people regard the followers of the Atharvaṇa as *heretics*, beyond the pale of the *Vedic Triad* ".[23] This objection is not a simple rhetorical device to open the discussion and indeed reflects a series of opinions contrasting the authority of the *Atharvaveda*, which are quite diffused in the Indian context.[24] Supporting the authority of the *Atharvaveda* Medhātithi states:

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23 See Medhātithi on Manu II.6 (Jha 1999: 179). A series of interesting textual arguments is provided.

24 Sani (Boccali, Piano and Sani 2000: 27) remarks that the *Atharvaveda* has been for a long time subordinated to the other three *saṃhitās*, referred to as *trayī vidyā* in *brāhmaṇas* and in the Buddhist canon. This fact was probably due to the peculiar characters of this collection, which was distant from Brahminical ritualism. In a late period the hymns of the *Atharvaveda* were modelled on the Ṛgvedic hymns and made coherent with Brahmanism. In this way the *Atharvaveda* became accepted within the Brahminical canon of Vedic religion. However, its position has always been under discussion and also in present days some southern Brahmins do not accept it as a canonical text. The case of the *Atharvaveda* is particularly interesting because it points out the conflicts and evolutions of the Hindu tradition and the importance of what could be called a process of determination of normative canon.

> This is not right; all good men agree in regarding the Atharvaṇa as a
> *Veda*. In this *Smṛti* itself (11.33) we find the expression *'shrutirathar-
> vāṇgirasiḥ,'* where the Atharva is spoken of as *'shruti'* and *'shruti'* is
> the same as 'Veda'. (Jha 1999: 179)

Thus, a first argument is about the agreement or consensus of good
men, while a second argument is of a literal kind, for Manu states that
the Atharva is *śruti* and the *śruti* is Veda.[25] It seems that in this case
the reference to Manu has the role to support the existence of an
agreement on the point. In other words, Manu is seen here as an exam-
ple of a good man.

Medhātithi provides another argument where we could possibly
envisage a *non-nominalistic criterion* to ascertain the authoritativeness
of a text. In fact, in this view, what makes a text authoritative is not
whether it is called Veda or not, but that it actually has those features
which make it a genuine Vedic text, and as such a text whose
authority in matters relating to the knowledge of *dharma* may be held
as ascertained. For instance, according to Medhātithi, the passages
relating to the *agnihotra* ritual are accepted as authoritative not
because everyone call them Veda, a name that is on the other hand
seldom used also for *itihāsa* and *ayurveda*, but because they possess
three definite requisites. The requisites a text must have to be con-
sidered Veda are: (a) to be not the work of a human author; (b) to
serve to know one's own duties;[26] and (c) to be free from flaws and
mistakes. Now, the point that is made is that these three criteria for
identifying the Veda are all present in the case of the *Atharvaveda*.[27]

Every Vedic *saṃhitā* is divided into several recensions and lines
of transmission.[28] The character that unifies them is the character of
being all *śruti*. This has some consequences for the problem of the

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25  However, this identification, which in this context is quite pacific, is not accepted
    in some cases.
26  Knowledge should be here meant as knowledge in a strong sense, and thus as
    *new* knowledge. Otherwise this requisite would be satisfied from the *Mahā-
    bhārata* also, which on the other hand would not possess the first requisite.
    Significantly, it seems that the requirements should be all present.
27  See Jha (1999: 179) for full details of this discussion, involving also the authority
    of *itihāsa* and *purāṇas* as regards the knowledge of *dharma*.
28  See Sani (Boccali, Piano and Sani 2000) for details on recensions. Medhātithi
    (Jha 1999: 180) provides an interesting list of the recensions of the different
    Vedas.

normative canon, in the sense that it is not at all clear what the Veda is made of. Apart from the case of the *Atharvaveda*, in the Indian tradition there are several elements supporting the view that the Veda is an open text. For instance, the possibility of a series of following revelations or, in other words, of an everlasting revelation, is acknowledged.

Furthermore, as we saw, an injunction is said to be Vedic and is a means of knowing *dharma* because it is revealed and not simply because it belongs to a specific Vedic *saṃhitā*. This aspect is implicitly crucial for the theory of the lost Veda. Generally speaking, the theory of the lost Veda is the key to understanding the distinction between Vedic texts and Veda. Medhātithi in these passages is clearly talking explicitly of compilations and referring to the *saṃhitās*. However, generally the non-identity between the Veda and the known Vedic texts is stated. On the one hand, Veda is only partly verbalised and, on the other, Vedic texts are complex and heterogeneous texts, provided with an inner variety. Therefore, it is impossible to establish a formal criterion of belonging to the text.[29] In other words, texts which are not included in the accepted canon may also be claimed as Vedic.

The question of the openness of these texts, which regards the boundaries and the criteria of belonging to Vedic revelation, may be seen as connected to the general question of the belonging of a norm to a normative system, which is widely discussed in general jurisprudence.[30] Apart from formal criteria of relationship between norms and the problem of the existence of a norm that founds the legal system, which is hardly recognisable in this context, even if of course the Veda has a foundational role, one could ask whether the criterion of content unity is suitable. As we saw, this question is also related to the problem of *dharma* as a natural-rational law and to the problem of the role of general principles and universal truths in Hindu jurisprudence.

In this regard, an interesting case is that of killing in relation to the *śyena* ritual, which is dealt with in several parts of the commentary

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29  In this regard a comparative analysis involving other laws, particularly religious laws, would provide useful insight on the inclusiveness of sacred texts and the methods laid down to define their limits. See Huxley (2002a).
30  On this problem, see, for instance Hart (1961), Kelsen (1970) and Raz (1970).

of Medhātithi on Manu, but especially on Manu II.6 discussing the meaning of "entire Veda". The discussion on the meaning of "entire" in Manu II.6 is carried out mainly with reference to the authority of *arthavādas*, *mantras* and names, as we will see in the next paragraph, but is also dealt with in connection to the problem of Vedic content unity. According to Medhātithi (Jha 1999: 186), the word "entire" has been interpreted by someone as an addition and should be meant as an answer to the objection that Vedic passages enjoining the *śyena* and other acts that are laid down in the Veda cannot be considered as dharmic.

The problem is that the *śyena* sacrifice involves malevolent spells and murdering and therefore is injurious (*hiṃsā*). A critical view is that, cruelty being prohibited, the *śyena* and other sacrifices, such as the *agniṣomiya* and other animal sacrifices, should be considered as *adharma*, sinful. *Dharma* has the nature of "ought" and the killing cannot have the character of something that should be done, being plainly sinful. On the other hand – it is held – if it is accepted that the killing is *dharma*, one should wonder what could be *adharma*. As a result, in this view, Vedic passages containing those ritual injunctions could not be roots of *dharma* (Jha 1999: 187).

Medhātithi does not accept this view. The main argument provided by Medhātithi is that the general prohibition of killing applies only to ordinary killing and not to the killing that occurs in the ritual sphere, which is scriptural (*vaidika*). Furthermore, the sinfulness of the killing enjoined by the scriptures should not be derived from a general principle according to which all killing is sinful. In fact, to kill is sinful *because* it is prohibited and not by its nature. Therefore, the prohibition should not be considered as applying to the scriptural killing also, which seems to be considered in this case as ontologically different (Jha 1999: 188).

As we said, general principles, which represent the general level of *dharma*, have a great cultural relevance but they are hardly involved in this context of interpretation. Medhātithi explicitly states that what is good and what is evil depend on being enjoined in the Veda and, if killing is forbidden in some contexts, this principle cannot be generalised. In this sense, here we find a peculiar manifestation of positivism in Indian thought.

# Word and sentence

The theories of knowledge and meaning we have briefly described are part of the investigation into *dharma* and are meant to establish the authority of the Veda as a means of knowing *dharma*. The entire Veda is considered as authoritative, but the knowledge of *dharma* is obtained in the first instance through the prescriptive parts of the Veda, that is, *vidhis*.

Medhātithi explicitly states that the word 'Veda' refers to the text considered as a whole as well to the single propositions that compose it (Jha 1999: 176).[31] The problem of the relationship between the whole and the part is considered also by introducing the etymology of the term 'Veda', explaining that it may be defined as the source from where people may obtain knowledge of *dharma*. Thus, we have here an example of the definition of Veda through *dharma* we mentioned dealing with the "theological" definition of *dharma*. On the one hand, this knowledge cannot be obtained by other sources and, on the other hand, each sentence of the Veda is a means of knowing *dharma* (Jha 1999: 178). Every single sentence of the Veda is Veda, that is, something through which it is possible to obtain the knowledge of *dharma*. Supporting this view it is said that the prohibition made to the *śūdra* to recite the Veda is violated even if he pronounces a single sentence. Furthermore, when one wants to make reference to the entire Veda, the epithet "entire" is normally added.

Generally, the term "*vidhi*" denotes a positive prescription, while the terms *niṣedha* and *pratiṣedha* make reference to a prescription having a negative content. The root of the term *vidhi* is *vi-dhā*, which indicates the action of distributing and arranging according to an order, and it means by extension "to settle" or "to lay down" and also "to command". *Niṣedha* and *pratiṣedha* derive from the roots *ni-ṣidh* and *prati-ṣids*, and both indicate the action of restraining and, by extension, of prohibiting (Piantelli 1976: 493-494). The terms *codanā* and *vidhi* are equivalent in many contexts. The main difference between them may be envisaged in the fact that the term *codanā* is

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31  Medhātithi further investigates the "twofold usage" of the term "Veda". It may refer to the entire text or to a single sentence, while a word such as "village" cannot refer to a single house and can denote only a set of houses.

more general and, moreover, as we saw dealing with the interpretation of Jaimini I.2, it appears to be less sentence-related and more clearly connected to the motivation prompting to action. [32]

*Vidhi*, as a prescriptive sentence, is analysed by the Mīmāṃsā in its components. First of all, the main marker of a *vidhi*, on the formal level, is the injunctive or optative verbal form. Secondly, in this view, which is shared with the grammarians, a given sentence enjoins a single *dharma* through the verbal form to which the *apūrva* is connected. The *apūrva* is indeed a basic element in the theory of action developed by the Mīmāṃsā. In fact, as we saw, it is the force leading to the results of the action. The *apūrva* resulting from the prescribed act is then viewed as connected to a component of the prescriptive, namely the verb, and not to the entire sentence. According to the *pūrvapakṣa*, the *apūrva* would be related to both verb and noun, but the established view is that it cannot be related to nouns because these refer to already accomplished facts. [33] The way in which the *apūrva* is connected to the verb is explained considering that in prescriptive sentences every verb is composed from a verbal root and an injunctive affix. This affix denotes an effort, the activity of the agent towards the accomplishment of what has to be accomplished and is then clearly connected to the sphere of *sādhya*, to which *dharma* belongs.

The verb expresses the *bhāvanā*, which is a force, a prescriptive value that pushes man to action. In this regard, Kane (1962-1975, V: 1235) remarks:

> In ordinary life when a person says to another 'this should be done by you', the prompting to do something comes from a person. But Veda has according to the Mīmāṃsā no author, human or divine. Therefore, in a Vedic vidhi the prompting arises from the injunctive or the optative form of the word; there is no person, human or divine, behind the

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32   On this point see the discussion in *Ślokavārttika* II.212 ff. (Jha 1993: 53 ff.).

33   Jha (1964: 233) writes: "That word, on the other hand, to which the Resultant is related must be something that is yet *to be accomplished*, and as such stands in need of such *Apūrvas* as would help in its accomplishment. It is only *Verbs* that are found to be expressive of what does not already exist at the time, but has got to be accomplished with the help of certain agencies. And in as much as the *Apūrva* is also something yet to *be accomplished* it stands to reason that it should be related to the Verb".

injunction; hence the bhāvanā is said to be śābdī (i.e. based on the word itself and not on the will or direction of a person).

In this context, the prompting to the action is not part of a relationship of obedience of man to the divine. In this sense, as we saw, it seems improper to speak of "command" or "order", with reference to *vidhi* and *codanā*. On the contrary, the dutifulness of the action is part of a conception in which the idea of an adaptation to an order of macro-cosmic and microcosmic relations is crucial. Through the Vedic prop-osition can be obtained knowledge of what is *dharma*, of which action has to be accomplished aiming to achieve a definite result. The moti-vation to act is seen as deriving from this knowledge.[34]

As a conclusion, the Vedic sentence is the basic unit of knowl-edge of *dharma*. Properly, when we talk of means of knowing *dharma* we should make reference to the Vedic injunction *per se* more than to the Veda as a whole. In other words, every single norm is seen as a source. In the analysis carried out by the Mīmāṃsā, the authority of the Veda as concerns the knowledge of *dharma* is ascertained distin-guishing between different kinds of Vedic sentences and analysing their normative bearing. The result is a very complex system hierar-chically arranged having at the top direct Vedic *vidhis* (Piantelli 1976). As regards Vedic sentences having not the character of *vidhis*, on the one hand, and non-Vedic sources such as *smṛti*, on the other, their role as authoritative sources for the knowledge of *dharma* is established co-ordinating them to the Vedic *vidhis*.

Several distinctions are made between different kinds of *vidhis*. In this regard, the distinction made between *apūrvavidhis* and other kinds of *vidhis* is very important. The *apūrvavidhi* may be understood as the injunction of an act from which a force, which was not known before, originates. In this sense, an *apūrvavidhi* typically enjoins a model of behaviour that would be otherwise totally unknown. In other cases, there could be different known models of behaviour and the role played by the Vedic injunction is to prescribe one of them. Piantelli remarks that in these cases the Vedic injunction provides an objective criterion to prefer one among different equivalent models. Therefore, while the *apūrvavidhi* makes known the very same behaviour, in the

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34 About the different views of Kumārila and Prabhākara on this point see Piantelli (1976).

case of *niyamavidhis*, restrictive injunctions, the prescription will simply provide the necessary deontological force to an existing model of behaviour, that is, to a behaviour that can be conceived independently from its being prescribed or less, like usual human activities. The same can be said for *parisaṅkhyāvidhis*, which list several possible alternatives and indicate one of them as the appropriate one (Piantelli 1976).[35]

## *Vidhi, arthavāda, mantra* and name

The cognitive authority of the Veda has been established with reference to injunctions, for it is through injunctions that one can *learn* that a specific act has to be accomplished. Manu II.6 states that the *entire* Veda is the source of *dharma*.[36] According to Medhātithi (Jha 1999: 182-183), the term "entire" refers to the fact that every word of the Veda is relevant for *dharma*. The objection that is moved against this view is that *dharma* concerns what one should do, and thus injunctive passages only should be considered means of knowing *dharma*, because it is from this kind of passages that what has to be done is learned.

   Moreover, many *vidhis* may concern the same act indicating different elements of the action, that is, the deities, the qualifying conditions, the substance, etc. but there are some passages, such as the one stating that Prajāpati cut off his own fat, which simply refer to events that occurred in the past and are descriptions of facts that seem irrelevant now. These passages, thus, cannot be seen as related to "ought" and dutiful action, and, as a result, it is not clear if they should be considered sources of knowledge of *dharma*. Apart from *vidhis*, three other kinds of Vedic texts are recognised: descriptions (*arthavādas*), as in the example above, *mantras* and names (*nāma-*

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35  On the above classifications and other classifications see Kane (1962-1975, V: 1228 ff.).
36  Seemingly, all traditions in which a role is played from sacred texts need to establish the authority of every part of texts, because otherwise they should be deemed partly irrelevant and this would not be in keeping with the nature of revelation. This question is then connected to the interpretative principle according to which the authority of a text has to be preserved as far as possible, which has a role also in secular laws.

*dheyas*). Should they all be considered useful for the knowledge of *dharma*? This analysis is preliminary to the task of organising texts and actions, which is the core of the Mīmāṃsā exegesis. In fact, these distinctions may be seen as a way to structure texts.

In Medhātithi's commentary there is a discussion of the cognitive value of the non-injunctive parts of the Veda. The analysis of Medhātithi is deeply grounded on Mīmāṃsā views on the subject. The Mīmāṃsā draws a neat distinction between the injunctive parts of the Veda and the other parts. In the *Tantravārttika* the *sūtra* 1, starting the discussion of the problem, states: "The purpose of the Veda lying in the laying down of actions, those (*parts of it*) which do not serve that purpose are useless; and in these is the Veda non-eternal" (Jha 1998: 1).

According to the *pūrvapakṣa*, *arthavādas*, *mantras* and names are not conducive to the knowledge of *dharma* and, thus, it cannot be held that the *entire* Veda is a source of knowledge of *dharma*. Medhātithi answers to this objection maintaining that the author of the *Manusmṛti* specified in verse II.6 that the entire Veda is a means of knowing *dharma* just to clear doubts that could arise on this point. From this interpretation of the function of verse II.6 emerges once again the interpretative character of the very same *dharmaśāstra*. The established view (Jha 1999: 184) is that even those passages are useful for the knowledge of *dharma*, although in their peculiar way. Medhātithi analyses the role of each of the three kinds of Vedic passages.[37]

First of all, let us consider the problem of the authority of *arthavādas* (Jha 1999: 182 ff.). The examples have a Vedic origin: "Agni is all the deities, Agni is the divine power of oblations, he invites the deities and makes offerings to them"; "Prajāpati cut off his own fat". The preliminary opinion is that from statements of this kind no consequence could be drawn as regards dharmic rules. In fact, in those and similar sentences, it is not established that a certain thing should be done but it is simply referred as a past event or a fact which seems devoid of any interest. For instance, the fact that Prajāpati cut off his own fat is not something from which one could draw consequences for oneself and one's life.

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37  A further discussion on these themes may be found in Medhātithi on Manu II.6 (Jha 1999: 193-201).

According to Medhātithi, the *arthavādas* seems useless for the knowledge of *dharma* only when they are considered out of context. In fact, taken by themselves, they cannot be considered means of knowing *dharma* because they do not have a verb in an injunctive form.[38] However, considering that these descriptive parts are present, one cannot simply not acknowledge them and act as if they do not exist. In fact, this would result in the negation of the authority of the Veda. According to Medhātithi, in the case of Veda, differently from the case of ordinary language, "the *Arthavādas are* there, we have to *construe* them" (Jha 1999: 185). The principle of interpretation is that an *arthavāda* has to be construed along with a *vidhi*. In other words, a *vidhi* may stand by itself and need not be construed necessarily along with an *arthavāda*, while *arthavādas must* be connected to prescriptive propositions and interpreted along with them. The interpreter has to identify the *vidhi* to which the *arthavāda* is connected and to interpret the latter adapting its meaning to the former. An *arthavāda* has to be connected to the prescriptive passage to make its normative value explicit (Jha 1999: 184-185).

Which is the normative value of *arthavādas*? Considering that they do not indicate an element of the ritual, which is normally the content of a *vidhi*, their function has to be interpreted in a different way. The established view is that they serve to eulogise the behaviour laid down by the *vidhi* to which they are connected and by this to strengthen its force. Therefore, in the example concerning Prajāpati, the passage should mean that the accomplishment of the ritual is extremely important, as shown from the fact that Prajāpati, in the absence of animals suitable to the sacrifice, made himself a victim cutting off his own fat (*id.*).

Moreover, through the praise of what is enjoined, the *arthavādas* may also serve to integrate the injunction. In this regard, an example is made concerning an injunction that prescribes to use wet stones during the ritual but does not make it clear which substance should be used to wet them. In Medhātithi's view, this lacuna may be fulfilled by way of interpretation connecting to the injunction a close descriptive passage stating that "butter is glory" (Jha 1999: 185). This passage indicates that the substance that should be used to wet the stones, before

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38   In this case they are seen as "syntactically defective", seemingly because they do not have a verb in an injunctive form.

throwing them into the fire, is butter. In this way, a doubt concerning the correct accomplishment of the ritual is cleared, and, at the same time, a meaning is assigned to a passage that would have been otherwise totally insignificant (*id.*).

The established view expounded by Medhātithi is thus that *arthavādas* are relevant for the knowledge of *dharma* because they play an essential role for the correct understanding of texts and the accomplishment of rites, integrating prescriptions and strengthening their authoritativeness by eulogising behaviours complying with them. Then, it is correct to state that the entire Veda is a means of knowing *dharma*. From the perspective of general jurisprudence the problem is here which role has to be attributed to narratives as concerns the knowledge of duty.[39]

The same reasoning may be repeated for *mantras*, ritual formulas of different kinds that have to be recited during the sacrifice, which constitute a very relevant element for the correct accomplishment of sacrifices. Purportedly, they do not teach anything that could be referred to as an "ought", and then to actions that have to be accomplished. On the contrary, according to Medhātithi, *mantras*, as well as *arthavādas*, may identify an element of the ritual for which there is no direct provision. In fact, genuine prescriptions on the accomplishment of a specific ritual could omit the indication of the deity to which it is addressed, while this is an essential element of the ritual. In these cases the indication may be drawn indirectly from the *mantra* that has to be used in the sacrifice, usually including the name of a deity.

The *mantras* may also simply *describe* what is done during the accomplishment of the sacrifice and, thus, their recitation may remind the performer the acts to be performed. According to Medhātithi, even in this case *mantras* make known *dharma*, although clearly in a different sense, there not being a new knowledge as in the case of *vidhis*. However, in Medhātithi's view this is sufficient to consider *mantras* as *dharmamūlas* and to establish that also in this regard the entire Veda is a source of knowledge of *dharma*.[40]

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39  On *arthavādas* see the comparative remarks in Piantelli (2000). See also Lombardi Vallauri (2001: 151-164) on the role of the descriptive statements contained in the sacred texts of Christianity.

40  See Medhātithi on Manu II.6 (Jha 1999: 186).

Another problematic case is the normative value of names. In this regard, the following passages are provided as examples: "One should sacrifice with the *udbhid*" and "One should sacrifice with the *balabhid*".[41] Firstly, it is underlined that the action is enjoined by the verb and the names in the two examples do not prescribe any act. Secondly, the names do not indicate the substance to be used in the sacrifice, which is *soma*, as established by way of interpretation making recourse to the general principle according to which the archetype of certain sacrifices provides the indications necessary to their implementation. In fact, the archetype of the *udbhid* sacrifice is the *jyotiṣṭoma*, where *soma* is offered, and thus the same substance has to be offered in the *udbhid*. Therefore, it is not necessary to force the meaning of the term *udbhid* to gain the indication of a given substance to be used in the sacrifice. Provided that names do not indicate any useful element for the accomplishment of sacrifice, the conclusion should be that names have no relevance as concerns the knowledge of *dharma*.[42]

To explain the function of names, Medhātithi makes the example of several passages concerning the *vājapeya* sacrifice, which indicate the moment of the sacrifice or the result. In this case, the different elements of sacrifice may be connected thanks to the use of the same name *vājapeya* in different *vidhis*.[43] In other words, the peculiar function of names as concerns the knowledge of *dharma* is to allow or to make easier the knowledge of the relationship between different dharmic elements of the ritual.[44] As a conclusion, all kinds of Vedic passages have their own specific function in the hermeneutical process leading to ascertain the elements of sacrifice or, more generally, *dharma*.

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41  See Medhātithi on Manu II.6 (Jha 1999: 183-184).
42  In this regard, it is worth remembering that, as we saw dealing with the concept of *dharma* in the ritual sphere, the substance to be used in the sacrifice has a prominent dharmic character.
43  See Medhātithi on Manu II.6 (Jha 1999: 186).
44  In spite of its seeming complexity, this argument is quite a commonsensical one. Using more familiar words, the argument would be that the name "purchase" connects a series of norms, where the name is present, as related to purchasing and by this helps interpretation.

## Organising texts and actions

The Mīmāṃsā developed an extensive hermeneutical system. This system is based on a complex series of distinctions between different kinds of texts, in order to determine their specific role in the ascertaining of *dharma*. Secondly, this system is based on a series of distinctions between different kinds of acts and elements of the action and, thus, involves a theory of dharmic actions. The principal task of interpretation is to organise several indicators of *dharma* to establish the structure and the details of dharmic actions. Actions are complex and would be ingenuous to hold that everything an interpreter should do is to read a text and establish that a single specific action is dharmic. Actually the ascertainment of *dharma* is the outcome of interpretation and the theory of the sources of *dharma* has a preliminary character, aiming to provide the tools for the ascertaining of specific dharmic regulations of complex human behaviours. In other words, scattered injunctive and non-injunctive passages have to be organised while ascertaining the elements of action and, at the same time, acts have to be organised through the organisation of texts.

   This way of proceeding can be further cleared through a discussion on the ritual of *agnihotra* in Medhātithi's commentary on Manu II.6. The *vidhis* "the Agnihotra should be offered"; "an offering of curds should be made"; "offerings should be made in the morning and in the evening, to Agni and Prajāpati", "one desirous of attaining Heaven should pour the libation into the fire" (Jha 1999: 182), all bear upon the same action (*sāmānya*), that is, *agnihotra*. Those passages provide different indications, qualifying *agnihotra* as an action that has to be accomplished, and answering to several essential questions such as: Who has to accomplish the act? What has to be offered? Where? To whom has the offering to be made? When should the offering be accomplished? Therefore each passage has a role in the ascertaining of the elements for a correct accomplishment of the act, laying down that, for instance, the substance that has to be offered is curds, the offering has to be made to Agni and Prajāpati, and the qualifying condition (*adhikāra*) of the sacrificer is the "desire of Heaven" (*id.*). In other words, the elements of this ritual are recognised through the organisation of certain prescriptive, and possibly non-prescriptive, texts.

This reconstruction of the act very often requires the interpreter to search for relevant indications in different places. First of all, relevant passages are not already organised. Medhātithi points out that details are scattered in different Vedic collections. In addition, they should be searched for in different kinds of texts, that is, *vidhi, arthavāda, mantra* and *nāmadheya*. It is also important to remark that the relevant elements are not searched for only in the existing Vedic collections, but also in the *dharmaśāstras* and in the non-textual elements for the knowledge of *dharma*. In our view, the relevance of *sadācāras* and *ātmanastuṣṭi* as indicators of *dharma* is already completely present in the Mīmāṃsā's interpretation of rituals.[45] Moreover, the *dharma-śāstras* themselves expound the result of this interpretative process, which takes into account different sources. Meant as texts, they are simply the consolidation of knowledge of *dharma* so obtained. More generally, the same interpretative process is carried on by interpreters in different contexts without necessarily resulting in a *dharmaśāstra* text.

    Jha (1964) has rightly remarked that the examples upon which the exegetical analysis of the Mīmāṃsā is developed are drawn from the very specialised context of ritual and are very difficult to understand not only for a Western reader but also for a contemporary Hindu.[46] However, the ritual is a general model of human action and the kind of reasoning used in this context goes well beyond the scope of the strictly ritual sphere. In this regard, the clearest example is probably provided by the distinction between *vidhi* and *arthavāda*, which is widely used by interpreters in legal contexts, even if it has its origin in reflections concerning sacrifice. The ritual of *agnihotra* may be considered as the model of a legal institute and the coordination of normative texts in the hermeneutical process of structuring actions may be seen as a typical process of legal reasoning.[47] This interpretative paradigm can be extended in a natural way to typically legal

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45  On the other hand, through interpretation many rules may be derived from the Veda itself.

46  See on the point Jha (1964: 316).

47  The interpreter has to build up a given institute composing and harmonising several norms contained in different sources. He analyses the texts to find out relevant passages and, at the same time, he analyses the action to search the rules that are needed. This problem will be further analysed in the last chapter considering the interplay between different sources.

cases, for instance a purchase, in Hindu law. Generally speaking, wherever *dharma* is concerned, whatever sphere of human action is involved, the underlying question is the knowledge of *dharma* provided by these interpretative means.

As already said, the hermeneutical system of the Mīmāṃsā underlies a theory of action, which provides the framework for organising actions. Many distinctions are drawn between several kinds of acts, on the basis of specific criteria. A first remarkable distinction is that between *laukika* acts, which are worldly acts, and *vaidika* acts, which are non-worldly and, in this sense, scriptural acts. This distinction is based on the effects of the act, which are a prominent component of the action considered as a whole. A *vaidika* act is an act producing a supersensuous effect, while a *laukika* act produces a visible effect, totally included within the limits of worldly action. Further distinctions are made under the above two headings. The most important distinction among *vaidika* acts is that between compulsory acts (*nitya*), occasional acts (*naimittika*) and acts that have to be accomplished if one aims to achieve a specific result, but are not compulsory as such (*kāmya*), as already mentioned.[48] Furthermore, considering the motives of the act, a distinction is made between *puruṣārtha* and *kratvartha* acts. The first ones are characterised as acts meant to realise a man's purpose, while the second serve to realise the goal of another act.[49]

Apart from the above general classifications, the Mīmāṃsā method of interpretation is based on sophisticated ways to ascertain identity or difference between acts and their coordination in complex actions. We will now briefly expound those technicalities, trying to point out the effort of interpreters aiming to ascertain the rules for the correct accomplishment of rites, starting from texts which in most cases were obscure and scattered.

Six criteria are identified to ascertain the difference between acts: different words, repetition, number, accessory details, context and name.[50] In principle, the sentences that in their literal expression make

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48 The *vaidika* acts may be positive, if an act is accomplished, negative, if one restrains from the accomplishment of an act, positive-negative, which can be positive or negative depending on the context.

49 On this distinction see Jha (1964: 258-262).

50 See Jha (1964: 237-239).

reference to different elements should be considered as containing the prescription of distinguished acts. Acts are denoted by verbs and as a result different verbs denote different acts. When the *same* verb is repeated several times, one should hold that at every occurrence it makes reference to a separate act, because otherwise the repetition would be useless. Therefore, if the same verb is repeated in the same proposition five times, one should understand that five distinct sacrifices are enjoined.

Against our common sense – but we should be reminded that here we have a very specialised interpretative context – it is held that another element for the differentiation of acts is number. For instance, in a text as "one should sacrifice seventeen animals to Prajāpati" one should understand that seventeen different sacrificial acts are laid down and not a single sacrifice involving the offering of seventeen animals. A further element of differentiation between acts is the difference concerning a detail that is accessory within the structure of sacrifice, such as the deity to whom the sacrifice is addressed or the substance that has to be used. As concerns context, the principle is that if the same act is prescribed in different contexts, for instance in different parts of the Veda, it should be held that the acts are distinguished.[51] Finally, different names, as a general rule, denote different acts, if the name appears in the principal injunction.

The distinction between acts requires an understanding of the distinction between *apūrvas*. In simplest sacrifices there is only one *apūrva* leading to one result. But there are also very complex sacrifices, composed of a series of distinct sacrifices. For complex sacrifices different *apūrvas* are distinguished. Four types are recognised. The first two are the *phalāpūrva*, which is the direct cause of the result of sacrifice, and the *samudāyapūrva*, which is the collective *apūrva* of a given group of acts. The *phalāpūrva* results from the combination of two or more *samudāyapūrva*. Then, there are the *utpattyapūrva*, initial *apūrva*, which is constituted from the *apūrva*

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51  Jha (1964: 238) explains this criterion with the following words: "We have the injunction of the compulsory daily *Agnihotra* in the text 'One should offer the *Agnihotra*'; and in a different section of the Veda we have another text enjoining the performance of the *Agnihotra* 'for a month'. In this case the conclusion is that when the *Context* is different, *the purpose must be different* (*Sū*. 2.3.24); so that the *monthly Agnihotra* laid down in the second text must be different from the daily *Agnihotra* laid down in the former text".

of every single sacrifice composing a group and the *aṅgāpūrva*, which belongs to single acts composing a single sacrifice. Then through a process of combination, acts collaborate to the realisation of the final *phalāpūrva*.[52] However, as we shall see soon, there are some acts and other sacrificial elements that have no independent *apūrva* and this fact raises further interpretative problems.

The ascertainment of identity and difference between actions and elements pertaining to actions is necessary to proceed to organise them in a coherent ritual structure. In this regard, a basic distinction in the Mīmāṃsā system is that between principal (*aṅgin* or *śeṣin*) and auxiliary (*aṅga* or *śeṣa*) acts and elements of the ritual. Auxiliary acts and elements collaborate to the goal of the principal action or element.[53] A systematic problem arises as concerns the relationship between the principal-auxiliary distinction and the primary-subsidiary distinction. A primary act (*pradhāna*) is an act that has no visible purpose and, thus, is held to produce only a supersensuous effect. A subsidiary act (*guṇa*) is, on the contrary, an act having a visible purpose, as in the case of the preparation of the substance that has to be offered. Subsidiary acts have no independent *apūrva* because they produce only visible results in connection with other acts. Considering that a subsidiary act is subordinated and functional to a primary act, it seems to be an auxiliary act.

Two opinions are maintained on the difference between principal-auxiliary and primary-subsidiary. According to the first opinion, the two classifications are not identical because the primary-subsidiary classification concerns only acts, while the principal-auxiliary classification concerns also substances, qualities and other elements belonging to the ritual. A different view is held by Kumārila, who does not accept this explanation and holds that the relationship of subordination and functionality may be known only through the principal-auxiliary classification, while the primary-subsidiary distinc-

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52    See Jha (1964: 232).
53    The relationship of interlinkedness and subordination between acts is dealt with in the third *adhyāya* of the *Pūrvamimāṃsāsūtra* of Jaimini. A clear indication of the prominent relevance of this distinction is that the entire interpretative system developed in *adhyāyas* 4-12 bears directly or indirectly on the relationship between principal and auxiliary.

tion is very specialised and concerns only the existence of an inde-
pendent *apūrva*.[54]

Auxiliary elements are classified as direct or indirect auxiliaries.
Direct are those auxiliaries that help in the accomplishment of the
sacrifice and, only by this, in the production of the final *apūrva*, while
those auxiliaries are indirect that produce their own distinct *apūrva*,
which contributes to the sacrifice's final *apūrva*. According to Kumā-
rila, even if the direct auxiliaries have no distinct *apūrva* but merely a
material and visible effect, a definite *apūrva* derives from the *choice*
of a definite auxiliary. For instance, several methods may be used to
prepare the grains that have to be used in the sacrifice, and if a
specific act is prescribed, for instance 'thumping and threshing', even
if that act has no independent *apūrva*, an *apūrva* is produced from the
*choice* of that specific method of preparations of the substance to be
offered. Jha (1964: 244-245) explains:

> The reason for this is that, according to *Kumārila*, every Vedic Injunc-
> tion, by its very nature, must be related to an *Apūrva*; and as the
> *Thumping and Threshing* have been *enjoined*, it must be related to an
> *Apūrva*; but as the Act of *Thumping and Threshing* itself is found to be
> productive of a *visible* Result, in the shape of the removal of the Chaff,
> the *Apūrva* to which it is related can be due only to the *choice* of that
> particular method of removing the Chaff in preference to other methods;
> and the real reason underlying all this lies in the fact that the Vedic
> Injunction must lay down a *Dharma*, – and if that *Dharma* were not
> conducive to an *Apūrva*, the said Injunction would lose its character of
> 'being an Injunction of *Dharma*'; and hence as the act itself is found to
> be conducive to only a visible end, we must accept an *Apūrva* as
> proceeding from the *choice* that is exercised. It is for this reason that

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54   See Jha (1964: 240 ff.). Another question concerns the elements of the ritual that
     may have an auxiliary character. Jha (1964: 242-243) remarks that, according to
     Jaimini, some elements have a relative auxiliary character, in the sense that, for
     instance, the act may be considered principal with regard to the substance and
     auxiliary with regard to the result. Interestingly, the agent is considered auxiliary
     with regard to the act because without the agent the sacrifice could not be
     accomplished. This conception shows how, in the sacrificial context, man is seen
     as one of the elements taking part in the structure of the ritual. In fact, as we saw,
     the ritual reflects the macrocosm and the complex network of relations involving
     human beings.

such Injunctions have been called '*Niyamavidhi*', 'Restrictive Injunction'.

Indirect auxiliaries may be of two kinds: those fulfilling merely an invisible aim and those fulfilling both a visible and an invisible aim. When an act is enjoined as such, without mentioning the effect that the accomplishment of the act can have on a substance or an agent, one should hold that the sacrificial act produces only an invisible result. These acts produce an intermediate *apūrva*, which collaborates to the production of the final *apūrva*. In fact, without this intermediate *apūrva* it would be impossible to recognise an auxiliary relationship with the principal act and those acts would be irrelevant.[55]

## Closer to truth: Methods of interpretation

The identification of the relationship between the elements of the sacrifice, following the principal-auxiliary scheme, is crucial for the interpretative process. The connections between different elements of the sacrifice, including the relationship between different sacrifices forming one complex sacrifice, have to be ascertained through interpretation. As we saw, *vidhis, arthavādas, mantras* and names are all conducive to the knowledge of *dharma*, indicating different elements of dharmic actions. The Mīmāṃsā establishes also a series of further exegetical tools to draw relevant indications from texts. They can be seen as methods of interpretation in the sense that the interpreters adopt them as guidelines to ascertain what is *dharma*.

The elements of the ritual and their relations may be ascertained through six means of interpretation: direct (Vedic) assertion (*śruti*), indirect indication (*liṅga*), syntactical connection (*vākya*), context (*prakaraṇa*), place (*sthāna*) and name (*samākhyā*). The authority of these indicators of *dharma* is dealt with establishing a hierarchy

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55 Jha (1964: 246) writes: "But all Acts of this class produce an *intermediate Apūrva*, through which they help in the appearance of the Final *Apūrva* of the Principal Sacrifice, to which latter, on that account, they are regarded as 'Auxiliary'. As these Actions do not help the Principal sacrifice in any perceptible manner, if they were not held to be productive of the *intermediate Apūrva*, then, as they will have disappeared long before the fruition of the Final *Apūrva*, they would not accord any help to the Principal Sacrifice".

between them. Jaimini's *sūtra* 3.3.7.14 (Jha 1999: 1164) states that: "When there is a coalition of Direct Declaration, Indicative Power, Syntactical Connection, Context, Position and Name, that which follows is always weaker than the one preceding it; because it is more remote from the purpose in view".[56]

Direct assertion may be seen as a sentence that explicitly indicates a dharmic rule, while in case of indirect indication the relevant dharmic element is implicit. Direct assertion is the most authoritative means of interpretation and prevails in a case of conflict with other indicators. An example may be provided here.[57] It concerns the ascertainment of the sacrifice in which a given *mantra* has to be used. *Mantras* are held as sacred for the deity to whom the sacrifice is addressed. The *mantra* called *Aindrī* makes reference to Indra in its very same name, and thus provides an indirect indication of the fact that it has to be addressed to Indra. In other words, the *mantra* would include an indicator of a relevant element to be ascertained for the sacrifice. But, in a Vedic *saṃhitā* (Vajasaneya), there is a direct assertion according to which the *Aindrī mantra* has to be recited worshipping the *Gārhapatya* fire. Direct assertion prevails and therefore the *Aindrī mantra* is recognised as auxiliary to the worshipping of the fire and not of Indra. By this, the interpreter is able to establish a relevant element of the sacrifice.

A third interpretative criterion is based on syntactical connection. With regard to the ritual of *Jyotiṣṭoma*, the *Śatapatha Brāhmaṇa* lays down that the *Ṛk* has to be recited loudly and the *Yajus* quietly. The terms *Ṛk* and *Yajus* are ambiguous. In fact, they may make reference to the *Ṛgveda* and the *Yajurveda*, and thus to specific Vedic collections, as well as to verse passages and prose passages. If one attributes to the two terms the second meaning, verses of *Yajurveda* should be recited loudly, while following the other interpretation they should be always recited quietly and the same reasoning applies to the case of *Ṛgveda*. A solution may be found through the criterion of syntactical connection. Interpreting the statement according to syntactical connection, it is possible to arrive at the conclusion that the two

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56  Sandal (1980: 114) translates: "In the common applicability of *śruti*, *liṅga*, *vākya*, *prakaraṇa*, *sthāna*, *samākhyā*, the weakness of the latter is by reason of the distance of the sense".

57  See Jha (1964: 264 ff.) for details of this and other examples we will give.

terms make reference to the two Vedas and not to the distinction between versified and prose passages. In fact, the first part of the *Śatapatha Brāhmaṇa* passage under discussion clearly concerns the two Vedas. Considering that the two parts are syntactically connected, it follows that in the second case reference is made to the two Vedas and not to their verse or prose passages.

As concerns *prakaraṇa*, that is, interpretation according to the context, Sandal (1980: 113) explains: "It is the dependence of one part of a passage upon another as the outcome of the mental process called expectancy".[58] Therefore, some sentences can be connected, even if there is not a syntactical connection between them or an indirect indication, when they are incomplete by themselves and can provide each other the element that would lack if singularly considered, for instance a result or a procedure.[59]

The relationship between different ritual elements may be ascertained also by assigning a special meaning to the order of words and to their position in the statement. For instance, if a *mantra* is mentioned with another two *mantras* soon after the mentioning of three sacrifices, it could be unclear in which sacrifice it should be used and the doubt cannot be solved making recourse to direct assertion, indirect indication, syntactical connection or context. In this case, an indication may be drawn from the order of words, establishing that the first *mantra* should be used in the first mentioned sacrifice and so on. In other words, this method makes order meaningful.

The last method is based on name. For instance, in complex sacrifices different *mantras* have to be used by several officiants and the problem the interpreter has to solve is which specific *mantra* has to be used by a particular officiant. If no help comes from the previous criteria, the question may be solved through the name of the *mantra*.

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58  Contextual interpretation seems a holistic interpretation rather than interpretation on the basis of the context in which sentences may be found, which resembles syntactical connection.

59  Jha (1964: 253) remarks that, according to Prabhākara a reason to prefer syntactical connection rather than context is that: "What is indicated by *Syntactical Connection* is based upon the meaning afforded by the natural construction and interpretation of the words of the *Mantra*, – while what is indicated by *Context* would, at best, be based upon some construction or interpretation forced upon the words in view of circumstances beyond the limits of the *Mantra*-text itself".

In fact, the *mantras* are variously classified and one of these classification identifies *mantras* on the basis of the officiant who has to celebrate them. Mohan Lal Sandal remarks that this principle is the weakest because it is based on artificial divisions and classifications of the Veda made by the teachers (*ācārya*). In this case we have then the example of an indication drawn from the "system", that is to say, from classifications and constructions of interpreters.[60]

As we said, these methods are conceived as hierarchically organised. Jha (1964: 251) clearly explains the logic underlying this hierarchy:

> ... when there is conflict between what is *directly asserted* by a Vedic text and what is implied by the *Indicative Power* of a certain word, it is the former that has to be accepted and the latter to be rejected. The principle underlying this supersession of the one by the other is that in all matters relating to *Dharma*, nothing can be accepted as authoritative except what is declared in the Veda; in the case of *Direct Assertion*, *what should be done* is directly declared in the Veda; in the case of *Indicative Power*, on the other hand, even when the indication is accepted, the course of action indicated is accepted as authorised only after, on the strength of the said *indication*, a *Direct Assertion* to the same effect is assumed. It is for this reason that whenever there is conflict between these two, the *Direct Assertion*, which is self-sufficient, accomplishes its purpose long before the Indicative Power can accomplish its own, through the *assumed* Direct Assertion.

Jha makes reference to the two first methods but the same logic underlies the relationship between all six. From whatever method one starts, it is always necessary to arrive at a direct assertion, even by way of presumption. Moreover, in this view, if one interprets a text on the ground of name, it has to be shown that the authority of this interpretative indication is founded on an assumed text that would lead to the same conclusion on the basis of position, and so on, till the direct assertion that has a self-sufficient authority. In case of conflict,

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60  According to Prabhākara, the indication drawn from position prevails on that deriving from the name because it is *vaidika*, scriptural, while name, concerning distinctions that are the result of the interpretative work of *ācāryas*, is *laukika*, secular, and thus necessarily less authoritative than what directly derives from the text.

the means of interpretation that is closer, following the said order, to the direct assertion, prevails, because it requires fewer steps to ground its authority on direct assertion.

Seemingly, this elaboration of the methods of interpretation to ascertain the relationship between the different ritual elements is carried out following the same kind of reasoning that is used to define the relationship between Veda, *smṛti*, *sadācāra* and *ātmanastuṣṭi*. It is worth noting that these interpretative criteria are non-subjective because no role is played by the will of the author of the text, and it could not be otherwise, considering the theory of the lack of an author of the Veda. Thus, that epistemological assumption influences every further elaboration of the problem of interpretation and knowledge of *dharma*.

Another very important distinction is that between archetype (*prakṛti*) and ectype (*vikṛti*), according to which some acts are the model for a series of other acts. Upon this distinction is founded an impressive series of hermeneutical tools that allows the elements of a sacrifice to be transferred to another sacrifice through integration and modification.[61] This typically ritual interpretation provides a significant example of the fact that the complex distinctions we saw are crucial for the way of reasoning of interpreters. In fact, Olivelle (2005: 12), analysing the structure of the *Manusmṛti*, states:

> Even though this section (3.1.1.1) is explicitly said to deal with the *dharma* of Brahmins, a close examination shows that Manu is here following a practice common in ritual texts. They describe fully the ritual procedure only for the archetypal rite of a group of related rites; the description of the other rites (ectypes) consists of pointing out only those ritual elements unique to each and different from the archetype. For Manu, the *dharma* of Brahmins constitutes the archetype, and he describes it fully. *Mutatis mutandis* these rules are applicable to all *varṇas*. Indeed, within this section itself Manu often points out how the *dharma* is modified for other *varṇas*.

This may be considered an example of interpretation leading to extend the application of rules. However, some further remarks can be made on this aspect considering cases that resemble analogical inter-

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61  On these methods see Jha (1964: 289 ff.).

pretation. As concerns the extension of a given discipline to subjects
that are not explicitly included within the scope of a prescription, the
position of women and *śūdras* in sacrifice is particularly interesting.
As for *śūdras* there are no doubts, in these Brahminical elaborations,
that they are not admitted to the celebration of sacrifices. Many texts
concerning sacrifice are explicitly referred to the first three *varṇas*
only. But there is also a general argument, *a contrario*, to exclude the
*śūdras* from the accomplishment of sacrifices. In fact, it is held that to
have the *adhikāra*, that is, to be entitled to sacrifice, it is necessary to
have received the *upanayana*, the initiation with which the period of
Vedic study begins. It is expressly excluded that a *śūdra* could receive
such initiation, and rather his contact with the Veda is seen as a sin.
Considering that the *upanayana* is seen as a necessary and sufficient
element to have the legitimation to celebrate sacrifices, *śūdras* cannot
have this legitimation.

Analysing the theology of debt in Brahmanism, Malamoud (1998)
quotes a *Taittirīyasaṃhitā* text according to which a Brahmin, at his
birth, bears upon himself three debts, towards the ancestors, the gods
and the ancient sages. To get free from those debts he needs to have a
son, to sacrifice and to study the Veda as a Brahmin student.[62] This
passage makes reference to the Brahmin only, even if all the twice-
born, having received the initiation, may have access to the Veda and
sacrifice. This problem is dealt with by the Mīmāṃsā, which arrives at
the conclusion that the doctrine of debts concerns all the three first
*varṇas* and not only Brahmins. Therefore the element founding the
legitimation is recognised in the *upanayana*, and on the basis of this
criterion the legitimation may be extended beyond the textual data to
all the three superior *varṇas*, setting out on the contrary the *śūdras*.

The problem of the legitimation of women is dealt with in a dif-
ferent way. The discussion is based on the interpretation of the *vidhi*:
"Who desires Heaven should sacrifice". According to the *pūrvapakṣa*,
the term *svargakāmaḥ* being a masculine term, one should understand
that the *vidhi* concerns only men. Furthermore, the legitimation of

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women is contrasted making recourse to the lack of property of goods, necessary to accomplish the sacrifice.

However, the established opinion is that masculine includes feminine, being the term "man" used as class, including men and women.[63] More significantly, the established view is based on a discussion of the "desire for Heaven" as the ground for being entitled to sacrifice. As a result, a woman is admitted to the celebration of sacrifices to the extent to which she desires Heaven. In any event, many texts explicitly lay down this principle, which is then the outcome of previous discussion and reasoning on the point. Interestingly, the desire of Heaven is also invoked to support the legitimation of a *śūdra*, but in this case legitimation is rejected, considering prevalent the element of *upanayana*, as we just saw.

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63  The principle of the masculine including the feminine is a basic Mīmāṃsā principle of interpretation. See Sarkar (1909) for further details.

Chapter 4

# The authority of *smṛti*

Among the sources of *dharma, smṛti* is hierarchically ranked in the second place, after the Veda. While Vedic texts are composed mainly of hymns and of ritual and speculative treaties, *smṛti* works, especially *dharmaśāstras*, have the purpose of teaching about *dharma* and contain in a direct form suggested rules of behaviour. In this sense, these texts are more relevant than the Vedas for Hindu law, for both their characters and their number.[1] From the point of view of Mīmāṃsā and *dharmaśāstra*, a neat distinction between the two sources does not even occur, because both emanate from the same culture and are linked in multiple ways. Nonetheless, the texts belonging to the *smṛti* have their specific features: while Vedic texts encapsulate and presuppose the *ṛta-dharma, smṛti* texts elaborate the knowledge of *dharma* through a largely interpretative work aiming to expound rules of behaviour.[2]

Dealing with the authority of *smṛti*, it is important to distinguish, on the one hand, the texts belonging to the *smṛti* literature and, on the other hand, *smṛti* itself. In fact, while the authority of *smṛti* as recollection is dealt with as an epistemological question, the authoritativeness of specific *smṛti* texts is dependent not only on the general

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1   *Smṛti* includes also *itihāsas* and *purāṇas*. A prominent view in Hindu thought is that all texts bear on the same reality. Mythical narrations describe *dharma* making recourse to a different kind of language. Interestingly, the *Mānava-dharmaśāstra* and the *Mahābhārata* share different parts (Olivelle 2005).

2   It is not by chance that these texts, and specifically the *dharmaśāstras*, have been considered as legal codes, being closer than any other part of Hindu literature to legal texts as known in Western experiences. This process started in the colonial period and is still quite influential in the understanding of Hindu law. See Menski (2003) for a detailed analysis of colonial and modern appropriation of *smṛti* texts during the colonial period and Davis (2006a) for a different presentation of the subject. However, all scholars of Indian laws agree on the misleading consequences that derived from this belief.

authority of the *smṛti* as a means of knowledge of *dharma* but also on the specific characters of a given *smṛti* text. Secondly, the concept of *smṛti* may include in some views more than texts.[3]

The problem of the authority of *smṛti* as a means of knowledge of *dharma* may be distinguished into three closely interlinked questions, which are largely analysed in the *Manubhāṣya* and the *Tantravārttika*. First, *smṛti* is not considered a self-sufficient means of knowing *dharma* and is said to be a *dharmamūla* in a basically different sense from that which is meant in the case of *śruti*. Secondly, the authoritativeness which is recognised in actual practice to works belonging to the *smṛti* requires an explanation of the ground of this authority, which, considering that *smṛti* is not self-sufficient, should be found out of it. On this point, the established view is that this foundation cannot be found elsewhere than in the Veda. Thirdly, once recognised through reasoning that *smṛti* necessarily has to be based on the Veda, thus it has to be explained which kind of connection exists between *śruti* and *smṛti*.

This is a very difficult task for interpreters, because the relationship between *smṛti* texts and existing Vedic texts is not immediately apparent. In connection to this problem the theory of the lost Veda we described previously was elaborated, along with some variants, which are functionally identical, aiming to explain the connection, if not the identity, between existing *smṛti* texts and Vedic texts. We will now analyse these three theoretical questions following the discussion of Medhātithi and Kumārila. In spite of their complexity and abstractness, these theories underlie the practical reasoning of Hindu interpreters.

## The ground of the authority of *smṛtis*

*Smṛti*, as we said, literally means memory, recollection. In the Mīmāṃsā a neat distinction is drawn between apprehension (*anubhūti*) and memory (*smṛti*). The first one bears directly upon the object of knowledge, and therefore is held a valid knowledge, while

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3    As we will see in the next chapter, a view exists according to which *sadācāras* also are included in the *smṛti*.

the second one has an indirect relationship with the object of knowledge, being a recollection of something that has been known through other means of knowing. In other words, memory does not lead to a *new* knowledge. Because of its nature, its reliability is inferior to that of the direct means of knowing, for it is more distant from its object: it is a mediated knowledge.[4]

This is the sense of an objection discussed in the commentary of Medhātithi on Manu II.6. Medhātithi does not negate that *smṛti* is a *dharmamūla* but he focuses on its peculiar function, that is, the teaching of *dharma*. For common people Manu's *dharmaśāstra* and similar works are the only means to know *dharma*, considering that it is impossible to have direct knowledge of it.[5] *Smṛti* works belong to Tradition and, in this sense, they are works that transmit and preserve a preceding body of knowledge. But, being *dharmaśāstra* works composed by human authors who mediate the knowledge of *dharma*, the problem of their reliability has to be coped with.

The authority of *smṛti* works is dealt with in depth in the *adhikaraṇa* I.3.1 of the *Tantravārttika*. The *pūrvapakṣa*, which holds that *smṛti* has no authority as concerns the knowledge of *dharma*, is developed within the explanation of *sūtra* 1: "Dharma being based upon the Veda, all that is not Veda is to be disregarded", while the *siddhānta*, which holds the opinion that favours the authority of *smṛti* is developed within the explanation of *sūtra* 2: "But on account of the agent being the same, the fact [the Vedic foundation of *smṛti*] could be established by reasoning (Anumāna)" (Jha 1998: 104 and 111).

The previous *pāda* established the usefulness for the knowledge of *dharma* of the entire Veda, and then of the different kinds of texts

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4   See this discussion in Jha (1999: 189). For a general discussion see Jha (1964: 69), focusing on the views of Prabhākara, and Bhatt (1989). The term *mūla* and the term *pramāṇa* are often used as synonyms, even if *pramāṇa* is properly a technical epistemological term, while *mūla* is a metaphor that may be compared with the idea of source or *fons* in Western traditions. As concerns the character of tradition and the relationship between new and revelatory knowledge and the recollection of this knowledge, some comparative remarks could be made with the Qur'an and *sunna* relationship, on which see Weiss (1992).

5   See Medhātithi on Manu II.6 (Jha 1999: 189). According to Medhātithi, those who remember have a special position. In fact, they apprehend through *śabda* or perception, that is, real means of knowing, while others simply learn what is remembered by them.

comprising it. The third *pāda* is the *smṛtipāda* and deals with the authority of "non-Veda". The origin of the discussion is in the fact that, on the one hand, *smṛtis*, having a human origin, should have no authority, but, on the other hand, their authority cannot be simply disregarded because they are good works accepted in practice as authoritative. Therefore, this doubt has to be cleared through reasoning.

The argument of the *siddhānta* starts from the remark that the *smṛtis* composed by Manu and other authors are well-done works and they are composed correctly. Thus, differently from the compilations of the heretic *Bauddhas* they *seem* authoritative works. Their correctness can be explained only recognising their Vedic foundation. The established view is reached through the perusal of all the hypotheses that can be conceived as regards the foundation of *smṛti* contents.[6]

Five hypotheses can be made on the authors of *smṛti* works: 1. they were completely mistaken; 2. what they state is based on their observation and personal experience; 3. they learned from others what they affirm; 4. they intentionally said wrong things aiming to mislead people; 5. their statements are based upon direct Vedic injunctions. To check the reliability of these five hypotheses two criteria are fixed. First of all, one should try, whenever possible, to accept only the hypotheses that are not contrary to directly perceived facts. Secondly, one should accept only those hypotheses that do not require, by turn, the assumption of unknown facts.

As concerns the first hypothesis, according to which the statements made by Manu – here adopted as an example for every author of *smṛti* – were completely mistaken, it is observed that this would be contrary to the directly perceptible fact that his work is an excellent compilation and, particularly, that it contains correct teachings. Therefore, this hypothesis would be contrary to evidence of the quality of Manu's work and also to the universal acceptance of the authoritative character of his assertions. In addition, this hypothesis would require to assume other unknown facts, for instance that people living at the time of Manu accepted and followed wrong teachings, or that Manu had to prove to others that he was not fallen into error, and so on.

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6   See Jha (1998: 111-112).

As concerns the second hypothesis, according to which the contents of *smṛti* would be based on personal observation of the person who composed the work, one should assume that observation and, secondly, the extraordinary capacity of the author to directly perceive supernatural entities as *dharma*. According to the *siddhānta*, this would be contrary to everything that can be observed in persons living in those times. Moreover, this kind of capacity should be excluded in a general way, as it is actually excluded to refuse the omniscience of the Buddha and others.

As concerns the hypothesis that what is contained in the *smṛtis* is based upon knowledge of persons other than the author, this should be absolutely discarded because knowledge so obtained would be similar to knowledge of a colour transmitted from a blind person to another blind person and no authority could be attributed to a tradition devoid of any ground as one of this sort.

As concerns the hypothesis that Manu intentionally tried to mislead people, this would require to assume plenty of other unknown facts, such as the misleading intention of Manu, the reasons that led him to this attempt to mislead, the fact that people actually fell into error, the continuation of this error till present times and so on. Further, according to the *siddhānta*, this hypothesis would be contrary to a directly perceivable fact, that is, the firm conviction of the truthfulness and reliability of the teachings of Manu.

In conclusion, the most reliable hypothesis is the last one: the content of *smṛtis* is based on direct Vedic injunctions. In fact, in this case, one should assume only one unknown fact, the existence of such injunctions. Furthermore, in this case there is no conflict with the fact that sages and learned people accept *smṛti* texts as authoritative texts.[7]

A similar, even if simplified, view may be found in Medhātithi's commentary, within the discussion on the meaning and usefulness of verse II.6 we analysed above. Four interconnected steps are made to state the authority of *smṛti*. First of all, *smṛti*, as recollection, depends upon a previous cognition. Secondly, the acceptance of *smṛtis* as authoritative works among sages precludes the view of them being

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7   Although reference is made to sages and learned men, this acceptance of authority in practice could involve wider parts of the community. From a comparative perspective, see the analysis of the doctrine of consensus in Islamic law in Weiss (1992).

mistaken works. Third, considering that *dharma*, as a supersensuous entity or quality, can be known only through *śabda*, Manu and others could not have gained correct knowledge of *dharma* from other sources. Fourth, it is a matter of common experience that the teachings of the Vedas are recollected. Therefore, there is only one persuasive view concerning the foundation of *smṛti*, that is to say: they are founded on the Veda (Jha 1999: 172-173).

This discussion points out also that who knows the Veda does not need any *smṛti*, which is recollection of the Veda, to know what is dutiful, because the Veda is the genuine source of knowledge of *dharma* and no other source is required.[8] In this view the other sources are not on the same standing of the Veda. What is known through them is properly the Veda, and by this full knowledge of *dharma* is obtained.

Other remarks, which are very similar to those included in the *Tantravārttika*, may be found. In fact, Medhātithi discusses the view according to which Manu and other authors of *smṛti* derived the contents of their works from imagination, without a basis in previous knowledge, as in the case of a story imagined by a poet. This view is set aside considering that hardly a rational person would accomplish an act that has been taught as dharmic on the basis of imagination.[9] On the other hand, it could be possible to hypothesise a mistake, but the mistake of an author of *smṛti* would have been ascertained by other sages. In addition, one should assume that this mistake was transmitted for centuries. Another argument is used to argue the Vedic grounding of *smṛti*, that is, the fact that *smṛti*, dealing with *dharma*, must have its source in something that equally deals with *dharma*.

The above considered, in this view *smṛti* cannot be but founded on the Veda. Therefore:

> The Veda that we thus infer (to be the source of the Recollections) must have been directly perceived by Manu and others and the Vedic texts in which the Dharmas laid down in the Smṛtis were originally prescribed (and which we do not find in the Vedas now), must have been contained in such Rescensions as have been lost. (Jha 1999: 190)

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8     See Jha (1999: 173).
9     See Jha (1999: 189).

The establishment of a Vedic foundation for *smṛti* texts is reached through reasoning and by way of inference and presumption. Very few are the cases in which is possible to find a Vedic text corresponding to a *smṛti* text. That is why it is necessary to assume that the *smṛti* text is based on a Vedic text, which has become successively lost, or that is extremely hard to recognise due to the weakness of intellectual faculties of human beings in present times.

## The theory of the lost Veda

Once established that there must be some kind of connection between the *smṛti* and the Veda, the problem is to establish which kind of connection actually exists. The relationship between the Veda and the other sources of *dharma* is dealt with by elaborating the theory of the lost Veda, which may be actually seen as a set of more or less sophisticated theories. As we saw earlier, this theory is at the core of the hermeneutical method used by the interpreters and plays the role of a source of legitimation. *Smṛti* authors usually state that the content of their works is already included in the Veda and, even if there is no explicit verse on the point, quite clearly they all frame their work within Vedic knowledge, including texts and practices. The theory of the lost Veda as explained in Medhātithi is particularly interesting because it provides a clear view of *smṛti* works as the outcome of interpretation. As usual, this theory is not simply stated but discussed and analysed to find an established view.

     Vedic texts that are inferred as the grounding of the memory of Manu and others, according to this theory, were part of recensions that have been lost in course of time but were actually known. Medhātithi considers five views on this point.[10] First of all, it is possible that some injunctions are contained only in some recensions. Secondly, it is possible that all the recensions are available but the dharmic rules are out of common reach because different details are scattered in different recensions. Several injunctions that bear on the same action, prescribing different elements, may be contained in different recensions. Therefore, it is possible that Manu, as well as other authors of

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10   See the complete discussion in Jha (1999: 191 ff.).

*smṛtis*, compiled the indications scattered in different recensions in order to present them in a way that could be easily understood. Similarly, it is possible that the *dharmas* are indicated in *mantras* and *arthavādas* and made explicit through interpretation.

The fourth hypothesis acknowledges the possibility that some *dharmas*, namely those that are difficult to find in existing Vedic texts, were actually performed since time immemorial, and in this way they have been transmitted through an unbroken tradition. According to this view these acts should be considered as eternal as the Veda. This hypothesis, although rejected by Medhātithi, is particularly interesting because it supports the non-identification of the Veda and existing or even lost Vedic texts. Finally, it may be assumed that Manu and others learnt those *dharmas* from other texts in which they were assumed by inference, so that nobody would actually learn those *dharmas* through the Veda.

Medhātithi holds that these hypotheses are reasonable but not completely convincing. In his view, what is necessary is that everything contained in the *smṛti* is contained in the Veda also, but this does not mean that in the *smṛti* we can find exactly the Vedic sentences. Then, it is not so important to have evidence of the whole process and it is not reasonable or necessary to investigate into details as concerns the original Vedic texts. The established view is sufficient that *śruti* and *smṛti* are connected and, specifically, that all that is contained in the *smṛti* is founded on the Veda (Jha 1999: 192).

Furthermore, Medhātithi does not support what we could consider as the standard version of the theory of the lost Veda, the complete loss of some Vedic texts, which is under discussion here. This view is not at all persuasive, because the acceptance of the lost Vedic texts would require some impossible assumptions, such as the disappearance of *all* the texts dealing with the *dharmas* of castes and stages of life, which are laid down in *gṛhyasūtras* and *smṛtis*, and therefore precisely of the most useful Vedic texts.[11] This passage clearly shows that these arguments are not so fictitious as it could appear at a first glance.

As we said, the subjects dealt with in Vedic texts and *smṛti* texts are very different and specifically the *dharmasūtras* and the *gṛhya-*

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11   See Jha (1998: 192-193). At page 193 there is a very interesting discussion of the life stages, quoting Gautama 3.35, which is 3.36 in Olivelle's translation (1999).

*sūtras* developed the structure of the *varṇāśramadharma*, which is absent in the *śruti*. Therefore, according to Medhātithi, another view is more reasonable:

> ... learned persons, who have formed definite conclusions of their own in all important matters, should compile a practical compendium of all such injunctions as are scattered over (in various sections of the Veda), beset with *arthavādas*, and difficult to determine what is conducive to the good of man and what is meant only to complete the sacrificial performance. (Jha 1999: 193)

This passage provides one of the clearest indications of the jurisprudential character of *smṛti*. Smṛtis are complex works in which authors expound their view on the appropriate way to behave. In the making of *smṛti*, certainly the evaluations and views of a given author play a role. *Smṛtis* are part of a complex process of interpretation in which the choice of the norms which are held as suitable to a given context is crucial. The relevance of personal opinion of *smṛti* authors is shown by the divergent voices emerging from the *śāstra*, that points out a vibrant and even chaotic reality (Olivelle 1999). These opinions were then "checked" by other sages and arguably by the entire community, as emerges from the arguments we saw in the previous paragraph.

At the end of the day the decision is up to the learned, and the real criterion to recognise the authority of what is enjoined in the *smṛtis* is the acceptance of the same persons who perform what is enjoined in the Veda. In Medhātithi's commentary, we can read only the following opinion:

> Between what is laid down in the *Smṛti* and what is prescribed in the Veda, there is a close connection. There is not much difference between the two, either as to the character of their performers or to the nature of the acts themselves. Those same persons who perform the acts prescribed in the Veda, — if they also do what is mentioned in the Smṛtis, it follows that these latter have their source in the Veda. The principal criterion of the authoritative character of a certain text is its acceptance by persons learned in the Veda; and the fact of the performing agents being the same in both cases has been put forward (in the Pūrvamīmānsā Sūtra 1.3.2) as a ground for inferring the existence of Vedic texts in corroboration of the *Smṛtis*. (Jha 1999: 192)

What is crucial is that the Veda constitutes a framework of reference for the further elaboration of *dharma* and therefore for the ongoing definition of duties and identity of the followers of this tradition. In this regard, we can observe also another implicit idea underlying this theory. Generally speaking, a *smṛti* text would be valuable only in the case of the absence of a Vedic text and clearly it would have the role to fill gaps, to integrate the existing Vedic texts. But what actually happens is that *smṛti* texts are perceived as compilations that include the implied or lost Veda and also injunctions contained in existing Vedic texts. This means that in practical terms they supersede Vedic texts. Furthermore, as we saw, they include also the practices that are deemed to be founded on the Veda, and logical facts and technical norms. If everything contained in the *smṛti* is contained in the Veda also, this means now that one could learn what one needs from the *smṛti*, without making direct recourse to the Veda.

## The characters of authoritative *smṛti* texts

Once the authority of *smṛti* as a means of knowing *dharma* has been recognised in this general way, the problem the interpreters have to deal with is how to ascertain if a specific text may be considered a proper *smṛti* text. Several lists of specific authoritative *smṛti* texts may be found in this literature. These lists cannot be considered as closed lists, because they do not include all the texts that have to be re-cognised as authoritative. Generally speaking, the *śāstra* is conceived as a whole. Even if some specific *dharmaśāstras* gained a prominent authority, other *smṛtis* could be used as authoritative texts and new *smṛtis* could be composed and could receive the acceptance of the learned as authoritative sources of guidance.

Nonetheless, in specific contexts the authority of some *smṛti* texts could be disregarded or limited. Authoritativeness in this context is a matter of degrees and interpreters were quite free to pick the solutions they favoured within a myriad of texts. As a result this process led to the transmission of some authorities and to the loss of some texts and opinions that nonetheless could have been used in some contexts or period. Those lists are then an indication of authoritative texts, and in

this sense a transmission of the accepted canon, even if they can also be simply an acknowledgement of the sources that have been used by the *dharmaśāstra* author himself.

The determination of normative "canon" within orthodox Brahmanism is interconnected, on the one hand, with the problem of the authority of so-called heterodox *smṛtis*, especially *Bauddha* compilations, and on the other hand with the problem of the existence within the totality of authoritative *smṛtis*, or within a single authoritative *smṛti*, of unauthoritative parts, passages and norms. Interpreters dealt with these problems mainly in connection to conflicts within the *smṛti*, as we will see. The presupposition of this discourse is that *smṛti* as tradition was not an exclusive concept of Brahmanism.

The perusal of the authority of single *smṛtis* raises difficult problems for the interpreters. In fact, the lack of authoritativeness of a single *smṛti* text potentially could question the authority of the *smṛti* as a whole and, particularly, could shake its reliability and position among common people. On this point many interesting observations may be found in the *pūrvapakṣa* of *Tantravārttika* I.3.2, where it is stated that if, on the basis of the necessity to find a Vedic text supporting the *smṛti* text, one begins to doubt the authoritativeness of single *smṛtis*, the result is a situation characterised by uncertainty, which could lead people to doubts about the authority of *smṛtis* in general. Given that it is not easy to investigate into the Vedic foundation of a passage, the majority of people need to know that one can find a valid source of guidance in the *smṛti* without having to verify in each case the existence of a supporting Vedic text. What we find here is an exigency of certainty, the need to recognise in every case, and in a general way, the authority of *smṛtis*.

According to the related *siddhānta* the falsification of a part of the *smṛti* does not mean the falsification of all *smṛtis* and this question has to be decided following a case-by-case approach. Therefore, it seems that the *siddhānta* disregarded the "political" needs presented in the *pūrvapakṣa* about dangers that could derive from the shaking of the authority of this source before non-expert persons who do not have the means to conduct an analysis on the authority of specific parts of normative texts. These different views probably show the internal debate of the Brahminical elite that administered this normative "canon".

How can it be ascertained if a *smṛti* text is authoritative? The general criterion is the acknowledgement of a Vedic foundation. However, Hindu jurisprudence elaborates some more specific and practical criteria to establish the authority of a particular *smṛti* text. Medhātithi provides a series of qualifications that a *smṛti* text should possess to be deemed as authoritative, discussing the meaning of the term *śīla* in Manu II.6.

Generally the term *śīla* is used as equivalent to *sadācāras*, but some authors consider *śīla* an additional source.[12] Several translations of Manu II.6 actually make of *śīla* seemingly a fifth source of *dharma*, so that the *dharmamūlas* would be Veda, *smṛti* texts, the virtuous conduct of persons who know the Vedas, the example of good people and individual conscience. These translations thus suggest a distinction between two different kinds of conduct, the practices of people who are versed in the Vedas and the practices of generally good people. This distinction raises some problems, given the fact that *sādhus*, good men, strictly speaking should be those who know the Vedas, and, as a result, it would become impossible to distinguish between these two differently qualified sources of *dharma*. In addition, following this interpretation there would be a discrepancy with other texts, such as Yājñavalkya I.7 and Manu II.12, which clearly acknowledge only four *dharmamūlas*, particularly if one considers that Medhātithi, for instance, considers Manu II.6 and II.12 as equivalent texts.

Jha's translation of verse II.6 of Manu is: "The entire Veda is the root-source of Dharma; also the Conscientious Recollection of righteous persons versed in the Veda, the Practice of Good (and learned) men, and their self-satisfaction". "*Śīla*" here is translated as "conscientious" and is connected to "*smṛti*". This translation by Jha is based on the interpretation of Medhātithi, who provides a peculiar explanation of *Śīla* as a qualification of *smṛti*.[13] We saw that the interpreters

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12  See Lingat (1998: 14).

13  Whether one should translate taking into account the views of the commentators or not is a much debated problem. In this case we can observe that even if this translation, based on the opinion of Medhātithi, could not be the most correct, nonetheless it is based on the authoritativeness of Medhātithi in practice. These texts are not philologically evaluated but interpreted and from different interpretations may derive different normative consequences. On the problem of the

elaborated the system of sources of *dharma*, and interestingly we can see here that commentators, who are part of the tradition, further elaborate the very same list of the sources of *dharma* on the basis of exegetical questions. This fact is even more significant if we consider that in the Hindu tradition *dharmaśāstra* texts were transmitted along with commentaries, which in many cases replaced the original texts as authoritative interpretations.

Medhātithi (Jha 1999: 189) defines *smṛti* as a recollection which is qualified from being conscientious, accurate, and from belonging to persons who are versed in the Veda. *Smṛti*, as such, is recollection of something that has been already known and "the meaning thus is that another 'authority' (means of knowing) for *Dharma* consists in the idea, 'this should be done, that should not be done,' entertained by people learned in the Veda" (Jha 1999: 189). This view strengthens the non-identity between *smṛti* and text, the latter being, so to say, a mere technical support of recollection.

Before giving his own interpretation, Medhātithi (Jha 1999: 201) discusses other views on the interpretation of the term "*śīla*". This may be understood in several ways and the question seems to be debated. Someone argues that *śīla* is a *dharmamūla* even if in a different sense, being not a means of knowing, as Veda and *smṛti*, but a means of accomplishing *dharma*. In this interpretation *śīla* is understood as "leaving love and hate", which provides a merit and then nothing else than *dharma* in one of its meanings. Therefore *śīla* may be seen as a cause, as a root of *dharma* itself more than of its knowledge.

Several objections are presented against the idea that *śīla* is a source of *dharma*, even in the special sense of something that accomplishes *dharma*. For instance, there would be no reason to mention the leaving of love and hate as a dharmic act along with sources of *dharma*. The answer to this objection is that *śīla* has been mentioned in a separate way just to point out its special relevance deriving from the fact that it is useful *per se* and in the accomplishment of all other acts, too. In addition, it should be considered *dharma* for every caste and condition.

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relationship between translation and commentaries see interesting remarks in Doniger (1991: lxv-lxxi).

Medhātithi, after having considered these opinions, provides his own explanation based on an etymological interpretation connecting *śīla* to composure of the mind. In this view, *śīla* must be understood as *samādhi*. *Smṛtiśīle* is a cumulative compound that connotes interdependence, and, as a result, not every *smṛti* but only that one composed in a state of composure of the mind may be considered as a source of *dharma*. The fact that an author of *smṛti* is versed in the Vedas is not enough, because even "the wise and learned man may fall into error".[14]

In this view, only that recollection which derives from a firm attention on what is prescribed in the Vedas is a valid source of knowledge of *dharma*. In other words, a *smṛti* text, as such, is not necessarily a source of *dharma*. In fact, the term *smṛti* may be used also to make reference to compilations that are actually heterodox and full of mistakes. The mere fact of being a *smṛti*, a recollection, does not involve authoritativeness in matters concerning *dharma*, which should be ascertained considering other elements.

On the ground of these arguments, Medhātithi states that the requisites an author of *smṛti* has to possess for his work to be considered authoritative are the following three: learning obtained from a qualified teacher, attention to the content of texts and the habit to act according to what is prescribed in them. He also states that the teaching of Manu and other authors of *smṛti* held to be authoritative has been accepted by wise men only because they found these qualities in these authors.[15] Therefore, presenting the characters a *smṛti* text should have to be held as authoritative and underlining the relevance of the qualities of their authors, Medhātithi makes also clear that wise men decide if these requisites are present. Then, at the end of the day, the final criterion to ascertain the authoritativeness of a *smṛti* text is the acceptance that it receives among sages.

It is objected that if this interpretation was correct, it could have been sufficient to state that the *smṛti* of Manu and other authors were authoritative without expounding the subjective characters of authors.[16] Medhātithi answers that the reason to make clear these requisites is that in this way a person who is not fully confident of the

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14  See Jha (1999: 202).
15  See Jha (1999: 203).
16  *Id.*

authority of Manu and others could ascertain it by himself. Further-
more, this allows to ascertain the authority of works that are not
included in lists of authoritative *smṛtis*, which cannot be considered
complete, because even some works not included are held to be au-
thoritative among wise men.[17] Then, this passage points out the open
nature of this "canon".

According to Medhātithi there is a further reason to state which
are the requisites an authoritative *smṛti* should have, that is, the
possibility to ascertain the authority of a new *smṛti* text. In principle,
when a wise man expounds his opinion in a dharmic matter, for
instance about an expiatory rite, his words are held to be authoritative
as much as the words of Manu. As a matter of fact, learned men
express their authoritative opinion in many cases. On this point, Me-
dhātithi equalises the author of *smṛti* to a *pariṣad*, an assembly of
sages who decide on doubtful cases, and makes reference to Manu
XII.113, which states "When even a single Brahmin who knows the
Veda determines something as the Law, it should be recognized as the
highest Law, and not something uttered by myriad of ignorant men"
(Olivelle 2005: 236).[18] There could not be a clearer indication of the
interpretative nature of *dharmaśāstra*. In fact, to make an author of a
*smṛti* equal to a *pariṣad* means to point out a strict connection between
*smṛti* and judgement, to be meant in this case as an authoritative
*opinio* on a dharmic matter.[19]

In this view, a relation with the Veda is always needed and is
assured from the acceptance of the authoritativeness of the teachings
contained in a text by sages and virtuous men. In fact, according to
Medhātithi:

> ... when a person is found to be recognised and spoken of by all wise
> and learned persons as endowed with the said qualifications, and they
> also accept a certain work as really by that person, – the word of such a
> person (and of the work composed by him), even though proceeding
> from a human source, should be recognised as an authoritative source
> for the knowledge of Dharma. (Jha 1999: 204)

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17  See Jha (1999: 204). Medhātithi mentions some authors as authoritative recol-
    lectors who are not included in the lists.
18  See Jha (1999: 204). On *pariṣads* see Ayyar (1952).
19  A given compilation may be *more or less* authoritative. In this context an authori-
    tative opinion is an influential opinion rather than a binding opinion.

If a learned man, endowed with those qualifications, would compose today a work on *dharma*, later generations would accept his work as authoritative as any ancient *smṛti* texts, such as the *Manusmṛti*. On the other hand, contemporaries of the author of a new *smṛti* do not know *dharma* from his words, because they have at their disposal the same sources of information. They are in the position to check the authoritativeness of his words, and specifically the sources he is using, including the Vedic ones, accepting or disregarding them. Therefore, when a work has been accepted as authoritative by sages, "it would be only right to infer its authoritative character from the fact of its being accepted by the wise and the learned (which fact could not be explained except on the basis of its being duly authoritative)" (Jha 1999: 205). This makes sense if we consider one of the Mīmāṃsā arguments to state the authority of *smṛti*, i.e. that it is unlikely that a text would have been transmitted as an authoritative text if, at the time of its composition, the sages would have criticised its contents as unreliable.

For this reason, even if the basic criterion to decide that a *smṛti* is authoritative is a logical one and is based on the presumption of a supporting Vedic text, actually what is crucial is the *acceptance* of the community of those who know the Vedas. On the other hand, the presumption of a supporting Vedic text is justified from the fact of the acceptance of some texts as authoritative texts. Interpreters proceed to justify theoretically the authority of *smṛti* starting from the exigency to cope with the inconsistency that there would be if non-authoritative works were accepted in practice.

Tradition continuously changes. New rules and new principles are recognised in practice and legitimated by reconnecting them to the firm grounding of the Veda. Using basic concepts of legal theory, we could argue that the validity of a source depends on its effectiveness. On the other hand, the acceptance of the authority of a compilation and of a single sage as an authoritative person clearly involves a previous framework of legitimation. Furthermore, within this framework the acceptance of single rules may be debated following the logic of their major or minor authoritativeness, depending also on the context.[20]

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20   The *śāstra* is considered as a totality. Lingat (1998: 143) explains: "According to the Hindu interpreter, all the *dharma-śāstras* were the expression of the same

As we shall see dealing with conflicts, the temporal criterion, which is by its nature a formal criterion, is not used to distinguish the authority of several *smṛtis*. In course of time some texts became firm authorities, while others, which could have been authoritative in certain environments in a given period, were superseded by new texts. When the production of *smṛti* compilations stops, some of them are "canonised", that is, they are firmly recognised as holding the utmost authority, but the evolution of Hindu law continues. Whenever experts of *dharma* expound their opinions on *dharma*, including solutions for new cases, *smṛti* is involved, for recollection does not need to be laid down in extensive compilations to be authoritative.

## Non-authoritative *smṛti* texts

The previous discussion on the requisites a text has to possess to be held as an authoritative *smṛti* text has also the purpose of providing a criterion to set aside texts which may be seen as *smṛti* texts but actually are not authoritative. This issue is a very relevant one, both in theory and in practice, because it concerns the relationship with other traditions, mainly Buddhism in this case, but also new Hindu sects and sub-traditions, whose coherence with mainstream Hinduism could be under discussion.[21] Medhātithi refers in a general way to heterodox people.[22] The fact that they do not accept Vedic knowledge involves that their *smṛtis* cannot have any authority as concerns the knowledge of *dharma*.

The discussion opening the commentary on Manu II.6 presents many detailed arguments supporting the lack of authority of heterodox

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eternal law, that is to say it is from the whole of written tradition, and not from this or that *smṛti* in particular that one must deduce the rule to be followed". Adopting the concepts of validity and effectiveness it could be said that the *śāstra* as a whole is valid but some parts of it may be ineffective.

21  See in the *Tantravārttika* the *adhikaraṇa* 3, treating the unauthoritative character of such *smṛti* texts as having their origin in ordinarily perceived worldly objects (Jha 1998: 153-168).

22  Medhātithi mentions "all such heterodox people as the Bjojaka, the Pañcharātra, the Nirgrantha, the Anarthavāda, the Pāshupata and the rest" (Jha 1998: 173-174).

*smṛtis*.[23] In fact, these works explicitly hold that the Veda is unauthoritative and refuse any connection with it. The teachings contained in them are directly contrary to the Veda, and, in addition, prohibit the study of the Veda.[24] There not being any kind of connection with the Veda, it could hardly be stated that they are based upon the Veda. On the other hand, the authors of these works explicitly state that they are based on authorities different from the Veda, as in the case of *Bauddhas*, who rely on a tradition transmitted through several Buddhas. *Bauddhas*, as well as others, maintain that their works are based on direct perception, while, as we saw, Mīmāṃsā and *dharmaśāstra* neatly refuse that *dharma* could be known simply through perception. As a conclusion, the separation between these works and the Veda, and their conflict, is complete (Jha 1999: 173-174).

All these arguments highlight the non-acknowledgement or the explicit refusal of the authority of the Veda, in principle and in practice. In fact, the rules of behaviour which are laid down in heterodox *smṛtis* then conflict with the rules laid down in orthodox *smṛtis*, which are based on the Veda. The contrariness to the Veda in this view is a reliable way to establish through reasoning the non-authoritative character of a *smṛti*. As we will see dealing with conflicts between *śruti* and *smṛti*, the inference of a lost Vedic text as support of a *smṛti* passage is set out when the *smṛti* conflicts with an existing Vedic text.

However, it could be held that, there being contradictory Vedic injunctions, the teachings of heterodox *smṛtis* could be considered as based on lost Vedic texts or recensions. This argument is used also to reinforce the authoritativeness of orthodox *smṛtis* conflicting with explicit Vedic texts. In the Mīmāṃsā and *dharmaśāstra*, as we will see in more detail later on, two opinions co-exist. According to the first one, a *smṛti* text contradicting an explicit Vedic text is not authoritative, while according to the second one it is equally authoritative.

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23   See also *Tantravārttika* 7(d) (Jha 1998: 232 ff.).
24   Medhātithi (Jha 1999: 173-174) provides some examples of "teachings directly opposed to the Veda", such as, for instance, to conceive killing as a meritorious act or, on the contrary, the prohibition of any killing, including a ritual one.

The theory of the lost Veda has two aspects. On the one hand, it allows to give a foundation to orthodox *smṛtis* by inferring a Vedic basis for accepted rules. But on the other hand, the same reasoning could allow to recognise the authority of conflicting heterodox *smṛtis*, because they could be based on lost Vedic texts as well.[25] However, as far as heterodox *smṛtis* are concerned, the established view is that a lost Vedic text cannot be inferred to support them. In fact, in the case of orthodox *smṛtis* such as the *Manusmṛti*, their relationship with the Veda is evident while the same could not be said for heterodox *smṛtis*, which totally disregard Vedic knowledge. In my view, the insistence on the fact that only the recollection of persons versed in the Veda is authoritative seems to be justified from the exigency of a distinction from heterodoxy, rather than from an elitarian Brahminical conception within Hinduism itself.

In any event, that heterodox *smṛtis* are taken into consideration and discussed is worth noting by itself. This could be seen as an effect of Indian pluralism, making different people, beliefs and practices live together. The very same criticism of the possibility of a direct perception of *dharma*, and then of a knowledge of *dharma* not obtained through the Veda, shows the pan-Indian relevance of *dharma*, notwithstanding different elaborations of the concept and different theories about the proper sources of knowledge. In this wider perspective, clearly *dharma* is not the same of Veda. The tight connection between *dharma* and Veda that is stated in Mīmāṃsā and *dharmaśāstra* is broken in other Indian cultures.

On the other hand, there can be some Hindus who do not accept the authority of the Veda. As we said many times, Hindu people and sects are very differentiated, so that a general picture of Hinduism has to be conceived as a sum of different conceptions rather than as the generalisation of some opinions, although prominent. One could think in terms of many partially overlapping circles. However, traditions evolve interacting with competing views that can be integrated or set aside, producing some modifications. Then, what could have been at the beginning a marginal sect could eventually become an accepted current of Hinduism.

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25  See Jha (1999: 174-175).

Historical evolution in Hinduism should be considered from the perspective of diffusion of beliefs and also rules of behaviour. For instance, according to Lingat (1998: 77), the passage from *dharma-sūtras* to *dharmaśāstras* was due to a late tendency towards universalism. In fact, while the influence of *dharmasūtras* was limited to certain Brahminical school:

> The authors of the *dharma-śāstras* want to substitute for these fragmentary and limited pictures of Indian society, or even to superimpose upon them, a new picture gathering together all characteristics and offering, as it were, a synthesis of the *dharma-sūtras*. We might suppose that the Hindu élite which remained faithful to its Vedas reacted to historical circumstances, such as the formation of the great empires or even the expansion of doctrines subversive to its own, by becoming aware of the community beliefs and rituals which, in spite of local variations, united them all. It is just this awareness of a community of culture which can account for the appearance of the *dharma-śāstras*. Those works could well offer some kind of code of Indianness.

This universalising aim could be seen as a way to integrate other thoughts and forms of life into the main paths. Certainly during this process there could have been complex interconnections with political phenomena, such as the unification of kingdoms, conquers, or also internal migrations. Even if *dharma* is conceived as universal, as we will see in detail dealing with the *holākādhikaraṇa*, it is admitted that some compilations or practices may be accepted only in certain parts of the country.[26] Then the *śāstra* was actually determined on a local basis and in this regard the acceptance of the sages and the role of interpreters was crucial for the emerging of the actual normative system, that is, of the actual dharmic rules deemed as authoritative in social relations.

It may be argued that, even if a huge differentiation is possible, definite boundaries are posed in Brahmanism, adopting as the criterion to establish the acceptance of the authority of the Veda. These boundaries are flexible but, on the other hand, a line has to be drawn and

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26  In other words, the canon should be in any case individualised. This fact could also explain why in some kingdoms new compilations were prepared, arguably to simplify and compile the accepted *dharmas* of the country.

something must be set aside. The problem of orthodoxy and hetero-doxy is basically a problem of identity.

Finally, we can further consider what we saw dealing with the role of the Veda and its relationship with other sources of *dharma*. The statement according to which *smṛtis*, as well as *sadācāras*, are authoritative to the extent in which they are based on the Veda does not mean that what may be found in the *smṛti* may be found also in the Veda. In the Veda we find mainly ritual *śrauta* norms. If the persons who perform those rituals adopt some model of behaviour that is not included in the Veda, there is a strong presumption of their being based on the Veda. In other words, the performance of Vedic rituals is evidence of being *smārta* and it is quite obvious that the practices of the *smārta* people would be considered as grounded on the Veda. Authoritative *smṛtis* are simply the *smṛtis* of those communities who accept the authority of the Veda and in this sense they are Vedic.

The personal criterion is actually the crucial one. "On account of the agent being the same" is stated in the *Tantravārttika* to say that the rules of behaviour included in *smṛtis* are followed by those who perform the Vedic rituals and, then, should be considered as grounded on the Veda, and we would say on Vedic culture, rather than in the Vedic texts, which are simply a manifestation of that culture. At the end of the day this means that the theory of the lost Veda is somehow overstated by scholars. In its simplest version it means that the persons who follow the Veda also accept some other normative texts and behave according to some standards of behaviour. In this sense these texts and practices are Vedic and the *theory* of the lost Veda is a cultural elaboration of their legitimation.

Chapter 5

# The authority of *sadācāras* and *ātmanastuṣṭi*

## The definition of *sadācāras*

In this chapter we will deal with the authority of the non-written or non-textual level of the sources of *dharma*. The basic concepts we have analysed dealing with the authority of *smṛtis* underlie also the discussion concerning *sadācāras*, that is, normative customs and models of behaviour, and *ātmanastuṣṭi*, that is, self-satisfaction. *Sadācāras* and *ātmanastuṣṭi*, much more than *dharmaśāstras*, raise several questions concerning their very definition and the extent of their role in Hindu law. Dealing with this theoretical discussion we will analyse some definitions of what may be considered in this context an authoritative practice and of the cognitive bearing of individual self-satisfaction as an indicator of *dharma*.

The standing of *sadācāra* and *ātmanastuṣṭi* in Hindu law is much debated among scholars. Particularly *ātmanastuṣṭi* is a controversial source in the Hindu tradition, and the debate of Hindu jurisprudence concerning its authoritative character and its limits is particularly interesting to assess the ascertainment of rules of behaviour in Hindu law. As concerns *sadācāras*, analysing their relationship with written sources in Medhātithi's view, we will try to point out the ways of transmission of the knowledge of *dharma*, which in our view are crucial to understand the Hindu legal tradition.

*Sadācāras* are characterised by three basic elements, i.e. an action, the aim to an invisible result, and the subjective qualification of the actor as a person learned in the Veda. In other words, *sadācāras* in this view are originally the dharmic practices followed by virtuous men, who adhere to the Vedic culture.

*Sadācāras* are behaviours followed in practice, and thus the factual element is a presupposition.[1] In the conceptions we are analysing, *dharma* is conceived as eternal, and in this sense, *sadācāras*, as facts, root *dharma* into history. The aim of an invisible result is crucial for the very same definition of *dharma*, as shown by the views of Medhātithi and other authors we considered above. Considering that *sadācāras* are sources of knowledge of *dharma*, the actions they indicate as dharmic necessarily share the nature of *dharma*. Therefore, this second element is coherent with broader conceptions on *dharma* elaborated in this system of thought and should not be underestimated as *merely* theological.

According to some authors (Lingat 1998; Halbfass 1990b) this element should be also seen as the crucial marker to distinguish dharmic practices as *dharmamūla* from mere customs, meant as what is merely made by the generality of people. In this regard, the problem is to differentiate *sadācāras* from customs that are other than dharmic by reason of the persons following them, as in the case of Buddhists or *nāstikas*, and by reason of visible results, because not everything is dharmic for Brahmins as well.[2]

In our view, to fix two broad categories of customs, conceiving them as opposite would be incorrect. In fact, this view would lead to misunderstand what was likely a highly dynamic process of interactions, in which different practices were integrated or, on the contrary, set out from a given tradition, on the basis of their being conceived as more or less dharmic. The recognising of a certain behaviour as dharmic creates a relationship with people adopting that behaviour, marking a difference with people that do not follow it.

Secondly, the qualification of some practices as dharmic allows to make scope for new social facts into the dharmic complex, which is by its nature open and changing. In this process, which actually is a

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1   However, a *sadācāra* is a rule and thus, in my view, even if that behaviour is dismissed in course of time, the *sadācāra*, although ineffective, continues to exist.

2   As we saw, *dharma* is a fundamental concept also in Buddhism. The point is that certainly Buddhist *dharma* is non-dharmic for Brahmins. Moreover, even though Hindu *dharma* is inclusive, some behaviours have not a dharmic relevance because they do not produce invisible results. However, there was a complex attempt to connect several bodies of rules to the dharmic system. On this problem see the discussion on the intermediate realms of law in Davis (2005).

process of selection of rules, the crucial factor is the acceptance made by the community. This social acceptance interacts with theoretical legitimation, which may be more or less fictitious but not at all useless. Interaction means in this context a two-way process, for community acceptance leads to an effort of legitimation and theoretical legitimation favours social acceptance. This means that an originally extra-dharmic custom can become dharmic.

In Medhātithi's commentary on Manu II.6 the discussion concerning the authority of *sadācāras* is notably less developed than the discussion concerning the authority of *smṛti*. This may depend on the strict interpretative connection that Medhātithi establishes between the two sources, which makes the part devoted to *sadācāras* under Manu II.6-12, although brief, very relevant as concerns the comparison between the two sources of *dharma*.

Medhātithi defines *sadācāra* as "that which consists in what is actually done, with a view to invisible results, by persons learned in the Veda" (Jha 1999: 175). The term '*ācāra*' means conduct and *sadācāra* adds a further qualification to mean what is done by good men. Moreover, the definition of Medhātithi is based on the connection of *ācāra* to *vedavid*. Therefore there are *two* qualifications here, that is 'goodness' and 'Vedic learning'. These two qualifications are possessed by the *śiṣṭa*, the cultured men. As a result, in Medhātithi's view, *sadācāras* are the practices of *śiṣṭas*, virtuous men who are learned in the Veda *and* act accordingly.[3] In this orthodox view, only the models of behaviour of learned men are *dharmamūlas*, sources of knowledge of *dharma*. In other words, an authoritative practice, a *sadācāra*, is a qualified practice and what is commonly done, as a mere matter of fact, is not a means of knowing *dharma*.[4]

Medhātithi provides some examples of authoritative practices, such as the tying of a bracelet and other auspicious rites that are performed during a marriage. Other examples regard the way to attend to guests and other respectable persons. According to Lingat (1998: 180) these examples, which are used also by later commentators, are

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3    See Jha (1999: 205).
4    The concept of *sadācāra*, as strictly related to the concept of model behaviour, could allow interesting comparisons with model behaviours in other traditions, for instance the exemplary lives of Jesus and saints or of Muhammad and his early companions, which have a prominent normative role.

"of secondary importance". However, *mimāṃsakas* and commentators often make recourse to standard examples to codify rhetorically specific questions. For instance, this is the case of the *holākā*, which is the standard example to deal with the problem of universal and particular authority, and of *agnihotra*, which is the example usually made to point out that the elements of the ritual may be found in different parts of the Veda and in other sources of *dharma*. This rhetorical device does not imply that these authors were not aware of the complexity of authoritative practices or that they restricted *sad-ācāras* to those kinds of practices only.

On the other hand, the above examples may be seen as evidence of the wide scope of the concept of *dharma*, which, as we said, goes beyond the usual distinctions between spheres of human action and embraces the totality of human behaviour. In fact, they point out the dharmic relevance of social models of behaviour, such as the appropriate conduct towards guests, of acts having a deep religious significance, such as worshipping, and also of other acts playing a role within the context of a marriage. From a Western modern perspective, the first case would be a typical instance of social norms and then one would be tempted to classify these rules under the headings of social, religious and legal norms, while actually all those acts are primarily conceived as dharmic acts and in this context there is no need for this kind of classification.

It is worth noting that some of these examples make reference to the behaviour of women, which should lead to understand the *śiṣṭa* qualification in a more comprehensive way. In fact, in our view, Vedic learning should be not meant as an elite learning, as the term would lead to suppose. On the contrary, the requisite of Vedic learning seems to mean simply that only the practices of the persons who are part of a certain tradition, which has theoretically its basis in Vedic culture, are authoritative, while it would be a too strict interpretation to hold that this requisite makes reference to intellectually highly cultivated persons, a sort of theologians, or to saintly men, as seems to be the main indication we receive from these texts.[5]

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5    A second, more difficult, view could be that the authoritative practices of women and others are qualified as authoritative by learned men. Arguably, different views existed within Hindu tradition.

The above marriage-related practices are explicitly characterised as "varying in different countries", and in general the focus of Medhātithi's discussion is on the variability of dharmic practices, which involves their inherently endless character.[6] In fact, Medhātithi points out that the appropriate model of behaviour may change according to circumstances, personal attitudes and even states of the mind.[7] Considering the diversity of circumstances and contexts that may be relevant for human action, dharmic action may assume endless forms. As a result, it would be impossible to decide in a general way which behaviour should be considered as appropriate and, then, to lay down general rules of behaviour suitable in every context.

Particularly, variability and endlessness entail that appropriate behaviours cannot be fixed once and for all and collected in a compilation. Thus, variety and endlessness may be seen as the distinctive characters of *sadācāras* and the real ground of difference with *smṛti* texts. According to Medhātithi, the *smṛti* prescribes acts that have a fixed form and, therefore, may be laid down in a text, while other dharmic rules should be searched for in *ācāras*.[8]

As concerns the relationship of *sadācāras* and written texts, Medhātithi states that:

> When, in regard to any action, there are no Vedic or Smṛti statements, but cultured man are found to regard it as 'Dharma' and do it, — then that act also should be accepted as 'enjoined by the Veda,' just like the act prescribed in the *Smṛti*. (Jha 1999: 205)

First of all, from a structural point of view, a particular behaviour may be elevated to a model only if persons who follow that behaviour *consider* it dharmic. In other words, a mere behaviour is not sufficient to

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6   See Jha (1999: 205-206).

7   A very simple but meaningful example is made with reference to the way one should take care of hosts. As a matter of fact, someone can have the tendency to be continuously at the disposal of his host, but this behaviour could be very pleasing for one host and annoying for another one, so that the way to behave should be determined on the basis of peculiarities and personal dispositions of hosts. This example also points to the fact that *dharma* is better understood as appropriateness than as justice. See Jha (1999: 206).

8   See Medhātithi on Manu II.6 (Jha 1999: 206).

produce a rule.[9] Therefore a distinction is made between acts that are commonly accomplished but have no normative relevance and acts that, on the contrary, are meaningful as concerns the normative dimension of the selection of dutiful behaviours. The reference to a subjective element leads naturally to think in this regard of the concept of *opinio iuris,* showing surprisingly, at least at first glance, that human legal rationality tends to follow similar paths in different cultural contexts.

Secondly, we may see here a clear statement of a seemingly formal conception of the relationship between the sources of *dharma*, for the inferior source basically intervenes when there is a need to integrate the gaps of a superior source. But, this passage should be read along with the view that the *smṛti* texts actually are not conceived in a legalistic fashion as the depositories of the totality of dharmic rules. The *smṛti* works as belonging to a definite literary genre are explicitly conceived as *limited* texts.

The limits of *smṛti* texts lead to an understanding of the relationship with *sadācāras* that challenges current views based on a neat distinction between the two *dharmamūlas*. A detailed examination of the relationship between *sadācāra* and *smṛti* may be found in Medhātithi's commentary on Manu II.10, which we already mentioned dealing with the problem of criticism. This verse states that Veda is "*śruti*", revelation, and *dharmaśāstra* means "*smṛti*": "The Veda should be known as the 'revealed word' and the Dharmashāstra 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).

In Medhātithi's view, this verse has an interpretative character and deals with the relationship between *smṛti* and *sadācāra*. This part of Medhātithi's commentary presents many resemblances, as concerns the kind of arguments, with the beginning of the commentary to verse II.6 we analysed in chapter two above. In fact, it starts with an objection concerning the usefulness of the verse, which, providing a definition of terms, could seem more appropriate in a treatise on the meaning of words than in a treatise on *dharma*.[10] The answer to this

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9     On the relationship between custom and normative custom see Davis (2004a).

10    The logic of this interpretation seems to be inspired by the need to attribute a systematic meaning to a verse that would be otherwise irrelevant or incoherent with the nature of the *dharmaśāstra* text.

objection clarifies the relationship between *smṛti* and *sadācāra* in this view.

According to Medhātithi (Jha 1999: 211), who overrides the literal meaning of the text, the aim of this verse is to establish that *sadācāras* must be considered as *smṛti*. Considering that *sadācāras*, being not codified (*nibandha*), normally are not considered neither *śruti*, revealed texts, nor *smṛti*, recollection, the aim of this verse would be to clarify that "*smṛti*" in the work of Manu refers to *sadācāras* also, differently from the common use of the term. The consequence of including practices in a wider meaning of the term "*smṛti*" is that everything that is said with reference to *smṛti* in general must be applied to *sadācāras* also.

The argument that allows the elaboration of a broad concept of *smṛti* including both *smṛti* in a strict sense, as properly written "codified" texts, and *sadācāras*, as non-codified practices, is based on their functional identity, which is stated through the interpretation of verse II.10. This verse, stating that for *dharmaśāstra* must be meant "*smṛti*", would aim, according to Medhātithi, to define *smṛti* as the place where the teaching of *dharma* is found. In fact, in this case *dharmaśāstra* would not be meant as a specific kind of works but generally the teaching of *dharma*. The following step is the statement that the teaching of *dharma* is also a function of *sadācāra*.[11]

As a result, an equalisation is made and through interpretation it is stated that everything that is said with regard to *smṛti* is said with regard both to *smṛti* in a strict sense and *sadācāras*. The codification in written texts, which make the two sources different, is seen as an immaterial quality:[12]

> '*Dharmashāstra*,' '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

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11 See Medhātithi on Manu II.10 (Jha 1999: 211). See Brick (2006), who argues for a close ancient connection between *smṛti* and *ācāra*.

12 However, in Hindu law scholarship it is common to refer the term *dharmaśāstra* to written texts.

> Practices of Cultured Men should also be taken as included under the name. (Jha 1999: 211-212)

This view, which is indeed an original one, raises a sound objection. If one accepts that *smṛti* is the teaching of *dharma*, then one should conclude that Veda also is *smṛti*. Medhātithi, answering to this objection, clarifies the difference with Veda and, at the same time, the necessity of the existence of a Vedic basis to consider *sadācāras* as authoritative. The difference is that, while in the Vedas the teaching of *dharma* is directly apprehended, the *smṛti* consists of remembered teachings. Therefore, in this view a substantial identity of Veda, *smṛti* and *sadācāras* is outlined, because the aim of all these three sources is the teaching of *dharma* and their difference is based on some structural character. Their relationship is clearly explained in the following passage:

> Where the words conveying the "Teaching of Dharma" are directly perceived (heard), it is the 'Revealed Word'; while where the words of Teaching are only *recollected*, it is '*Smṛti*'; and since this latter condition is also fulfilled by the 'Practices of Cultured Men', this latter also comes under '*Smṛti*'; as a matter of fact, no authority can attach to any Practice, in corroboration whereof a Vedic text is not 'recollected'. (Jha 1999: 212)

Practices of virtuous men strictly speaking are, as well as *smṛti*, recollection and transmission of the Veda, which is in this view the only self-sufficient source of knowledge of *dharma*. A *sadācāra* is authoritative as far as it can be connected to the Veda. The strict connection between authoritative *sadācāras* and Veda is pointed out from the statement that a practice is *as prescribed* in the Veda. Therefore, proper written *smṛti* and *sadācāras* have the same ground of authority, as emerges from the following Medhātithi's passage:

> As regards *Practice* ... its authoritative character is exactly like that of *Recollection* (Smṛti); because that also has its basis in the Veda. On the other hand, wrong Practice is generally based upon visible causes (of greed, &c.), and unlearned persons are apt to commit mistakes; hence it can not have any authority at all. (Jha 1999: 175)

Which kind of relationship thus exists between Veda and *sadācāras*? Should the existence of a Vedic text supporting every single *sadācāra* be assumed, or the connection may be of a different kind? The endlessness of *sadācāras* has relevant consequences as concerns the problem of Vedic foundation. In fact, considering the endless forms and variability of practices, it is difficult to assume a Vedic text supporting every practice, even making recourse to the lost Veda argument, because to infer a Vedic text corroborating practices collectively or individually is indeed troublesome. The endless forms of *sadācāra* should involve the endless forms of Veda.

Medhātithi favours a subjective criterion, which is partly detached from Vedic texts, which nonetheless are preserved as the basis of *sadācāras* in other views we will see, that are basically preliminary views, but nonetheless provide useful indications on some conception that could be actually diffused. Medhātithi holds that practices of good men are authoritative because these persons are learned in the Vedas and are used to act in a dharmic way. The point is that to establish the authority of *sadācāras* there is no way but to *presume* a Vedic foundation as for *smṛti*. The acceptance of a given behaviour among qualified people *equates* the injunction of that behaviour in a Vedic text, in the same way in which the content of a *smṛti* passage is held to be founded on a Vedic Injunction.[13] In this case also, the problem remains whether a text actually existed.

In *Tantravārttika* I.3.4 (Jha: 182-203) there is a very detailed discussion on the authority of *sadācāras*, carried out in a quite complex way through a series of *pūrvapakṣas* and *siddhāntas*. The fourth *adhikaraṇa* (*sūtras* 5-7) deals properly with the superior authority of the declaration of substance we will explain dealing with conflicts. However, Kumārila provides a different interpretation, starting the discussion concerning the authoritative character of practices of good men.[14]

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13   See Medhātithi on Manu II.6 (Jha 1999: 205)
14   Kumārila provides three interpretations, the first one based on *sūtra* 7, held to be an *adhikaraṇa* by itself, the second one based on a joint interpretation of *sūtras* 6 and 7, and the third one, joining all the three *sūtras*. The first interpretation mainly deals with the characters of authoritative practices, while the second interpretation, which is more closely connected to the problems dealt with by Medhātithi, mainly addresses the problem of Vedic foundation. The largest part of this discussion is developed under *sūtra* 7, which embodies also the *siddhānta*

The consideration of the authoritative characters of *sadācāra* raises several doubts. In fact, the practices followed in the *āryāvarta* should be considered authoritative as regards the knowledge of *dharma*, because those who follow them are the same persons who accept the authority of Veda. But, on the other hand, *sadācāras* are not "duly coded and compiled" (Jha 1998: 200) and then one cannot be sure that those practice are authoritative. As in the case of *smṛtis*, *sadācāras* should be held as authoritative by reason of the fact that they are performed by the same agents who accept the authoritative character of the Veda. As we saw in Medhātithi's view, the codification of *smṛti* involves also a certain stability of acts. On the contrary, the endlessness and variability of *sadācāras* raise further doubts on the dharmic characters of at least some of those practices. In fact, normative practices are by their very same nature spontaneous and localised, and then basically beyond control. This would require a due consideration of the authority of a specific practice, while the dharmic rules embodied in texts are normally the object of an in-depth investigation of their dharmic character. This also entails that *sadācāra* rules will be put in written form when their authoritative character is widely accepted.

As in the case of *smṛti*, the view according to which the ground of authority of *sadācāras* may be only the Vedic foundation, which is a principle established through reasoning, leaves open the problem of which specific practices, if any, are actually founded on the Veda. *Sadācāras* may be considered authoritative provided that they have non-visible aims and therefore may indicate *dharma*. However, further doubts arise from the fact that, even if it is true that a wise man normally will act in accordance with Veda, it is also possible that good men follow a model of behaviour that is contrary to *dharma* and "as such their practice fails to command our full confidence" (Jha 1998: 182). In this case, the problem is how to distinguish between a behaviour that is a violation of *dharma* and a behaviour that is in accordance with *dharma*, and as such may be considered a reliable source of knowledge of *dharma*. We will now analyse the problems we mentioned, that is, the characters of Vedic foundation and the way to distinguish authoritative practices from non-authoritative practices,

concerning the second interpretation. We will deal with these arguments in a unitary way.

on the basis of Kumārila's view. From this discussion clearly emerges the dialectics concerning the limits of this source, which is crucial in the development of Hindu law.

## Establishing the authority of *sadācāras*

The arguments against the authority of *sadācāras* focus primarily on the lack of a Vedic foundation. As a matter of fact, in the Veda, and also in *smṛti* texts, there is no basis for many existing practices. Actually their authority is supported by lists of sources of *dharma* included in *smṛtis* and in this sense it seems that the "authority of the practices is implied in that of the *Smṛtis*" (Jha 1998: 200). In fact, if the *smṛtis* lay down that *sadācāras* are authoritative, and the *smṛtis* are authoritative, then it should follow that *sadācāras* are authoritative sources of knowledge of *dharma*. But this view is not accepted, for *smṛtis* are authoritative only to the extent to which a Vedic foundation may be recognised and, as a result, the authority of *sadācāras* should ultimately depend on the Veda. In addition, the *smṛti* verses including *sadācāras* among the sources of *dharma* are held to be unreliable because they support also the authority of *ātmanastuṣṭi*, which is considered by the *pūrvapakṣin* plainly devoid of any authority as concerns knowledge of *dharma*. We will deal with this argument and the related *siddhānta* in the part devoted to the authority of *ātmanastuṣṭi*.

     This discussion, which reminds us of the beginning of Medhātithi's commentary on Manu II.6, concerns the possibility of an acknowledgement of the authoritative character of *sadācāras* thanks to an authoritative text laying down that authoritativeness. This is very interesting from a legal theory point of view. In fact, there is a resemblance with the Kelsenian theory of *Stufenbau*, for the authority of the inferior source depends on the superior source. This is a debated view in Hindu jurisprudence and, as we saw, the established opinion is that the authority of the sources of *dharma* is ascertained through reasoning. Nonetheless, discussions on this point in the texts we are considering seem to point out a sort of necessity-universality of some problems and ways to approach the question of authority.

In this view, the authority of *sadācāras* cannot but depend on the Veda. As a matter of fact, there are no Vedic texts similar to *smṛti* texts such as Manu II.6 that corroborate the authority of *sadācāra* stating explicitly that they are authoritative. Furthermore, according to the *pūrvapakṣin*, it is also impossible to *infer* such texts.[15] The existence of a Vedic text stating the authority of *sadācāras* would entail that they come earlier than the Veda and this would conflict with the paramount authority of the Veda and its eternity, which is an established truth in this view. Furthermore, if practices pre-exist the Vedic text, it could not be said that they are based on the Vedic text and therefore they would remain anyway devoid of foundation. Similarly, if *sadācāras* precede the *smṛti* texts stating their authority, one could hardly say that they find their basis in *smṛti* texts, because there would be an inversion in the relationship between the supporter and the supported. In other words, *smṛti* would be based on pre-existing *sadācāras*, and this cannot be accepted in this view.[16]

This criticism concerns the possibility to ground the authority of *sadācāras* collectively on a single Vedic or *smṛti* text, but also the possibility of a Vedic or *smṛti* foundation for *sadācāras* singularly considered is excluded in the view held by the *pūrvapakṣa*. In fact, to argue for the authoritativeness of *sadācāras* one should infer a *smṛti* text at support and, then, also a Vedic text supporting that *smṛti* text. On the contrary, according to the *pūrvapakṣa*, "on the sole authority of the prevalence of certain practices, we cannot infer the existence of corroborative *Smṛti* [and Vedic] texts" (Jha 1998: 200-201). In fact, some practices could be followed for worldly reasons such as greed.

According to the *pūrvapakṣa*, a *sadācāra* should be based on a *smṛti* text, which in turn should be based on a Vedic text. In this regard, it is objected that the authors of *smṛtis* "must have seen these practices exactly as we see them" (Jha 1998: 201) and, therefore, if they had been aware of Vedic texts supporting those practices, they would have included those acts in their *smṛtis*. This argument could be

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15  See Jha (1998: 201 ff.).

16  Interestingly, according to an important view, held for instance by Lariviere (2004), *smṛti* is based on pre-existing *sadācāras* and can be seen as a meta-discourse on practices. This shows how different the perspective of interpreters can be from the perspective of scholars of Hindu law, who are not concerned with the largely ideological problem of the legitimation of sources and particularly do not have to cope with the bounds of Vedic foundation.

compared with the discussion of Medhātithi on the impossibility to collect usages, which, as we saw, in his view is the main difference between *dharmaśāstras* and *sadācāras*. On the other hand, if the authors of *smṛti* stated the authority of practices because they recognised the authoritativeness of good men of their period, this would not be sufficient to demonstrate that those practices had actually a Vedic foundation. Therefore, and this is the *pūrvapakṣa*'s conclusion, *sadācāras*, having not any grounding in the Veda, cannot be accepted as authoritative as regards dharmic matters.

The established view, which supports the authority of *sadācāras*, is similar to the view we saw dealing with the authority of *smṛtis*, and is based on two basic reasons. The first one is that the persons who follow those practices are the same persons who perform Vedic sacrifices. The second one is that those practices do not conflict with Veda or *smṛti* (Jha 1998: 201). As a reply to the arguments held in the *pūrvapakṣa* against the authority of *sadācāras*, the *siddhānta* holds that when certain actions are performed by virtuous men and cannot be attributed to worldly motives, such as greed or others, then those behaviours should be accepted as *dharma*. Therefore, it is made clear that not all actions usually performed are considered *dharma* by virtuous men themselves and only those actions which they consider *dharma* and *perform as such* may be accepted as *dharma*, for they are the same persons who accomplish the sacrifices prescribed in the Veda.

The declarations of the authors of *smṛti* who state the authority of *sadācāras* are seen as additional evidence. They are significant because the authors of *smṛti* would not have supported practices if they did not know that they were based on the Veda (Jha 1998: 201). Furthermore, in this view, it is possible that the *smṛti* texts stating the authority of *sadācāras* are based on the Veda. The *pūrvapakṣa* denies the possibility of the existence of a Vedic text conferring authority to *sadācāras* collectively but the *siddhānta* maintains that the fact that the Vedic basis is not found does not mean that it could not be inferred, as in the case of *smṛti*.

In fact, considering that extensive declarations of *smṛti* are actually founded on very brief references in the Veda, the difficulty to find corroborative texts for short assertions such as the one declaring the Vedic basis for practices is not surprising. According to the

*siddhānta*, scriptures do not allow only what is described in them in a detailed form, but also what is dealt with to a limited extent. The external forms of *sadācāras*, that is, actions, may be known through sense perception, but the fact that they are conducive to invisible results can be known only through the Veda.[17]

The *pūrvapakṣin* holds several others arguments to point out that the practices of good men cannot be considered as an authoritative and reliable source of knowledge of *dharma*. First of all, the very same concept of *sadācāra*, as behaviour of good men, is considered ambiguous because it establishes an interdependence between goodness and *dharma* leading to a logical fault, for good men are those who observe *dharma*, and *dharma* is what is made by good men. The problem here is how to define virtuous men and correct conduct if they are correlative. In other words, "there being an interdependence, none of the two can be definitely ascertained" (Jha 1998: 183).

According to the *siddhāntin*, there is no logical flaw because those persons who are said to be virtuous are virtuous not because they act in a good way but simply because they act according to the injunctions of the Veda. What actually happens is that once a person is recognised as a virtuous person, his actions are held as *dharma*, notwithstanding the lack of a Vedic text on that point. In addition, good men do not need to provide a Vedic authority for their action in everything they do. From immemorial time, the practices of virtuous men have always been found to conform to the Veda. Therefore, "people coming to recognise the authoritative character of such practices (and not always taking the trouble, to seek the further authority of the scriptures), take up these practices as the basis" (Jha 1998: 186). Confidence in the Vedic foundation of *sadācāras* justifies the ascertaining of *dharma* making recourse to them without investigating their actual Vedic foundation.[18] In the texts we are analysing we certainly find a theoretical legitimation but, on the other hand, this

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17   See Jha (1998: 185-186).

18   In this regard, the *siddhāntin* also remarks that at the beginning *sadācāras* are seen as occasional but in course of time they are held as necessary for the knowledge of *dharma*. This could mean that a given practice could be followed at the beginning in a spontaneous way and then receive that legitimation and awareness deriving from the connection to the Veda.

process seems quite natural in a homogeneous cultural environment that recognises itself as belonging to the Vedic tradition.[19]

A further critique of the *pūrvapakṣa* concerns the fact that many actions that are seen as *sadācāras* are actually performed for worldly motives. Having their origin in some visible cause, such as greed, and being inspired by worldly reasons and not the acquisition of spiritual merit, they cannot be included within the scope of *dharma*. For certain, as a result, people cannot trust in these practices and cannot consider them as authoritative sources of knowledge of *dharma*.[20] On the contrary, the *siddhānta* states that the fact that *some* behaviours seem to be based on perceptible motives does not involve necessarily that they are not *dharma*. In fact, even in the Veda actions can be found based on perceptible motives, and this depends on the fact that in every human action there is necessarily a component that may be related to a perceptible motive, while what is crucial is that there is an aim, although non-exclusive, to achieve invisible results.[21]

Therefore this argument cannot be a real argument to hold that the practices of good men have no basis in the Veda. Nonetheless, the scope of *sadācāras* can be *delimited* on the basis of worldly aims. For certain, there are some actions that are performed by good men, but are commonly performed also by the *mlecchas*, such as agriculture, commerce, singing, etc. Even if nobody thinks of such actions as *dharma*, they cannot be used as an argument against the authoritative character of *sadācāras*. In fact, according to the *siddhānta*:

> ... the nature of these cannot rightly lead us to reject the authority of all practices of good men (that have any visible causes); nor can the fact of some such actions being accepted as *Dharma* establish the Dharmic character of all of them. (Jha 1998: 187)

In other words, it is necessary to distinguish between different kinds of actions performed by good men. It would be incorrect to assume that all their actions are dharmic and, therefore, the non-authoritative

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19  On the relationship between customs and social awareness see Sacco *et al.* (1999). In our view, it is useful to distinguish original Vedic environments and other environments subject to brahmanisation.
20  See Jha (1998: 183).
21  See Jha (1998: 187).

character of some actions cannot be an argument against the authority of all *sadācāras*.[22] The established view is then the following:

> Among ordinary people, certain practices are distinctly specified as *good*, while there are other actions, which are common to all living being (such as those of *eating* and the like, which help to keep the body), and which, as such, are performed by the good men also. But among all practices, those alone that are current among the good people only are called *Dharma*, and not all the Actions that are common to all living beings (and as such among the good also). (Jha 1998: 187)

A further argument against the authority of *sadācāras* is that the practices of persons belonging to different countries are different and mutually contradictory and, then, one could not ascertain which is the correct way to behave.[23] Moreover, one could not rely on *sadācāras* because they are often plain transgressions of *dharma* and excessive behaviours, as shown by several examples of gross violations accomplished by virtuous men in ancient and present times. For instance, Prajāpati had an incestuous love with the daughter Uṣā, Indra committed adultery, Arjuna had a life full of excesses. The same objection could be repeated for the good men of modern times (that is, VII A.D.). In fact, among persons of modern times – it is stated – it is possible to find blamable practices of any kind, in the South and in the North, and "endless minute transgressions of the *Dharma* appertaining to each man's family or caste" (Jha 1998: 183).[24] This should suggest that a certain practice could not be accepted as authoritative for the knowledge of *dharma* merely because good men adopt it.[25] In other words, some practices of good men can be violations of *dharma* rather than sources of knowledge of *dharma*.

In the *siddhānta* this argument is contested, presenting some ways to get rid of the problem that aim to reinterpret the mentioned cases or

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22  Interestingly, the *siddhāntin* remarks that some *mleccha* practices also are accepted as *dharma* because they are common to good men.

23  Conflicts shake the authority of *dharmamūlas*. We will deal with the problem of conflicts between *sadācāras* in the parts specifically devoted to conflicts and to the problem of universal authority of sources.

24  The examples are particularly relevant because they lead to think that *sādhus* are not only Brahmins. See also Piantelli (2000) on this point. In any event, it seems possible to argue that these violations were very diffused.

25  See Jha (1998: 189).

anyway to put under discussion the consequences that the *pūrvapakṣa* would like to draw. In *siddhānta*'s view, the texts including those examples may be interpreted and explained in such a way as to get them free of those elements producing blame and aversion. In fact, all the examples provided are taken into consideration giving them a new interpretation aiming to show that they are not real but seeming violations of *dharma*. As a result, when it is found that good men act according to *dharma*, the arguments questioning the righteousness of *sadācāra* have not any more a reasonable ground.[26]

The examples provided in this discussion are very interesting. To understand their nature, we have to remark that in traditional societies literary texts also could be normative texts, being an expression of a cumulative culture. This depends to a large extent on the fact that the conceptions of normativity are strictly connected to worldviews and to descriptions and mythical representations of human actions. Further, *itihāsa* and *purāṇas* are part of *smṛti* and share the nature of teaching and transmission of knowledge. In this sense, the *Mahābhārata*, for instance, may be read as a huge illustration of *dharma*. Therefore, it is not surprising that in a quite technical text, such as the *Tantravārttika*, quotations from these works, and even from dramas, may be found.[27]

Firstly, according to the *siddhānta*, the Vedic and purāṇic passages that are presented to set out the authority of the practices of good men could actually be simply accidental coincidences of words and expressions, having not the meaning which they seem to have. Secondly, the prohibition of those actions could concern only human beings and not super-human beings as those mentioned in examples. Therefore, those seemingly adharmic actions could be justified on the basis of the fact that persons who perform them are not affected by limitations and weaknesses affecting ordinary human beings.[28]

Considering the explanation provided to make sense of the incestuous love of Prajāpati, according to *siddhānta*'s interpretation, the word Prajāpati, which refers to the protector of all creatures, may be understood as a name of the sun. Adopting this perspective, it

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26  See Jha (1998: 192).
27  Ancient literatures were a crucial part of social life, playing a role in self-understanding and cultural transmission. Narratives such as the *Odyssey* or the *Mahābhārata* embody ethical views and models of behaviour.
28  See Jha (1998: 189 ff.) for a full discussion of the topic and examples.

appears that it is nothing but an ordinary fact that the sun brings about the dawn, Uṣā. In this sense, Uṣā is called the daughter of Prajāpati and the fact that the sun lets its rays fall on dawn has been viewed, in a figurative way, as intercourse between a man and a woman.

Another case that is reinterpreted in an interesting way is that of Nahuṣa, who tried to seduce Śacī, the wife of Indra. In *siddhānta*'s interpretation, the very same fact that Nahuṣa was born again as a snake and, thus, was punished shows that his act was sinful. The same could be said for Vasiṣṭha, who contemplated suicide, and Viśvāmitra, who helped a *caṇḍāla*. Such cases, according to the *siddhānta* point out simply that good men also can perform acts that are contrary to *dharma*, but only those actions that they themselves consider *dharma* are *sadācāras* and, thus, sources of knowledge of appropriate be-haviour. Secondly, some of the men quoted in examples can perform adharmic acts because they have also the capacity to undertake heavy expiatory rites, purifying themselves, while ordinary people should take care not to follow their model, because those acts would be much more dangerous for them.[29]

A very interesting example of purported transgression of *dharma* is that concerning Kṛṣṇa and Arjuna, who drank alcohol. The *siddhānta* provides an interpretative solution that allows to consider their behaviour in keeping with *dharma*. In fact, it is argued that only *surā* is prohibited to all the three upper classes while other alcoholic drinks, such as *madhu* and *sidhu*, are not prohibited for *kṣatriyas* and *vaiśyas* but only for Brahmins. Then, the conclusion is that Kṛṣṇa and Arjuna, being not Brahmins, did not commit any transgression be-cause they drank *madhu*. Incidentally, this passage points out the inner differentiation of duties that is typical of dharmic conceptions and is based on the principle of appropriateness, rather than of inequality, as it seems.

The practices of good men are means of knowing *dharma* and, then, they can be seen as both behaviours and rules. In this sense, a behaviour that is not in keeping with a Vedic or *smṛti* rule may be seen as a case of violation of that rule or as the expression of a different conflicting rule. In fact, as we will see dealing with conflicts,

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29   The connection between the weakness of ordinary people and dharmic behaviour seems to highlight the protecting function of *dharma*. In other words, who acts according to his own *dharma* is protected, while adharmic behaviours lead to fall.

conflicting rules may be held as equally dharmic. In all the considered examples of purported transgression of *dharma* by good men the problem is actually to determine if a given behaviour is a violation of *dharma* or, on the contrary, a dharmic behaviour and, as such, a source of knowledge of *dharma*. In other words, the problem is whether those practices of good men could be assumed as *models* for action, there being the risk that they are actually gross transgressions of *dharma*. Therefore, the *pūrvapakṣa* provides those examples to shake the reliability of *sadācāras* and, on the contrary, the *siddhānta* has to argue that those behaviours are not genuine *sadācāras*.

This question underlies also the discussion on transgressions accomplished by good men in modern times. As instances of transgression of the *dharmas* that are established in the *smṛtis*, the *pūrvapakṣa* mentions the case of the Brahmin women who are used to drink wine in the countries of Mathurā and Ahicchatra, and the case of marriage with maternal cousins, a common practice among southern people.[30] A first opinion is that these practices should not be deemed as transgressions of *dharma* laid down in *smṛtis*, and thus as sinful practices, but rather as equally authoritative alternatives. In fact, being equally based on the Veda, *smṛti* and *sadācāra* are independent and equally authoritative. However, this very influential view, as we will analyse in the next chapter, is rejected in this context, in keeping with the established view that the superior source should prevail on the inferior one. In other words, on the basis of their comparative strength, *smṛti* is more authoritative than *sadācāras*.[31]

A different way to state that those practices are dharmic is connected to the problem of the universal or particular authority of sources of *dharma*. In fact, certain actions might be prohibited in a part of the country, while allowed in another part. In this view a given practice would be sinful or dutiful depending on the place and, particularly, on the tradition followed by forefathers. As a result, the purported violations of *dharma* envisaged in some practices, such as those followed in the South, would be actually different specific

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30  The discussion on transgression of *dharma* in modern times is very significant for the understanding of the relationship between texts and practices and provides realistic examples that are a valuable source of information.

31  See Jha (1998: 194).

*dharmas.*[32] However, the *siddhāntin* rejects this explanation as misleading because all practices, although conflicting between them, have to be in keeping with Scripture (*āmnāya*) to be considered as authoritative. But what has to be meant by "scripture"? In a view, the term "scripture" could be interpreted as referring to the *śruti* only, but according to the *siddhāntin* it applies to *smṛti* works also. Therefore, in this view, the practices that are contrary to the laws established in the works of Manu and other authors cannot be grounded on the Veda and cannot be accepted as authoritative.[33]

Particularly, as concerns the case of practices of Brahmin women that drink alcohol, the discussion bears on the possibility to extend to women what is prescribed for men, which is a general principle of interpretation established by the Mīmāṃsā. On the basis of that principle, the rule for the drinking of wine is prohibited to Brahmins has to be interpreted as including women also. As a result, the practices of those Brahmin women should be seen as a direct violation of *dharma*, and not as an equally dharmic optional alternative.[34]

The established view is that *sadācāras* are authoritative sources of *dharma*, provided that they are grounded on the Veda. Then, the authority of *sadācāras* as a source cannot be set out from the fact that some peculiar practices are not in keeping with the Veda. From a theoretical point of view, the crucial question is the relationship between conflicts and transgressions. In the next chapter we will analyse in more detail the complex relationship between Veda, *smṛti* and *sadācāras* and the problem of their comparative authority in case of conflict, which could be interpreted in a totally different way. However, at this stage, the ambiguous character of practices emerges, for they can be in some cases violations of *dharma* and in other cases authoritative sources, *sadācāras*.

To recognise a behaviour as grounded in the Veda, also through the fiction of the lost Veda, is a powerful instrument to legitimise some practices and disregard some others, which could be nonetheless

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32  The problem of diversity of practices and universality of *dharma* will constitute the core of the *Tantravārttika*'s *holākādhikaraṇa* we will analyse in more detail in the last chapter.

33  See Jha (1998: 195).

34  See the relevant *pūrvapakṣa* and *siddhānta* (Jha 1998: 195-200), where the case of the killing of a Brahmin is also discussed.

accepted and followed as dharmic in some contexts. In other words, different views can exist on the dharmic character of some behaviours and thus on the existence of a *sadācāra*, that is to say, a model that becomes normative for others. This also shows that the theoretical discussion on the authority of sources actually has important consequences as regards accepted standard of behaviours. In other words, to admit that *sadācāras* conflicting with *smṛti* are equally authoritative or that conflicting *sadācāras* in different parts of the country can be held as equally dharmic means to allow a larger scope for pluralism. In this sense, arguably, the very same willingness to accept some practices as dharmic could push interpreters to elaborate their theory of sources as more or less inclusive.[35]

## The authority of *ātmanastuṣṭi*

*Ātmanastuṣṭi* is the self-satisfaction, or inner contentment, deriving from the accomplishment of an act. This self-satisfaction is seen as an indicator of the dharmic character of that act and, thus, can also count as a means of knowing *dharma*. In the orthodox view of Mīmāṃsā and *dharmaśāstra*, the authority of this source of *dharma* requires a connection with the Veda, which in this case is established following a subjective criterion. In fact, only a person learned in the Veda and used to behave according to it may act relying on his internal sense of satisfaction as a source of guidance. On the other hand, like for other sources, this requisite could be meant more or less strictly.

The authority and role of *ātmanastuṣṭi* are quite controversial. Some authors of *dharmaśāstra* do not include *ātmanastuṣṭi* among the sources of *dharma* in an explicit way. Even if this fact does not involve that they regard it as unimportant, an inner conflict could be envisaged considering that different views could exist on the role to be acknowledged to this specific source. In the *Tantravārttika* and in Medhātithi's commentary, the established view supports the relevance of *ātmanastuṣṭi*. We will now consider the arguments held to state its

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35  On these topics see also the discussion in Davis (2004a). For a historical account of the role of custom in Western traditions see Cavanna (1982). On the role of customs and usages in modern legal orders see Sacco *et al.* (1999). On customs in Canon law and other religious laws see Ferrari (2002a).

authority, beginning with the analysis of the *pūrvapakṣa*, according to which *ātmanastuṣṭi* is an unsuitable criterion to ascertain *dharma*. This criticism may be understood considering the typical dialectic between *pūrvapakṣa* and *siddhānta*, which is generally conceived as a way to duly found the established view. However, possibly the *pūrvapakṣa* embodies actual concurrent views and the overall discussion is evidence of which kind of doubts could arise in this regard.

As said above, in the *Tantravārttika* the discussion on the authority of *ātmanastuṣṭi* is carried out dealing with the authority of *sadācāras*. In fact, the *pūrvapakṣa* arguing for the non-authority of *sadācāras* refuses that they can be considered authoritative on the ground of those *smṛti* texts, such as Manu II.6, that explicitly list them among sources. Now, the point is that according to the *pūrvapakṣa* those lists are unreliable *because* they include also *ātmanastuṣṭi*, whose authority is suggested to be absurd. This would depend on the fact that self-satisfaction can have many different causes and, thus, changes according to the persons involved and the contexts. According to the *pūrvapakṣa*, this variability points out that *ātmanastuṣṭi* is a "highly fickle standard" (Jha 1998: 184) and therefore cannot be an indicator of *dharma*.

An example of the unreliability of *ātmanastuṣṭi* is made with regard to the Buddha, who was satisfied performing acts contrary to *dharma*, such as criticism against Vedas and Brahmins. In addition, Brahmins are satisfied accomplishing acts during which animals are slaughtered while the same actions are disapproved by *Bauddhas*. Moreover, some Brahmins are satisfied when they receive food from *śūdras* and some people of the South are satisfied with marrying the daughter of their maternal aunt, while generally those acts are seen as negative acts that cannot satisfy good men.[36] As a conclusion, *ātmanastuṣṭi*, as well as *sadācāras*, cannot be an authoritative source of knowledge of *dharma*. The *pūrvapakṣa* states:[37]

> For these reasons, we conclude that the Veda and the *Smṛtis* are the only
> authorities in matters relating to *Dharma*; and as for the conduct and

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36  See Jha (1998: 183-184).
37  It is worth noting that *sadācāras* are sometimes associated to *ātmanastuṣṭi*, as in this case, and sometime to *smṛti* in a strict sense.

practices and inner satisfaction of men, they are just the same as drinking bouts and jokes (current among ordinary people). (Jha 1998: 203)

The established view, which supports on the contrary the authority of *ātmanastuṣṭi* as a means of knowing *dharma,* is based on the following argument: a person whose conduct is inspired by *dharma* will find inner contentment in a dharmic behaviour and will naturally reject an adharmic behaviour. In this view, the minds of men learned in the Veda "have been fully impressed with the idea that only such Actions as are laid down in the Veda are *Dharma*" (Jha 1988: 187-188) and, considering that their minds are purified by the knowledge of the Veda and its meaning, their intention is always "in accordance with the path of duty laid down in the Veda" (Jha 1988: 188).

Therefore, the authority of learned men is such that their self-satisfaction provides to an act the same authority as if it was directly enjoined in the Veda. To further explain the fact that what comes into contact with a man learned in the Veda receives Vedic authority, a parallel is made with the case of salt mines or gold lands, where everything produced may be nothing but salt or gold. The *siddhānta* quotes also a passage drawn from Śakuntalā: "Whenever any doubtful point presents itself to good men, they are helped by their own minds, which always help them to come to the correct conclusion" (Act I). This passage clearly shows, in my view, that the *siddhānta* considers *ātmanastuṣṭi* as an individual ascertainment of *dharma* carried on in doubtful cases.

Other arguments are provided to support the authority of *ātmanastuṣṭi*.[38] However, the core argument remains that the action that provides to the agent an inner satisfaction is accepted as *dharma* because for good men "it is not possible to have an inner satisfaction,

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38  For instance, a textual argument is provided also in this case stating that the authority of *ātmanastuṣṭi* could be argued on the basis of the mere fact that Manu and other authors assert that it is authoritative (Jha 1998: 188). Furthermore, a reference is made to rewards deriving to each person from the contemplation of sages. Additional examples explaining the authority of practices and self-satisfaction concern cases of a magical or strictly religious kind, such as the power of purification recognised to the 'mere contact of a saintly man. An example concerning the mongoose, for whichever herb the animal touches is a cure for poison, is practically identical to an example provided by Medhātithi in his discussion.

in anything else save the doing of that which is Dharma" (Jha 1998: 188). *Ātmanastuṣṭi*, as well as *sadācāras*, is thus an authoritative means of knowing *dharma*:

> ... the practices and the inner satisfaction of such people as have their minds saturated with *Dharma*, themselves become the means of *Dharma*; and as such they are to be accepted, by people seeking after a knowledge of *Dharma*, as laid down in the Veda itself. (Jha 1998: 189)

In Medhātithi's commentary on Manu the discussion on *ātmanastuṣṭi* is very similar to that in the *Tantravārttika*.[39] First of all, Medhātithi makes clear that *ātmanastuṣṭi*, like other sources, is authoritative to the extent in which it is grounded on the Veda and, in this specific case, the connection is assured by the fact that self-satisfaction can be an indicator of *dharma* if it is experienced by persons who know the Veda and normally act in keeping with it. In other words, the reliability of this source depends on the reliability of qualified subjects. If the qualifications of being good and learned are present, the act that satisfies their mind, or that does not produce their aversion, is *dharma*. The opponent criticises this view because this focus on a subjective state would involve that if a man is satisfied by the accomplishment of a sinful act, strictly speaking that act should be *dharma* and, conversely, an act clearly enjoined in the Veda could not be considered *dharma* if someone has doubts or is not satisfied by accomplishing it.

Answering to these preliminary views, Medhātithi expounds five opinions supporting the authority of *ātmanastuṣṭi* as a means of knowing *dharma*. The first view focuses on the potency of the self-satisfaction of qualified good men, for "under its influence '*Dharma*' may become '*Adharma*' and '*Adharma*' become '*Dharma*'" (Jha 1988: 207). In this regard, the example of the salt mine we found in the *Tantravārttika* is provided to point out that self-satisfaction of learned men *makes* everything pure. This is a radical view according to which what is indicated from *ātmanastuṣṭi* is *dharma*, even if it conflicts with other sources, for instance a prohibition contained in a *smṛti* text. According to a second view, to admit the authority of *ātmanastuṣṭi* would not mean to allow that adharmic acts can be

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39   See Jha (1999: 206 ff.).

considered as dharmic because it is *impossible* to be satisfied performing an adharmic act. In other words, *ātmanastuṣṭi* is unquestionably conducive to the knowledge of *dharma* and, so to say, if the act is adharmic then there is not *ātmanastuṣṭi*, by definition.

A third view is particularly interesting because it acknowledges a more limited scope to this source of *dharma*. As we will see in detail dealing with conflicts, in some cases it is allowed to choose between different and even conflicting courses of actions that are considered as equally dharmic. This is called *vikalpa*. But, how to choose? In this view *ātmanastuṣṭi* helps by indicating in a specific context what course of action is more appropriate, depending also on personal attitudes. In other words, provided that the choice concerns equally dharmic behaviour, it is a matter of personal preference. This is true particularly in those cases where different penances are laid down for the same adharmic behaviour. They can be very diverse and actually their diversity is likely to be puzzling, because seemingly the same effect can be reached through extremely heavy or, on the contrary, extremely light expiations. In these cases, *ātmanastuṣṭi* provides the indication of the right penance, that is to say, what is sufficient or appropriate to expiate a sin.[40]

According to a fourth view, Manu II.6 should be read as setting aside from *dharma* the actions performed by *nāstikas*. This kind of argument has been used by Medhātithi dealing with other sources as well. From this perspective the recollection, practices and self-satisfaction of those who do not accept the Veda are not sources of knowledge of *dharma*, although clearly they are from a different perspective. As we said, *Bauddhas* disapprove acts that are approved by Brahmins, while they approve other acts that are generally seen as adharmic. In other words, they are *dharma/dhamma*, depending on the adopted point of view.[41] To qualify self-satisfaction as an indicator of *dharma* through the requisite of Vedic learning aims to provide a criterion in order to distinguish between different traditions. A fifth view is that *ātmanastuṣṭi*, like *śīla*, is a general character of all acts,

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40  See Lombardi Vallauri (2000) for some interesting remarks on this peculiar aspect of penances.

41  This is a remarkable example to understand the pan-Indian relevance of the concept of *dharma* and at the same time its "empty" character, if assumed as a general term.

including those prescribed in other sources. Therefore, self-satisfaction should be involved while performing every act and, in this sense, it would be a further qualification or a final criterion to establish the dharmic character of an act.

The existence of many different views on the role of *ātmanastuṣṭi* is reflected in the debate developed in Hindu law scholarship. First of all, the very same status of *ātmanastuṣṭi* as a source of *dharma* has been put under question. According to Lingat (1998: 6), this source seems not completely coherent in lists of sources of *dharma*, such as Manu II.6 or II.12, because the other three sources have an authority that is "exterior to man". In this sense, *ātmanastuṣṭi* is peculiar because it is associated to individual conscience and as such seems too variable and unsuitable to provide a firm rule of behaviour. Menski (2000) criticises the opinion of Lingat and, on the contrary, recognises a crucial role to this source. More generally, Menski points out that the understanding of the sources of *dharma* has been often flawed by a positivistic pre-understanding, diffused among Western scholars and also Indian scholars, that focuses on texts and sees as marginal the role of individuals in the process of creation and ascertainment of rules. Particularly, Menski (2006: 217) writes:

> Classical *dharma*, thus, relies on the individual's self-controlled ability to discern appropriate action, almost by intuition. 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'.

Therefore, a first question is how to understand the individual character of this source of *dharma*. In other words, which kind of source *ātmanastuṣṭi* is, and, more generally, are there individual sources of rules? A second question, which is closely connected to the first one, concerns the extent of the role of *ātmanastuṣṭi*.

Davis (2004b) argues that *ātmanastuṣṭi* should be meant as personal preference and, far from being a crucial source of *dharma*, would have a role in those cases where the decision may be *left* to personal opinion or preference. According to him, this choice "has not moral or legal consequences because it typically concerns mundane personal matters" (Davis 2004b: 742). However, even if the term can

also apply to mundane matters, it remains the fact that in this context *ātmanastuṣṭi* is meant as an indicator of *dharma* in a strong sense. A way to accept the dharmic relevance of *ātmanastuṣṭi* and, at the same time, to circumscribe its role can be to limit its relevance to those cases where it is possible to choose between different dharmic actions, for instance, when different penances are established or when different substances may be used in the sacrifice and the choice is left to the personal preference of the sacrificer.

Moreover, considering the "standard" theory of the relationship between sources of *dharma* emerging from texts, *ātmanastuṣṭi* has a role when a dharmic rule cannot be found in superior sources. This means that to ascertain *dharma* one should first look at *śruti*, then at *smṛti* and *sadācāra* and, finally, at *ātmanastuṣṭi*. In addition, in case of conflict between a dharmic rule indicated by a superior source, for instance *smṛti*, and the rule indicated by *ātmanastuṣṭi*, the former should prevail. We will see that this theory is actually much more complex. However, it is worth noting here, dealing with the role of *ātmanastuṣṭi*, that this would mean that this source has a residual role.

On the contrary, Menski (2000; 2006) argues that the formal order of sources of *dharma* is "chronologically" reversed in the actual process of ascertainment of *dharma* because hardly a Hindu will directly search for a rule in Vedic recensions or in *smṛti* texts and rather he will first rely on individual judgement and on accepted practices prevailing in the respective cultural environment. This view is criticised by Davis (2004b), at least as concerns *ātmanastuṣṭi*, because it would suggest that the different rank of sources is equally reversed. In other words, the fact that a Hindu will approach a dharmic question relying at first on his/her individual discretion does not involve that this could indicate the rule of *dharma*. In this sense, personal evaluation cannot provide a reliable test of "legality". [42]

Probably there is no *one* correct view. In fact, this source, by its nature, is challenging and the evaluation of its relevance depends on the willingness to admit an individual and internalised source of *dharma* and the consequences that would follow. In other words, when Lingat says that *ātmanastuṣṭi* is not "exterior to man" it seems to hear the *pūrvapakṣin* who cannot really accept that *dharma* could be

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42   We will deal with the question of the reversed order of sources in more detail in the last chapter.

ascertained through this "fickle criterion". Moreover, the view of Davis is in keeping with many opinions that can be found in Sanskrit texts limiting the extent of the role of this source. But, on the other hand, we saw that there are some opinions according to which *ātmanastuṣṭi* is so powerful that it can make dharmic a behaviour that otherwise would be adharmic.

In my view, following Menski, *ātmanastuṣṭi* is both a real and a crucial source of *dharma*. As concerns its genuine character of source of knowledge of *dharma*, the established view conceives *ātmanastuṣṭi* as an individual ascertainment of *dharma* carried on through an evaluation of the context on the basis of one's own "sensitivity", involving both sensations and reflection. The difficulties involved in this kind of ascertainment are taken into account and, like in the case of *sadācāras*, a basic distinction is required between the violation of a dharmic rule and the ascertainment of a different dharmic rule. In a sense, someone who is not willing to act in a dharmic way will be satisfied accomplishing an adharmic act and could be unwilling to conform to a dharmic rule. This could be the case of a Buddhist, for instance, who follows a different path, or also of a Brahmin who consciously does not comply with a dharmic rule. In fact, obviously, the existence of a rule entails the possibility to violate it.

*Ātmanastuṣṭi* would be a fickle criterion to ascertain *dharma* if somebody could make for himself the norms he prefers and could not comply with some norms concerning, for instance, succession because he does not feel an inner contentment. But *ātmanastuṣṭi* certainly does not amount to a sort of autonomous relativism. In this sense, it is an individual ascertainment of *dharma* but it is not selfish. It remains within the wider conceptual framework of *dharma*. As we saw, a close connection is established between *ātmanastuṣṭi* and *sadācāra*. In both cases the problem is to ascertain the reliability of sources that acknowledge personal and social law-making. Also Lingat (1998: 6) takes into account this point and states:

> [the commentators believe that] the approval of conscience, as a rule of life, is not to be admitted except in the cases of individuals of great virtue. At that rate this source is in danger of being confused with "Good Custom". It is evident, on the other hand, that in speaking of what is agreeable to the conscience, our authors do not intend that whatever suits someone can be considered as a rule of behaviour. Before referring

to conscience it is fitting to look into the question whether it is not possible by analogy or by way of a natural consequence to deduce the required rule from those which have in fact been expressly formulated, or whether it is not possible to resolve the conflict between two rules which are only apparently contradictory. In other words recourse to reason and to logic should not be overlooked.

Two remarks can be made in this regard. First, Lingat, although recognising that the authority of this source does not mean that one can simply do what one likes, is not able to give sufficient scope to *ātmanastuṣṭi* because he makes of this source a sort of subjective conscience *opposed* to reason and logic, that is to say, an undesirable last resort. Secondly, the normative force of *ātmanastuṣṭi* is admittedly connected to *sadācāras* but is then limited to few exceptional individuals.

In this regard the main theoretical problem is whether the behaviour that is indicated as *dharma* by the inner sense of approval of a person is *dharma* only for the concerned person. The fact that a certain behaviour is recognised as *dharma* by an individual does not make *ātmanastuṣṭi* an individual affair. Therefore, arguably, "personal preference" in this case does not mean that the relevance of the matter under consideration is limited to a single person, but rather that personal intuition may reach the truth of *dharma*. In other words, the outcome of this internalised process is an objective dharmic rule having relevance for other persons also. When, on the other hand, *ātmanastuṣṭi* plays a role in deciding between different alternatives or in choosing the appropriate penance, the dharmic rule is certainly contextual and personalised at the utmost but is nonetheless objective. In this sense, the authority of a dharmic rule ascertained through *ātmanastuṣṭi* is "exterior to man" as much as the authority of a rule contained in a Vedic or *smṛti* text. The peculiarity of this source is in its being an internalised source, but a person taking seriously the legal cosmology of *dharma* would not behave as if it was a question depending entirely on him/her. Furthermore, if to have an authority exterior to man means to have a coercive character, this depends on social acceptance also in the case of other sources, for as we saw even the authority of *smṛti* is ultimately based on social acceptance.

The fact that *ātmanastuṣṭi* is a proper source of knowledge of *dharma* is not surprising if we take into account that "conscience",

"intuition" or "inspiration" are widely recognised in other traditions as a way to reach the knowledge of duty. The principal example is probably provided by the Buddhist tradition, where the possibility to reach a direct knowledge of *dharma* is fully acknowledged, and appropriate behaviour is seen as almost a spontaneous result of spiritual advancement.[43] However, as we said, in the case of *ātmanastuṣṭi* a connection with the Veda is necessary, because *dharma* in principle may be known only through the Veda. This foundation leads interpreters to consider as authoritative only the *ātmanastuṣṭi* of persons who normally act in keeping with the Veda because, purportedly, their education and experience give them a particular awareness of *dharma*. Therefore, *ātmanastuṣṭi* may be held as a culture-specific form of *recta ratio* rather than "caprice" and, as such, suggests to reconsider in this broader framework the view that *dharma* is beyond the reach of men.

*Ātmanastuṣṭi* interacts with other sources. A rule that is known through self-satisfaction can remain a personal solution to a very specialised question on dharmic behaviour in a given context or can be diffused and embodied in social practices, becoming then a *sadācāra*. In the latter case it seems that *ātmanastuṣṭi* becomes a social criterion when a sufficient number of persons agree that the rule is dharmic on the basis of their own self-satisfaction and of the positive evaluation of the authoritativeness of the person who ascertained the rule. On the other hand, this process of social testing is required also for other sources, as we saw.[44] In this sense, *ātmanastuṣṭi* may be at the origin of rules that are successively embodied in other sources and, significantly, may be an important instrument for the evolution of dharmic rules in keeping with the evolution of society. In fact, a new "intuition" of dharmic behaviour is possible and

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43   See French (1995). In Confucianism also the idea is present according to which appropriate behaviour is the outcome of an "ethical know-how", which is based on the level of awareness of the agent and on spontaneous adaptation to context rather than on general models of action that are laid down previously as a guide for action (Varela 1992). For interesting remarks concerning Jewish law and particularly the concept of the "inspired judge" see Jackson (2002).

44   Assuming *ātmanastuṣṭi* as a social criterion, it would be interesting to investigate into the connection with *lokavidviṣṭa*, the social disapproval of particular rules that is conducive to their dismissal in practice. In fact, aversion could be meant as the contrary of self-satisfaction.

a new rule can compete with established *smṛti* rules as an equally dharmic alternative because it is equally held as Vedic-founded.[45] Certainly *smṛti* rules are in principle provided with a major reliability but, at the end of the day, social acceptance will decide on appropriate behaviour.

Provided that *ātmanastuṣṭi* is a genuine source of *dharma*, some other remarks can be made on its actual relevance in the process of ascertaining a rule and its relationship with other sources. First of all, even accepting that *ātmanastuṣṭi* has a role when a relevant rule cannot be found in superior sources, it would be nonetheless very relevant. In fact, a *lacuna* exists when the interpreter cannot find the relevant rule and this case is not limited to the complete lack of rules.[46] First of all, when a practical situation is involved, a whole set of rules has to be ascertained and doubts will normally arise as concerns some aspects of the matter. Secondly, textual norms can be conducive to different interpretations and, in this sense, from the same statement different rules can be derived. This means that the interpreter can be in doubt on the appropriate rule also when a rule exists. In addition, a situation of uncertainty, and thus ultimately a case in which the interpreter has to cope with a *lacuna*, may be envisaged also in case of conflicts, because when there are conflicting rules on the same point the practical outcome is the lack of a clear rule. In all these cases, that is to say, practically in any case, *ātmanastuṣṭi* will be involved.

As a result, in my view, *ātmanastuṣṭi* is much more than a last resort because all sources interact in complex ways in the process of ascertainment of *dharma*. Rather, it is the *ultimate* criterion to judge on the appropriateness of a behaviour. In a normative order that largely relies on the concept of appropriateness of action in a given context, including all the elements of the action, *ātmanastuṣṭi* helps to identify *dharma* in a particular and individualised context. This depends also on the fact that a rule expressed in a *smṛti* text or in a *sadācāra* could

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45   In this regard, recalling the connection between macrocosm and microcosm that is peculiar to this tradition, possibly a mystic conception of *ātmanastuṣṭi* could be possible, for *ātman* could be read as the Self in a philosophical sense and as the empty origin of a new revelation.

46   See Lombardi Vallauri (1981) for an in-depth theoretical discussion on *lacunae*.

be in need of further contextualisation and could be actually disapproved in a specific context.

Secondly, as concerns the question of "chronological" ascertainment, we already mentioned that a fundamental distinction should be drawn between the cognitive authority of sources and their relevance, that is, their authority in practice. So, clearly the Veda is the source of higher rank as well as the less directly relevant source. In case of conflict the superior source should prevail but the fact is that also non-Veda sources are "forms of the Veda" and this justifies in social practice their reliability. In other words, their acceptance as Vedic make them Vedic and no further inquiry is required, as we saw dealing with the authority of *smṛti* and *sadācāra*. Coherently, *ātmanastuṣṭi* is seen as less reliable than other sources but, once its Vedic foundation is accepted, it is presumed to be a reliable indicator of *dharma*. The practical result is that, even if in principle this presumption should be discarded in case of conflict with a superior source, in most cases the investigation into *dharma* will stop when an acceptable solution is found.

The above concerns mainly learned interpreters and particularly *dharmaśāstrins*. A further problem is whether the normative force of *ātmanastuṣṭi* is limited to few individuals belonging to an elite. Menski (2000: 155) remarks that, while in Islamic jurisprudence only jurists can claim to be entitled to the ascertainment of duty, in the Hindu tradition everyone is entitled to the search for appropriateness. This is a general question affecting the overall theory of sources of *dharma* and we will deal with it in more detail in the last chapter. What can be stated here is that *ātmanastuṣṭi* is a relevant source of knowledge of *dharma* for every Hindu. If a person is recognised as "good" and as normally acting in a dharmic way, his or her individual ascertainment could be recognised as authoritative in certain contexts. To which extent depends ultimately on the dynamics between pluralism and the need to preserve the coherence of different manifestations of tradition.

Chapter 6

# Conflicts between sources of *dharma*

## Introduction: Normative coherence and legal reasoning

In this chapter we will deal with the way in which normative conflicts
have been perceived and discussed in Hindu jurisprudence. Conflicts
may arise in every normative system and lead to the attempt of pre-
serving the coherence and then the identity of the normative system
and of the civilisation of which that system is an expression.[1]

The peculiar way in which conflicts are perceived and the
solutions conceived to cope with them are a qualifying aspect of the
making of a legal culture. For instance, according to modern legalist
theory, conflicts between norms can be considered simply as a defect
of the legal system that depends upon the limits of the rationality of
the law-makers and of their capacity to *organise* the normative corpus.
However, conflicts can be approached from a broader perspective
according to which they are part of the theoretical and practical
process leading to the elaboration of the forms of life that a com-
munity accepts as binding for itself, by choosing the accepted one
among alternative existing models and setting aside other prospected
forms of behaviour. In this sense, a seemingly limited problem con-
cerning legal reasoning may help to understand crucial aspects of a
legal culture.[2]

Particularly, the question of conflicts between normative texts is
strictly connected to the question of pluralism because it basically
concerns how many forms of life can coexist within a single norma-

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1    Remarkably, the very same existence of conflicts requires cultural differentiation
     and, therefore, the former may be assumed as an important evidence of the latter.
2    The reduction of the problem of conflicts to a question of legislative technique
     can be seen as an effect of the complete reduction of law to state law. However,
     in this case also the underlying problem is how to organise normative differences.

tive system, the way in which they can be organised in a coherent
whole and the values involved. The way in which these problems have
been dealt with in the Hindu tradition is one among several possible
ways, but moving from this context-specific thought it is possible to
understand from a comparative point of view some universals ques-
tions and then to explain some differences existing between different
jurisprudences connecting them to broader cultural assumptions.[3]

The normative texts which form the *śāstra*, singularly or collec-
tively considered, give an astonishing impression of inconsistency.
Remarkably, the first reactions of Western scholars to these texts were
often informed by the Orientalist prejudice assuming the existence of
a radical cognitive difference between Westerners and Easterners,
particularly as concerns the capacity of recognising conflicts (Doniger
1991: xliv-xlv).[4] These reactions point out the difficulty in approach-
ing a different normative system without a proper understanding of its
peculiar functioning. According to Doniger (1991: xlviii):

> The gymnastic that the Indian commentators go through on some
> occasion (often in blatant disagreement not only with one another but
> with the patent meaning of the original verse) suggests that, like us, they
> too sometimes failed to make sense of the text. Yet we must assume that
> if we knew enough about the culture, we would at least know why

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3    Research concerning universal and particular aspects of legal reasoning should
     deal with the different possibilities that emerged in course of time in different
     contexts. A character that can appear strikingly similar in two different contexts
     can actually have, if seen in connection with other several aspects, a different role
     or a different relevance. In this sense, the task is not only to map what is common
     and what is different, or invariant and variant, but also to reconstruct the under-
     lying connections that can possibly explain a co-variance. In other words, if
     something changes probably other characters make possible this change, or in
     turn are driven to change. Therefore, this kind of analysis would require the
     ascertainment of a cluster of interacting theoretical problems.
4    Doniger (1991: xlv-xlvii) comments: "Such an assumption ignored the fact that
     most great religious traditions, including our own, are the result of historical
     conflations and express insoluble contradiction" and, interestingly, distinguishes
     between inconsistency and incoherence, meant as the incapacity to cope with the
     contradictions, remarking that: "Yet we would do well to remember that there are
     orders, degrees, gradations of rationality and coherence. Inconsistency and
     contradiction are characteristic of most great religious texts, including Manu; but
     incoherence, or the failure to come to terms with one's inconsistencies and
     contradictions, is another matter".

> something puzzling to us made sense to them, though we may still find
> it irrational in light of our assumptions about the world.

In other words, what can seem to an external observer a jumble of
conflicting statements could be differently perceived through a more
in-depth knowledge of different aspects of that culture. In fact, those
normative texts did not stay by themselves and there was an entire
culture that elaborated and surrounded them.

Furthermore, the study of the Hindu philosophical texts shows a
remarkable theory of interpretation that extensively deals with the
problem of conflict. In this sense, the Orientalist prejudice is certainly
based on the non-acknowledgement of Hindu theories that are at least
as much elaborated and analytical as their Western counterparts. Of
course, a particular role in the elaboration of the principles of inter-
pretation of conflicting normative texts has been played by the
Mīmāṃsā, which, being the school of the Vedic exegesis, supplied
theoretical instruments to commentators and other interpreters. Ar-
guably, the core of the hermeneutical enterprise of interpreters was
precisely to evaluate different forms of behaviour emerging in the
society and organise them, disregarding some, praising others, and
normally giving them a definite scope, continuously searching for
coherence within śāstric learning and moreover a coherence between
this system of knowledge and forms of life acceptable within this pale.

Therefore, the work of interpreters aiming to elaborate the norma-
tive structure of Hindu traditional society involved both technical
aspects and cultural values. In this chapter we will analyse the prob-
lem of conflicts particularly in the perspective of the comparative
authority of sources of *dharma*. In the last chapter we will also see
that the theoretical way to deal with conflicts elaborated by Hindu
jurisprudence is far-reaching and may be assumed as a key to under-
standing the characters of Hindu law.

The problem of conflicts between norms, i.e. antinomies, is
connected in Hindu jurisprudence to the problem of authoritativeness
of sources. In fact, conflicts constitute a problem for the *theory* of
sources as grounded on a theory of the means of knowing *dharma*. As
we saw, *vidhis* are meant as knowledge units and therefore a conflict
between norms is dealt with as an epistemological conflict.

Conflicts raise doubts concerning the validity of knowledge of *dharma*. Analysing the discussions on the authority of the different sources of *dharma*, we saw that the existence of conflicts is normally one of the *pūrvapakṣin*'s arguments to shake or deny their authority and reliability. Furthermore, the concept of conflict is involved in the overall discussion on the comparative authority of means of knowing *dharma* and concerns also the authority of particular *vidhis* and methods of interpretation and, in this sense, it provides to interpreters a general tool to elaborate on dharmic rules. If the problem of conflict is, on the one hand, connected to the epistemological foundation of the validity of knowledge of *dharma*, on the other hand, it has clearly very important practical consequences because it regards the rule to be followed in practice when alternative models of behaviour are prospected.

In this theoretical context, problems of the following kind are discussed: does the existence of contradictory Vedic texts shake the authority of the Veda? Is it possible to hold that, for instance, the authority of a *smṛti* text is based on a lost Vedic text when there is an explicit Vedic text contradicting it? There being many divergences and conflicting rules in *smṛtis* and *sadācāras*, which of them is the authoritative one? All these problems were relevant for the definition of the identity of Hinduism. The theoretical undertaking of the Mīmāṃsā aimed to provide a firm foundation to the authority of the Veda and to the other sources of *dharma* and in late works there is evidence of the exigency to defend that foundation from the attacks of those competing cultures, particularly Buddhism, refusing the traditional organisation of Hindu society.[5] On the other hand, a further engaging task was to elaborate a theoretical pattern suitable to make inner differences stay together.

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5   Verpoorten (1987: 22), making reference to the opinion of the Tibetan author Tāranātha, remarks that Kumārila "took upon himself the mission of repelling Buddhism, that was popular in his days, and of fighting one of its famous champions, Dignāga, of the *Sautrāntika-vijñanavāda* school".

## Real and seeming conflicts

According to the conception we are analysing every single injunction is a means of knowledge of *dharma* by itself. *Vidhis* and *pratiṣedhas*, i.e. positive and negative injunctions, lay down the actions that have to be accomplished. The general problem for interpreters was that of organising the different actions laid down by the *vidhis* in a coherent normative structure. As we saw, dealing with this task the Mīmāṃsā elaborated several distinctions between different kinds of *vidhis* and different kinds of actions. It could happen, and actually it frequently happened, that, while organising texts and actions a conflict was found.

The Sanskrit term for conflict is *virodha*.[6] This term has a wide semantic scope and is suitable to denote any kind of conflict. In fact, contradictoriness, or contrariness, is relevant in different contexts of analysis, including for instance the discussion on conflicts between the meanings of words, which is of concern to Indian theories of language.[7] As for normative conflicts, Medhātithi on Manu II.14 explains *virodha* as "setting forth of contrary facts, – e.g., what is declared to be 'Dharma' by one text is pronounced to be '*adharma*' by another" (Jha 1999: 223). In the *Tantravārttika* we find several definitions of conflict, which indicate that contradictoriness is sometimes referred to sentences and sometimes to actions. This depends on the strict connection between norm and action, because the conflict between normative sentences is connected to the conflict between the actions they lay down as dutiful. However, as we will see, the distinction between language and facts is crucial in the theoretical elaboration of conflicts. An example of definition of conflict in terms of contradictory views may be found in the *Tantravārttika*: "When two notions are found to present two contradictory ideas with regard to one and the same object, they are said to contradict one another" (Jha 1998: 125).

As concerns the contradictoriness referred to courses of actions, the following passage may be quoted:

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6    Another term to denote contradiction and incompatibility is *vipratipatti*.

7    In some peculiar context, such as aesthetics, the term *virodha* acquires a technical meaning; see Mazzarino (1983: 270) and a short but interesting reference in Conte (1995).

> ... we often find the Vedic texts themselves laying down contradictory
> courses of actions, such for instance as the Injunctions – (1) *Pours the*
> *libation before the Sun has risen*, and (2) '*Pours the libation when the*
> *Sun has risen*'; '*Holds the Shoḍaçi vessel at the Atirātra*, and *does not*
> *hold the Shoḍaçi vessel at the Atirātra*,' and so forth, – where it is
> absolutely impossible to follow both the courses laid down. (Jha 1998:
> 126-127)

Contradictoriness is meant as an incompatibility between actions laid
down by different *vidhis*. As a result, two injunctions are in conflict
when they lay down two alternative courses of action, that is, two
actions that cannot be performed simultaneously. However, the in-
compatibility between actions does not entail that the injunctions,
although contradictory, are incompatible and that one of the two
should be set aside from the normative system, as we will see dealing
with the distinction between *siddha* and *sādhya* in Medhātithi.

Certainly, the clearest case of conflict occurs when the same
action is both prescribed and prohibited. However, a conflict can oc-
cur in a less apparent way in cases such as the prescription of pouring
the libation before the sun has risen and when the sun has risen. In
fact, there could be a combination (*samuccaya*) of acts, with the result
that the libation should be poured before the sun has risen *and* when
the sun has risen. However, a conflict is recognised in this case also
on the basis of several further assumptions. Medhātithi makes clear
that the *agnihotra* is a single action, which has to be performed once.
The act cannot be repeated and only one is the suitable point of time to
perform it. Therefore, considering that each of the three points of time
excludes the others, there is a conflict, which is then solved allowing
an option between the different times of performance.[8]

Interestingly, a skilled interpreter could see a conflict where it is
hardly detectable and, on the other hand, what may appear as a con-

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8    The example regards the ritual of *agnihotra*. See Manu II. 15 (Jha 1999: 224):
    "At sunrise, or before sunrise, or at early dawn, – the sacrificial act may be per-
    formed at any time, – such is the pronouncement of the Veda". This verse is the
    outcome of interpretation, which connects three distinct and conflicting
    injunctions by organising them as equally valid. In fact, they are originally seen
    as exclusive injunctions, each excluding the other two points of time. In other
    words, starting from a conflict an option is recognised following a general
    principle we are going to analyse in the following pages.

flict could be non-contradictory to his eyes, on the ground not of a cognitive difference but of the knowledge of several other relevant aspects and of the "logic" of these texts.

Furthermore, in some cases the interpreter needs to ascertain whether a conflict occurs through an empirical analysis of the factual coherence of different acts indicated by different norms. In fact, interpreters always proceed starting from the actions laid down and then ascertain their relations and the existence of a real conflict.

As a general principle of interpretation, every effort has to be made to reconcile two contradictory norms.[9] This principle can be considered common to many juridical traditions, but the intellectual categories by which the interpreters tried to set aside seeming conflicts, even if they can be strikingly similar as for their formulation, are quite different as concerns their actual application.

Reconciling seemingly contradictory texts, the greatest importance is assumed by the distinction between *vidhis* and *arthavādas*. As we saw, an *arthavāda* is a text that merely describes a fact and whose function is to eulogise the accomplishment of a prescribed act or to complete the prescriptive content of a *vidhi*. In any case, an *arthavāda* has to be construed along with a *vidhi*, which is the only proper means of knowing *dharma*.[10] A proper conflict may occur only between two *vidhis* prescribing two alternative courses of action, and not between a *vidhi* and an *arthavāda*, because the latter cannot prescribe the accomplishment of an action by itself. Therefore, one of the ways to solve an apparent conflict, conciliating the two texts, is that of considering one of them as a *vidhi* and the other as a mere *arthavāda*.[11]

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9    See Sarkar (1909: 78).

10   As we saw, apart from *vidhis* and *arthavādas*, the *mimāṃsakas* distinguish two other types of texts, *mantras* and *nāmadheyas*. Even though the proper means of knowing *dharma* is a *vidhi*, a peculiar function is assigned to each of the other types of texts.

11   As concerns a conflict between two *arthavādas*, this is hard to conceive. Consider the following passage of *Tantravārttika* 1.2.9 (Jha 1998: 40): "... if the sentences (*Arthavādas*) – that speak of the 'weeping,' 'cutting out of the fat,'... – were taken as laying down certain Actions to be performed, then alone could there be a contradiction (of Scriptures or of ordinary facts of perception). But, as a matter of fact, we do not take these sentences in their literal sense; nor do we supply into them words from without, in order to make them signify a direct Injunction; all that we hold them to signify is *Praise* only; and certainly, there can be no contradiction in this".

This theoretical distinction had a great importance in the elaboration of conflicts within traditional texts. Lingat, highlighting that "interpreters often have recourse to this point of view to remove texts which, otherwise, would have been embarrassing" (Lingat 1998: 159) provides a series of interesting examples. One of these examples concerns the case of the share of paternal estate that has to be attributed to the eldest son. Lingat (*id.*) remarks that, while a passage in the *Taittiriyasaṃhitā* (III.5.2.7) attributes a larger share to the eldest son, some authors, who on the contrary favour the equality of partition, interpret this passage as an *anuvāda*, which has not a prescriptive role but is simply an account of past events.[12]

Another example quoted by Lingat concerns the case of loss of ownership.[13] In the *dharmaśāstra* of Nārada we find the following statement (I.81): "An object given as a pledge, boundaries (*sima*), the property of a child, a deposit, a loan (*upanidhi*), women, the property of the king or *śrotriyas* does not cease to belong [to their owners] by being in the possession of another during twice ten years". It seems that Nārada does not admit the loss of ownership by reason of possession for a certain lapse of time but the following verse states that: "Only excepting a woman or the property of the king, even pledges, etc. (*ādhyādiny api*) are lost to their owner when they have been openly in the possession of another during twice ten years".

Excepting the case of women and of the property of the king, the two texts seem to be contradictory. However, Vācaspati Miśra gives an interpretation that allows to set aside the contradiction. The key is the word *api* ("even"). He states that a phrase as "Even drinking poison would be better than to dine in that man's house" does not mean that it is good to drink poison, and the purpose of the phrase is to emphasise the recommendation to abstain from eating in the house of a person who has committed some sin. In a similar way, by reason of *api*, the second statement of Nārada can be construed as an *arthavāda* being intended to reinforce the first statement.[14]

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12  The *anuvāda* is a kind of *arthavāda*. See Kane (1962-1975, V: 1240).

13  See Lingat (1998: 160) for details of the example described in the text and for other interesting examples. The *śrotriyas* mentioned in the text are theologians.

14  This could be understood in this sense: The property of the king and of women cannot be lost, *even* if it could happen (not: it should happen) that the other kinds of ownership are lost after twenty years.

These examples show one of the reasons why the reading of traditional Hindu normative texts can give an impression of astonishing inconsistency. In fact, the typical way of proceeding of these texts is to collect side-by-side contradictory texts, recording new solutions without refusing the others. In this regard, Doniger (1991: lv) argues:

> The apparent inconsistencies are no mere accidents of historical conflation (the 'throw in the hopper' approach to Indian texts) but rather the natural outgrowth of centuries of development during which different minds reached different conclusions about problems that are ultimately insoluble. Contradiction is inevitable in a tradition that insists upon hanging on to old ways of approaching complex human problems while simultaneously adding new, often different, approaches to the same subjects. Manu inherits this tradition and deals with it explicitly, juxtaposing conflicting views and then adjudicating between them.

However, what can seem to an external observer an absolute contradiction may be "easily" solved by an interpreter used to distinctions such as that between *vidhi* and *arthavāda*. Some interpretations can appear as fictitious and, on the other hand, the interpreter normally adopts the appropriate hermeneutical tool to legitimate the view that he considers as preferable. This is typical of legal reasoning and the distinction between *vidhi* and *arthavāda* should be seen as a sound and functioning instrument in *this* system, as every system has its peculiar instruments and legal devices.[15]

In case of conflict between two injunctive texts, the interpreters had other efficient instruments, hierarchically organised, to set aside contradictions. In *Tantravārttika* 1.3.2 we read:[16]

> ... when we come to suspect a certain *Smṛti* Injunction of being contradictory to a direct Vedic Injunction, it is just possible that the suspected contradiction could be explained and set aside, by showing that the two do not exactly refer to the same subject; or even when they do treat of the same subject, as there would be no contradiction, if one

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15  This distinction elaborated for Vedic texts has been used even in recent times; see Jha (1964: 9). For a philosophical discussion on juridical technique see Lombardi Vallauri (1981: 573).

16  In the *Tantravārttika* this discussion is developed under the *sūtra* concerning conflicts between Veda and *smṛti*, but this way of reasoning may be considered generally valid whenever a conflict is involved.

could be explained as a General Injunction, and the other as the prohibition of a particular phase of it, the two texts could be accepted side to side; specially as in another case (where the particular prohibition would not be applicable), both of them could be found to be equally applicable, and as such they could both be accepted as optional alternatives, both equally authoritative; and thus there would be no absolute contradiction between the two texts. (Jha 1998: 125)

The first case, called *viṣaya-vyavasthā*, occurs when the two texts can be reconciled referring them to different subjects.[17] For instance, Jīmūtavāhana reconciles two sets of apparently contradictory texts, which concern the rights of the son born after a partition, by holding that the two sets of norms have different subjects, for in one case they concern the self-acquired property of the father, while in the other the property descended from the grandfather.[18]

The second case occurs when there is a conflict between a positive injunction and a negative one. In this case the interpreters have to establish the character of the negative text, which can be a *pratiṣedha*, a general prohibition of what is first prescribed, or a *paryudāsa*, a restricted or qualified prohibition that must be considered as an exception.[19] Of course, in the first case only there is a real conflict, because an exception cannot by definition conflict with the general injunction. Therefore, interpreters could solve apparent conflict by showing that the negative injunction is a *paryudāsa*. Hindu normative texts frequently provide a general rule and then make following it long lists of contrary injunctions that have, more or less, clearly, the value of exceptions.[20] With regard to this way of organising texts through general rules and exceptions Doniger (1991: lv) writes:

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17   In other words, if the two texts have not the same object they have not the same scope for application. As a result, they do not lay down two incompatible courses of actions and cannot be viewed as contradictory.

18   For more details see Sarkar (1909: 94).

19   In this regard, it is worth remembering that in the Mīmāṃsā theory of action, actions are viewed as composed of a plurality of acts and phases whose details are indicated by different textual and non-textual sources. This means that many injunctions refer to the same complex act and have to be organised.

20   On the distinction between *pratiṣedha* and *paryudāsa* see Sarkar (1909: 314-315). This distinction has many further relevant implications, for instance in case of violation, on which see Sarkar (1909: 333-334).

This is, after all, the normal way to constitute any sort of legal code, and it is a method whose most extreme form was already achieved in the grammatical treatise of Pāṇini, which set the paradigm for all kinds of scientific inquiry in India: state one general rule, to which the whole of the subsequent treatise constitutes nothing but a series of increasingly specific exceptions. Ritual texts have archetypes and ectypes, rules and exceptions, just like Pāṇini.

Sarkar (1909: 319) highlights the existence of another relevant maxim concerning "general and particular": "When there are two rules on the same subject, one general and the other particular, the particular rule prevails". This principle, which is common to many traditions, is more inclusive than the previous one and is based on specification rather than exception. For instance, an injunction that prescribes the sacrifice of an animal could be interpreted as allowing the sacrifice of any animal, but, if a particular rule indicating a specific animal is found, then this should prevail on conflicting interpretations. Sarkar (1909: 336-337) adds:

> ... in the maxim of the general and particular, both the rules are positive. There is no express maxim dealing with the case of a general negative rule and a particular negative rule, nor is there any discussion as regards the question of an exception to a negative Vidhi.

The third case of a seeming conflict is that of *vikalpa*, which is an option between equally valid alternatives. It is the opposite of combination (*samuccaya*), in which all the different acts have to be performed.[21] *Vikalpa* is a central tool in the way of reasoning of interpreters and then it is also the key to understanding the logic of normative texts such as *dharmaśāstra*. This term is used also in the science of grammar where it indicates two accepted forms of a word (for instance *Tantravārttika* and *Tantravārtika*). There can be an option only when the texts laying down different models of behaviour are equally valid and then the two courses of actions are equally dharmic. In this case, both texts are applicable and both courses of action may

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21  See Jha (1964: 311): "In cases of 'Inclusion', there is performance of several Subsidiaries together, while in the case of 'Option', only one of the several possible Subsidiaries can be performed; and the choice in the matter lies with the Sacrificer".

be accomplished. However, it is worth noting that the *vikalpa* applies also to the non-textual rules of *sadācāras*. The *resulting* situation for the agent is an option, and therefore a choice can and must be made. The theory of the optional alternatives is a way to solve conflicts because when a choice is allowed there is not any real conflict.

The existence of a *vikalpa* may be indicated by explicit words of relevant texts or ascertained by reasoning. Furthermore, *vikalpa* may be restricted (*vyavasthita*) or not restricted.[22] The *vyavasthita vikalpa* is based on the differentiation of the sphere of validity of the different injunctions by reason of place, time, agent, act, result, occasion and condition. Therefore, a conflict between two norms is only a seeming conflict in the case of *vyavasthita vikalpa* because it means that, according to the circumstances, only one of the several actions must be accomplished. For instance, in the ritual context, if three *mantras* are prescribed to be recited, and the combination is not possible, the seeming conflict may be solved on the ground of another injunction that lays down that each of the three kinds of *mantras* must be recited depending on the *varṇa* of the agent. This is a *vyavasthita vikalpa* indicated by direct declaration.

Secondly, in some cases the text gives explicitly to the agent an option between several models of behaviour, particularly when it is allowed to choose the appropriate action on the basis of the result one wishes to obtain.[23] In this case also, the underlying principle is that among different possible behaviours, only one is the appropriate action and then there is not a real conflict. When the *vikalpa* is not restricted the choice is totally depending on the will of the agent.

The interpreters make recourse to these hermeneutical instruments to organise scattered rules and different opinions, trying to assign to conflicting passages a specific scope of application or role to set aside the conflict. However, in some cases the conflict cannot be solved through these interpretative means and the solution should be found making recourse to the principle of the hierarchical order of sources, assessing the comparative authority of two norms. In other words, when two texts are by no means reconcilable "the question, as

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22   See Jha (1964: 312-315) and Kane (1962-1975, V: 1250-1253).
23   On these cases see further Kane (1962-1975, III: 834, 866-867).

to which of the two is to be accepted to the preclusion of another is decided according to their comparative strength (or authority)".[24]

In principle, the application of the hierarchical criterion means that, in case of conflict between *śruti, smṛti, sadācāra* and *ātmanas-tuṣṭi*, the preceding source prevails on the following. This is seen as a case of *bādha*, that is to say, exclusion, which is a general way to organise normative complexity that applies also, for instance, to methods of interpretation.[25] Generally speaking, if conflicting statements may be organised on the basis of their comparative strength the conflict may be easily set aside or even seen as a mere seeming conflict.[26]

However, the arising problems are much more difficult. In fact, the peculiar theory according to which the authority of inferior sources is grounded on Vedic texts entails, as we will see, that every conflict may be considered a conflict between two Vedic texts, thus provided of the same authority. Secondly, what happens if the contradictory texts are equally authoritative and cannot be reconciled through interpretative means?

Before entering into the details of the discussion on the comparative authority of sources, it is worth noting here that the last resort to assure the coherence of the system is the *vikalpa*, which in this sense is at the core of legal reasoning. As we said, a *vikalpa* may be recognised in several cases, all of them representing a potential conflict, but there is a fundamental difference between the case in which a *vikalpa* may be contextualised, and then may provide a ground for differentiation between different injunctions, and the case in which no differentiation is possible and the conflict cannot be set

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24   See *Tantravārttika* 1.3.2 (Jha 1998: 125).

25   Consider the following passage in *Tantravārttika* 1.3.2 (Jha 1998: 143): "Exactly as in the case of Direct Assertion, Indirect Implication, &c., (explained under *Sutra* III-iii-14), their comparative strength or weakness is ascertained, according as the one that follows is found to be contradictory to, or supported by, that which precedes it, — in the same manner we could also ascertain the authoritativeness or otherwise of the various *Smṛti* texts, according as they are found to be contradicted or supported by Vedic Texts".

26   See, for instance, the following passage of *Tantravārttika* 1.3.4 (Jha 1998: 175): "As a matter of fact, however, two Actions can be said to contradict each other only when they are based upon equal authorities, and are laid down as to be performed at one and the same time".

aside. In the latter case *vikalpa*, ascertained through reasoning, is the last resort to avoid the lack of authority of one of the two rules and is particularly necessary when dealing with conflicts between two Vedic texts. This case is much more problematic and can have a role only when there is no other way out. In fact, differently from the cases of *vikalpa* we analysed above, the *vikalpa* between two equally authoritative texts having the same object is potentially capable of shaking the general authority of sources, as elaborated by Hindu interpreters.


## Conflict between *śruti* and *śruti*

From a theoretical rather than practical perspective the most relevant case of conflict between two equally authoritative texts concerns Vedic texts.[27] The question is: do conflicts between Vedic texts constitute a valid argument against the authority of the Veda as a source of knowledge of *dharma*? As we saw analysing the discussion of Medhātithi on Manu II.10, inconsistency, along with untruthfulness and repetition is one of the arguments used by the *pūrvapakṣin* against the authority of Scripture. Furthermore, the result of inconsistency would be that "people are always in doubt as to which alternative they should adopt" (Jha 1999: 214).[28]

Medhātithi's treatment of this problem may be held as based on the distinction between descriptive and prescriptive statements. As we saw, in Hindu jurisprudence a clear distinction is made between *siddha*, which is an accomplished entity, and *sādhya*, which is an entity that has to be accomplished. *Dharma* concerns the sphere of *sādhya*, and this is the reason why it can be known only by *śabda* and not by the ordinary means of knowledge based on perception. As concerns conflicts, the point is that in this view there can be inconsistency only between *siddhas*. In fact:

> It is only in connection with two accomplished entities that, when found to be incompatible with one another, they are held to be 'inconsistent';

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27   In some sense, on the solution of the problem of conflict between two Vedic texts depends the very same foundation of the whole system of Vedic orthodoxy against the opposite views.

28   The established view is elaborated commenting on Manu II.15.

the same cannot be true in connection with things still to be accomplished ... For what has got to be accomplished may be accomplished either in one way or another; and how could there be any inconsistency in this? (Jha 1999: 226)

Considering the topic from the perspective of sentences, a conflict may exist between two descriptions of inconsistent facts, while normative statements, which concern facts-actions that are not yet accomplished but should be accomplished cannot be inconsistent. The peculiarity of a conflict between norms has been widely discussed in legal theory.[29] However, it is noteworthy that in this context, *vidhis* are knowledge units and in this sense the general epistemological discussion on error applies to them as well. Particularly, in the theory of knowledge elaborated by the Mīmāṃsā the contrariness between two cognitions is one of the means to ascertain the falsity of one of them. A further argument is then held to deal with Vedic inconsistencies, stating that *śabda-pramāṇa*, knowledge obtained through the Veda, has a peculiar character and cannot be falsified.

Considering the nature of *sādhya* and also the peculiar character of Veda, the established view is that both conflicting Vedic texts are valid means of knowledge and both models of behaviour laid down are *dharma*. The *Manusmṛti* (II.14) states: "Where there is conflict between two Vedic texts, both are held to be Dharma; both have been rightly pronounced by the wise to be Dharma" (Jha 1999: 223). [30]

However, the acceptance of the validity of conflicting norms is merely a starting point. In fact, the existence of two Vedic texts laying down two alternative actions as *sādhyas* raises the problem of which of the two must become *siddha*, an accomplished entity. Remarkably, considering that both models of behaviour are equally dharmic, the problem is that to accomplish one of them would involve the violation of the other, because, if there can exist two conflicting norms, there cannot exist two conflicting accomplished actions. As a general rule, in case of conflict between equally authoritative texts, there is an option between the two models of behaviour, that is, *vikalpa*.

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29  The possibility of finding an equivalent of the principle of non-contradiction for normative statements is often discussed by legal theorists. See, for instance, Conte (1989), von Wright (1963) and Kelsen (1970).

30  The second part of the verse makes reference to other authoritative opinions. See Medhātithi on Manu II.14 (Jha 1999: 224).

The classical example of *vikalpa* between two equally author-itative Vedic texts is that concerning two injunctions laying down two substances, *vrīhi* and *yava*, that is, rice or barley, as the substance to be offered in a particular ritual context. In such a case, someone who wants to act following one injunction will see the other injunction as an obstacle and therefore he is "drawn from two sides, by these two texts, as if by two celestial women (equally attractive)" (Jha 1998: 134). In fact, the two texts have the same authority and there is no way to reconcile them. As a result, to follow one of them means to disregard the authority of the other, and this would amount to consider both texts as partially non-authoritative.

In this case, the *vikalpa*, which is indicated by reasoning, is a way to cope with an exceptional situation. The authority of a Vedic text cannot be simply set aside but, nonetheless, when two conflicting Vedic texts exist, one of them has to be disregarded. Clearly, this possibility can be allowed in principle only when the conflict is absolute and there is no way to solve it by interpretative means, because it raises several objections. Jha (1964: 311) explains:[31]

> ... there is the typical instance of option between *Yava* and *Vrīhi*, both of which are optional alternatives; − accepting this option, (1) if we use *Vrīhi*, and not use *Yava*, we reject the authority of the Vedic text enjoining the use of *Yava*, − (2) we assume the untrustworthy character of the text, − (3) if, on the other hand, we use *Yava*, and not use *Vrīhi*, we reject the authority of the text prescribing *Vrīhi*, and (4) assume the untrustworthy character of this text; (5) in this latter case again, we accept the authority of the *Yava*-text which we had rejected before, (6) we thereby reject the previously assumed untrustworthiness of the *Yava*-text; (7) in using the *Vrīhi* again, we accept the authority of the *Vrīhi* text we had rejected before, and (8) we also reject the previously assumed untrustworthiness of that text.

In case of conflict, the two models of behaviour are both valid, but at the moment of option the accepting of one of the texts means to reject the authority of the other. The texts are authoritative or non-authoritative by turns, and this is why the non-authoritativeness is said to be partial. A relevant objection is that, if someone decides to use

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31   See also *Tantravārttika* 1.3.2 (Jha 1998: 133).

the *yava*, his conclusion will be conflicting with the conclusion of who decides to use the *vrihi* and therefore one of the two would be wrong and not, so to say, partially wrong.[32]

The reply is that in this case the injunctions are equally of Vedic origin and, therefore, their authority cannot be totally rejected. What happens is that:

> the authoritativeness or otherwise is only like the rising or sinking (of an object) (i.e., though the authority ever continues, yet when it rises up, we accept its authoritativeness, and we make use of one Injunction; and when it sinks down, its authority is only hidden from view, and that of the other Injunctions having come up, we accept this latter and act up to it). (Jha 1998: 142)

Therefore, in the case of option both texts remain valid and all that happens is that the choice of one of the two alternatives *compresses* the authority of the other, which, being intrinsically valid, is never set aside. In other words, it is a question of *emergence* and the normative system is variously determined each time.

It could be argued that in such a case both injunctions lose their validity and then the resulting situation is a sort of permission.[33] But it is closer to the way of thinking of the *mimāṃsakas* to hold that we have not a permission, but two obligatory texts as optional alternatives. In this regard, the discussion dealing with the case of a mixed offering of *vrihi* and *yava* is interesting. In other words, why does one not simply use some rice and some barley? The injunctions prescribing *vrihi* or *yava* as the substances to be used are seen as restrictive. This means that each of them excludes the other substance, and, moreover, each of them is prescribed as sufficient. As a result, a mixed offering would violate both injunctions and "it would be far better to attribute unauthoritativeness to each of them by turns" (Jha

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32  The objector relies on the general theory of contrariness based on ordinary experience in which: "we find that the contradiction of the cognition of other people is by no means a very slight means of ascertaining one's own cognition to be false; as for instance, when (by some disorder of the eye) we see the moon as duplicate, or when we are mistaken in our notions as regards the various directions, we conclude our own ideas to be false, only when we find them to be contrary to those of other people" (Jha 1998: 141).

33  See Sarkar (1909: 98).

1998: 134). In this sense, the possibility to choose derives from the competing authority of conflicting texts and not from the lack of a rule deriving from the fact that the two texts lose their authority because of their contradictory character. Considering that the *vidhis* are means of knowledge of *dharma*, we can remark the peculiarity of this conception by saying that in the case of contrariness of two notions both are true.[34]


## Conflict between *śruti* and *smṛti*

A case of conflict between non-equally authoritative texts should be decided according to their comparative authority. The paradigm of conflict between sources having a different authority is provided from conflicts between *śruti* and *smṛti*. From a practical point of view, this case of conflict is not very relevant because Vedic *vidhis* that can conflict with rules included in *smṛti* texts are very few.[35] Nevertheless, this hypothesis is extremely important on a theoretical level, because it explains the kind of relationship that is established between the different sources of *dharma*. This particular theoretical elaboration is useful to make clear some characters of the Hindu normative system that allowed a flexible development, and thus the extraordinary continuity of this normative system and the unity of Hindu culture, notwithstanding huge inner differences.

   A discussion of the problem of conflict between *śruti* and *smṛti* may be found in the second *adhikaraṇa* of the *Tantravārttika*. The starting point is Jaimini's *sūtra* 1.3.3: "When there is contradiction between the *Smṛti* and the *Çruti*, the former is to be disregarded; it is only when there is no such contradiction that we have an assumption of the Vedic text" (Jha 1998: 124). As we saw, the authoritative character of the *smṛti* is established in a general way assuming a foundation in the *śruti*. In fact, the existence of a *smṛti* text held to be authoritative by the sages leads to the assumption of a Vedic text as support and, if it is not possible to find the Vedic text supporting the

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34  For a logical analysis of antinomies see Bobbio (1993: 209-213) and Conte (1989). On the distinction between "valid" and "true" in the Mīmāṃsā see Jha (1964: 69-79).

35  See Sarkar (1909: 233-234) and Wezler (2004).

*smṛti* text, it is reasonable to suppose that the Vedic text has been lost. It is worth noting that in this case the supporting Vedic text is simply inferred. Therefore, in case of conflict, the following problem arises: does a *smṛti* text, which finds its authority in the Veda, remain trustworthy when it is found to be in conflict with an existing Vedic text?

In this case also, the problem of conflict is connected to the authority of a means of knowledge. If it is impossible to solve the contradiction through interpretation, two possibilities may be pro-spected, the first one leading to the acceptance and the second one to the refusal of the authority of a *smṛti* injunction. Both views can be supported by several arguments and the discussion is developed in the second *adhikaraṇa* through *pūrvapakṣa* and *siddhānta*, the former supporting the authoritativeness of *smṛti* even in the case of conflict with *śruti*, the latter sustaining its non-authoritativeness. Therefore, the established view does not accept the authority of *smṛti*. However, as we will see in the next paragraph, the *pūrvapakṣa*'s view represents an opinion that will become very relevant and is supported by Kumārila himself, who develops a different interpretation of the *sūtra*.

According to the orthodox Mīmāṃsā view, if there is a contra-diction, the authority of the *smṛti* text has to be totally rejected because the existence of a Vedic text supporting that specific *smṛti* in-junction can be inferred only when there is no conflict. On the con-trary, according to the *pūrvapakṣin*, one could not disregard that the authority of *smṛti* as concerns the knowledge of *dharma* has been established *in a general way* and that, if one begins to doubt it because there could be a conflict with the Veda, or also within *smṛti*, or be-cause some actions prescribed in the *smṛti* could be actually based on illusion or greed and then would be non-dharmic, the result would be a situation of uncertainty.

In fact, it is stated, it is extremely difficult to establish if a *smṛti* is contradicted by a Vedic injunction, considering that there are different recensions of the Veda and that Vedic injunctions can be ascertained also through complex interpretative means. Therefore, if people's con-fidence in *smṛti* is shaken in some cases, there is the risk that it will lose every authority and all the efforts made to establish its authority

in a general way would be futile.[36] This first argument is then based on the concern for the uncertainty that will be produced in practice. In fact, one could not pretend that every man has the capacity to investigate into the Veda.[37]

A second very important argument that can be found in the *pūrvapakṣa* is that it would be justified to consider a *smṛti* text conflicting with a Vedic text as non-authoritative only in the case in which Vedic texts themselves were never found to contradict each other. But, as a matter of fact, there are contradictory Vedic texts, and the *smṛti* text could be based on a lost Vedic text, although conflicting with an existing Vedic text.[38] This argument aims to make of a conflict between a *smṛti* and a Vedic text a case of conflict between two Vedic texts, one existing and one lost and inferred at the support of the *smṛti* text. The result is that, according to the general rule regarding conflicts between equally authoritative texts, both texts are valid and both prospected models of behaviour are *dharma*, and thus a *vikalpa* should be allowed.

Furthermore, the lack of authority of a *smṛti* text, in case of conflict, could not be based on the assumption that it is based on non-visible aims, because in the Veda also there are some actions that have visible results. On the other hand, according to the *pūrvapakṣa*, if one accepts that the *smṛti* is founded on the Veda when there is no contradiction, while it is founded on illusion when there is a contradiction, the resulting theory would be incoherent, because the authority of *smṛti* has to be accepted or not accepted in both cases. In addition, the authors of *smṛti* were certainly aware of conflicting Vedic texts and, if they included some rules in their works, arguably they considered them as based on other Vedic texts.[39]

All the *pūrvapakṣa*'s arguments are rejected in the *siddhānta*. First of all, the Vedic foundation and thus the authority of *smṛti*

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36  See Jha (1998: 126).

37  As we saw, according to Medhātithi, the role of *smṛti* is properly to transmit the knowledge of *dharma* to those who could not learn it directly from the Veda. In my view, this realistic attitude is also crucial for the understanding of the relevance in practice of *sadācāras* because it can be argued that one could not pretend that every man has the capacity to investigate into the *smṛtis*.

38  In this regard, it is worth noting that "all Vedic texts are equally authoritative for all men" (Jha 1998: 127).

39  For a full discussion on these topics see Jha (1998: 126-130).

should be considered as a general rule that admits some exceptions. The fact that a *smṛti* text conflicting with a *śruti* text cannot be founded on the Veda does not entail that the Vedic foundation is set aside in all cases.[40] According to the *siddhānta*, what should be done is to differentiate accurately the cases in which the general rule and the exception are applicable. Thus, the *siddhānta* does not acknowledge the "political" concern for uncertainty raised in the *pūrvapakṣa*.

Secondly, a Vedic foundation may be inferred only if there is no conflicting Vedic text on the point and, if it exists, the *smṛti* should be considered as based on illusion. In fact the *smṛti* has no self-sufficient authority and the Vedic foundation is simply inferred. Now, the opinion according to which it could be possible to infer a lost Vedic text conflicting with an existing Vedic text does not make sense because a Vedic text already exists. A clear example is made in this regard. When someone sees an elephant certainly he does not try to infer the existence of the elephant from its footprints. *Smṛti* is like the footprints that lead to infer the existence of the elephant, that is, Veda. In other words, if there is a Vedic text on a certain subject, there is no need to infer another Vedic text as support of the conflicting *smṛti* text, which thus remains baseless.[41]

Moreover, the Vedic foundation can be inferred only if a contrary Vedic text is not found, and the established authority of a *smṛti* text can be set aside if, by chance, a contrary Vedic text is found later on. In other words, once a contrary Vedic text is found, the conclusion is that the *smṛti* text never had its basis in the Veda. This clearly shows that the Vedic foundation of *smṛti* is presumptive and conflict with the Veda is the main reason to make this presumption end. This argument is connected to the *siddhānta*'s reply to the possibility of a *vikalpa* in case of conflict between a *śruti* and a *smṛti* text.

As we saw, the *vikalpa* should be used only under strict necessity, when there is no way out, even when a conflict between two equally authoritative texts is involved. *A fortiori*, an option should not be accepted in the case when one of the competing authority is stronger than the other, particularly in the case of a conflict between *śruti* and *smṛti*, because the *smṛti* has not a self-sufficient authority. In fact, it is preferable to preserve the full validity of *śruti* and of *smṛti* conforming

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40   See Jha (1998: 131-132).
41   See Jha (1998: 130-131).

to *śruti* and to lose the authority of *smṛti* conflicting with *śruti* rather than to negate, at least partially, the authority of both *śruti* and *smṛti*, as happens in the case of *vikalpa*.

In the case of conflict between two *śruti* texts nothing could justify the acceptance of one of them and the refusal of the other, while in the case of conflict between *śruti* and *smṛti* texts there are two reasons to accept the authority of *śruti* and reject the authority of *smṛti*. First of all, the Veda is authoritative by its nature while the *smṛti* is by itself non-authoritative.[42] Secondly, in the case of option between two *śruti* injunctions, as in the case of *vrīhi* and *yava* we saw, the authoritativeness of the disregarded injunction is preserved because it is simply compressed when the alternative injunction is followed. This cannot be the case if a *smṛti* text is involved, because it would anyway lose any authority in case of conflict with a *śruti* text. In fact, as a general rule, the *vikalpa* involves that the acceptance of one of the alternatives sets aside the authority of the other one. Then, if the Vedic rule is accepted, the *smṛti* rule loses its authority and from that moment onwards it is not anymore possible to accept its authority because the lack of authority cannot be considered as an external property, differently from what happens when a Vedic text, which is inherently authoritative, is concerned.[43] This depends on the fact that when the *smṛti* loses its authority it is assumed that is not based on the Veda but on illusion, and the presumption of a Vedic foundation cannot be restored.

As a conclusion, a *smṛti* text conflicting with a Vedic text cannot be held as laying down an equally dharmic behaviour and the hierarchical criterion is applied, for the superior source prevails. This also involves the possibility that existing *smṛtis*, for instance a certain *dharmaśāstra*, can include some parts that are actually devoid of authority, although preserving their general authority for the parts that are in keeping with the Veda.

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42  See Jha (1998: 135).
43  See Jha (1998: 137).

## Overriding the hierarchical criterion

The opinion sustained in the *siddhānta* represents the orthodox
*mimāṃsaka* theory supported by Śabara and his followers. However,
the relationship between *śruti* and *smṛti* has been subject to further
elaborations that can be seen as deriving from actual practice. In this
regard, Lingat (1998: 13) remarks that two different opinions on the
topic were supported by different schools:

> If one takes *smṛti* in its etymological sense of human tradition founded
> upon memory, its authority cannot but be inferior to that of *śruti*, which
> is direct revelation of the rule. But in course of time its authority grew to
> the point of equalling that of *śruti*. At a time when *smṛti* was considered
> to be conveyed entirely in a special literature – namely during the age of
> the commentators – two opinions on the subject were in vogue. For
> some ... if *śruti* is silent, [the authority of *smṛti*] is equal to that of the
> Veda. If, on the other hand a rule exists in *śruti* which contradicts what
> is conveyed by the *smṛti*, the former must, naturally, prevail. *Smṛti* thus
> has a secondary authority, dependent upon the non-existence of a cor-
> responding rule in the *śruti*. On the other hand, for other commentators
> such as those who follow Kumārila ... the precepts of *smṛti* are
> invariably founded upon the Veda ... Consequently those precepts have
> an authority equal to those of *śruti*, and, should a conflict occur between
> the two categories, it is permissible to infer a choice between them.
> Common opinion favours the second theory. But ... writers have, thanks
> to various arguments, managed often to remove completely any rule of
> *śruti* which embarrasses them, and to cause that of *smṛti* to prevail.

While Śabara and his followers, who aim to preserve the absolute
primacy of the Veda, are willing to admit that some *smṛti* texts are
non-authoritative, Kumārila favours the authoritativeness of all the
texts of the tradition and gives his own interpretation of Jaimini's
*sūtra* that states that the *smṛti* conflicting with the *śruti* is not
authoritative. He develops his arguments trying to reconcile the
established views for, on the one hand, the *smṛti* is authoritative and,
on the other, this authority can be rejected in case of conflict with
Vedic texts. Particularly, he asks how is it possible to hold that the
*smṛti* is founded on illusion in case of conflict after that it has been
established through fully acceptable arguments that it is founded on
the Veda.

First of all, according to Kumārila, most conflicts can be solved through interpretation. Secondly, on the basis of the theory of the lost Veda, which is generally accepted, he holds that *smṛti* teachings have the same authority of the texts which may be found directly in the Veda.[44] Then, Kumārila provides two interpretations that allow to preserve the authority of *smṛti* in case of conflict with a *śruti* text. According to the first interpretation:

> With a view to offer a salutary advice to the people, what Jaimini says in the *Sūtra* is that, in a case where we find the Vedic text laying down one action, and the *Smṛti* laying down another, – and thus there being an apparent contradiction between the two, on that point – it is desirable that, in practice, we should adopt the course laid down in the Veda. (Jha 1998: 164)

Kumārila holds that in this case there is not a rejection of the authority of the *smṛti* text. In fact, who follows the path laid down in the Veda, meant as preferable, does not negate the authority of *smṛti*. In his view, even in the case of the alternative Vedic injunctions of *yava* and *vrīhi*, someone who during his life uses always one of the two substances cannot be said to have rejected the authority of the other text. Kumārila then supports the idea that, in case of conflict between *śruti* and *smṛti*, both rules are equally dharmic, and the superior source is simply preferable because of its inherent reliability.

Therefore, what is meant here is that *smṛti* texts are generally authoritative because they express what can be found in the Veda using other words. On the other hand, considering that the Veda has a self-sufficient authority and is thus more reliable, it is reasonable that many will be more confident with the dharmic character of the model of action laid down in a Vedic text rather than in a *smṛti* text, but this does not mean that the conflicting *smṛti* text is not reliable and thus it is possible to adopt the behaviour it indicates.

Furthermore, the view for the authority of a *smṛti* text, whose authority has been fully accepted, could be totally set aside when a conflicting *śruti* text is found, can be criticised using the same kind of argument. In fact, if it is possible to discover a contrary *śruti* text after a lapse of time, it is also reasonable to acknowledge that a further *śruti*

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44   For a detailed analysis of these arguments see Jha (1998: 154 ff.).

text supporting the *smṛti* text could be found later on. Therefore, the theory of the lost Veda suggests not to draw definitive conclusions on the authority of a *smṛti* text, whose authority could be hardly disregarded, provided that its teachings are accepted as dharmic by learned persons. Clearly in this view the consequences are very different from those to which one arrives assuming that a person who followed a *smṛti* text conflicting with a Vedic text followed a text founded on illusion from the beginning.[45]

Kumārila provides also a second interpretation, which supports a view that is crucial also in Medhātithi on the relationship with non-Vedic traditions. In this view, the *smṛtis* to be rejected are those of *Bauddhas* and other traditions that are out of the Vedic pale. Kumārila is concerned for the diffusion of compilations and practices that, although contrary to the Veda, could be perceived by people as dharmic optional alternatives, on the basis of the fact that they could be founded on lost Veda. Therefore, he thinks that it is necessary to contrast their authority, and this would be the sense of the principle for *śruti* to prevail on *smṛti* in case of conflict. In fact:

> ... how could any limit be put upon the assumption of such lost texts? And then, any action that may have been accepted by some people for a certain time, – if found to be incompatible with the Vedic texts – might be assumed to be based upon lost texts; and as such would come to appear as of equal authority with the Veda. And it is with all this in view that the *Sūtra* has expressly declared that *when there is a contradiction, that which contradicts the Veda is to be totally rejected.* (Jha 1998: 166)

While an "orthodox" *smṛti* may always have its foundation in at least a lost Vedic text, this is not possible for the compilation of those, like the *Bauddhas*, who negate at the very root the authoritativeness of the Veda and whose rules are generally and patently conflicting with Veda.[46] As a conclusion, Kumārila's interpretation is suitable to organise the differences inside the Vedic tradition, while, on the other hand, define its boundaries. If compared to Śabara's view elaborated

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45  See Jha (1998: 164-165).
46  For a discussion of this topic see Halbfass (1990b: 63-64). According to Halbfass the check criterion to distinguish between orthodoxy and heterodoxy became very uncertain and, on the point, Kumārila is more conservative than other later thinkers such as Jayanta.

in the *siddhānta* we analysed, this second view on conflict between *śruti* and *smṛti* appears more concerned with the "political" exigency to preserve the authority of *smṛtis* and their reliability in the social context. This discussion also shows how these sophisticated theories and complex discussions are not detached from social reality and, on the contrary, their very same elaboration depends on different views the interpreters have on society.


## Other conflicts

Before dealing with conflicts concerning other sources of *dharma*, it is worth noting that a peculiar kind of conflict can be envisaged between *śruti* and *smṛti*. In fact, *Tantravārttika* 1.3.4 explains a case that could be viewed as a case of conflict between different criteria to solve conflicts. While, on the basis of the principle of comparative authority, *śruti* should prevail on a conflicting *smṛti* text, it is stated that a *smṛti* text concerning an action *prevails* over a *śruti* text concerning the qualifications of the action. Then, the content of a text can be a reason to set aside the comparative authority of sources, provided that the *smṛti* text can be held as authoritative.[47]

Interestingly, the cases under discussion concern some acts prescribed in *smṛti* texts in connection to ritual, such as the changing of the sacred thread or the using of the right hand only, that do not conflict with contrary Vedic texts but rather can interfere with Vedic rules on the correct accomplishment of the rituals concerning, for instance, its duration or the sequence of acts. In these cases, considering that the injunctions have not the same object, it is not possible to speak of inconsistency in a strict sense and a broader concept of conflict is involved, that is, the incompatibility between actions taking part in the complex structure of ritual. As a result, the existence of a conflict should be ascertained in practice. In this case also, however, the interpreters tend to solve the conflict through interpretation, trying to preserve in any case the primacy of the Veda.

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47   This discussion is developed on *sūtras* 5-7, which are those that Kumārila interpreted differently from Śabara as dealing with the authority of *sadācāras*. See Jha (1988: 169-177).

We have considered the way in which conflicts are perceived and dealt with in Hindu jurisprudence analysing the discussion of the case of conflict between two Vedic texts and the case of conflict between Veda and *smṛti*. Certainly, several other kinds of conflicts may occur, because each source may conflict with the others. Secondly, a conflict may occur between rules that derive from the same source and are thus equally authoritative.[48]

The most relevant cases, also from a quantitative point of view, are the conflicts between *smṛtis* or *sadācāras* and the conflict between *smṛti* and *sadācāra*. The way to cope with these further conflicts is similar to the way to cope with conflicts between two *śruti* texts or between *śruti* and *smṛti*, which provided the paradigms of conflicts between sources having the same or a different authority.

In the case of conflict between two *smṛti* texts, which is of course a frequent event, both texts should be considered as equally valid and the possibility to choose between them is allowed.[49] The same can be repeated for conflicts between *sadācāras*, for mutually contradictory practices of good people of different countries should be considered as equally dharmic. This is the result of the fact that the authority of all sources of *dharma* is founded on the Veda and then it is possible to consider every kind of conflict as a case of conflict between Vedic texts.

The theory of the lost Veda is relevant also as concerns conflicts between sources having different authorities. In fact, for instance, a conflict between a *smṛti* text and a *sadācāra* can be seen as a case of conflict between two original Vedic texts on which their authority is based. Therefore, the two opinions we saw on the application of the hierarchical criterion concern this case also.

In the previous chapter we analysed a discussion on Brahmin women who drink alcohol and on the practice of marriage with maternal cousins, remarking that the crucial point is whether a prac-

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48   However, the internal differentiation of the authority of each source has to be taken into account. For instance different kinds of Vedic texts can have different authorities and *smṛti* texts, although in principle provided of equal authority, can be held in practice as more or less authoritative.

49   This is the prevalent opinion. See Medhātithi on Manu II.15 (Jha 1999: 226). According to Sarkar (1909: 96-97) in this case of conflict, being *smṛti* texts considered as proceeding by the same Vedic text they have to be construed in such a way to solve the conflict.

tice conflicting with a Vedic or a *smṛti* text should be considered a violation of that text or a valid alternative model, a *sadācāra*. Moreover, applying the hierarchical principle the *smṛti* should prevail anyway over a *sadācāra*. On the contrary, it could be held that a seeming violation is actually a *sadācāra* that embodies an equally authoritative rule, as equally Vedic-founded.[50] The interpreter has thus many options and much depends on the particular question involved.

As concerns *ātmanastuṣṭi*, we saw that one of the main views is that this source has a role in the determination of the appropriate action in case of *vikalpa*. In this sense, *ātmanastuṣṭi* would be the way to choose among several options and therefore it would be relevant only in limited cases. But we have also considered a different view according to which *ātmanastuṣṭi* could also prevail over a superior source, including a direct Vedic injunction, on the ground of the application of the theory of option between actions that can be held as equally dharmic because of their Vedic foundation. Finally, the case of conflict between two courses of action indicated as appropriate by *ātmanastuṣṭi* could seem at first glance a scholastic hypothesis. However, in my view, taking seriously the fact that this source is a proper source of knowledge of *dharma*, a conflict could be envisaged considering that, although known through an internalised process, the resulting rule is objective. Therefore, someone could be in the position to choose between two alternative rules indicated as dharmic by the self-satisfaction of two sages.

The resulting picture is actually very complex and one could think that dharmic rules were undetermined or that, at the end of the day, everything could be said to be *dharma*. This would be a partial conclusion. In fact, also through the interplay of sources and the application of the principles we analysed, *dharma* was determined and contextualised in practice, as we will see in the next chapter.

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50  In this regard, it is also worth remembering that according to Medhātithi there is no difference between *smṛti* and *ācāra,* because the "codification" is a completely immaterial aspect.

# PART III

# CONCLUDING ANALYSIS

Chapter 7

# The interplay of sources

## Introduction: The making of Hindu law

In the previous chapters we analysed the theoretical groundings of the
sources of *dharma* in Hindu jurisprudence. Those theoretical, seldom
sophisticated, discussions could appear at a considerable distance
from practical law. They provide the arguments to state which are the
authorities as concerns the knowledge of *dharma*, reaching established
views on the authority of Veda, *smṛti*, *sadācāras* and *ātmanastuṣṭi*.
They also provide indications to distinguish within a vast mass of
normative materials, to assess the extent of the authority of specific
parts of the Veda, to discriminate between authoritative *smṛtis* and
non-authoritative ones, to understand which *ācāras* are authoritative,
to decide on conflicts, and so on. These established views are the
outcome of reasoning, because, as we have seen at every step of this
analysis, rational discussion is always involved in these topics. This is
also evidence of the prominent argumentative character of Hindu
jurisprudence, which would not need to be emphasised if there was
not a diffused and implicit understanding of anything Indian as mystic
or non-rational.[1]

The brief indications on sources of *dharma* we find in *dharma-
śāstra* texts are simply the encapsulation of a debate that is developed
in other texts, particularly in Mīmāṃsā texts. All interpreters were
aware of these problems and, by turn, contributed to their theoretical
elaboration. In fact, the mere list of authorities on *dharma* could be

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1    In this regard, it is worth noting that ancient Indian philosophies on language and
     logic are now increasingly recognised in contemporary philosophical research.
     See, for instance, Ganeri (2001). For a wider approach, which highlights the re-
     levance of argumentative traditions for modern India, see Sen (2005).

not sufficient for an interpreter who has to deal with by far more complex interpretative questions while ascertaining the rules of *dharma*.

Jurisprudence has different sides, and a practical one along with a theoretical one.[2] The works composing the *dharmaśāstra*, differently from the works of Mīmāṃsā, are made up of rules of behaviour and represent a practical jurisprudence that directly addresses the appropriate way to behave in different contexts. In a legal experience that is not based on sovereign rule-making, a prominent place is played by the authoritative opinions of experts of *dharma*, who may claim to be and actually are perceived as the recipients of an authoritative tradition. Considering that *dharma* is something that has to be known and is not posited, and in this sense is a kind of natural law, the Hindu legal tradition is primarily based on knowledge and then on more or less authoritative views. They are not binding and come into practice to the extent to which they are considered as an appropriate understanding of *dharma*. Ultimately, their role in living laws depends on their acceptance in social contexts.[3] On the other hand, those who adhere to the legal-cosmological framework of *dharma* will naturally search for a source of guidance in the expert opinion of subjects who are qualified for their being good and learned. However, the experts of *dharma* are themselves part of society and, in this sense, they properly elaborate on what they have before their eyes.

It is worth remarking that not every expert of *dharma* is also an author of a *dharmaśāstra* text or a commentary. The texts we possess are only a limited expression of the thought on *dharma* that has been developed in different contexts aiming at ascertaining appropriate behaviour in different practical contexts. The theoretical framework we tried to describe is part of the education of all learned experts on *dharma*. Much of the theoretical jurisprudence we analysed was firstly addressed to interpreters and theoreticians themselves. In fact, the

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2     See Davis (2004a), who makes reference to Weiss (1992). However, while Davis holds that *dharmaśāstra* is theoretical jurisprudence, in our view it could be considered as practical jurisprudence, as far as it is concerned with the elaboration of rules of behaviours. On the contrary, Mīmāṃsā could be seen as the theoretical investigation into *dharma* and its sources.

3     In this regard, Medhātithi's discussion on new *smṛtis* we saw previously points out that many can claim the authoritative character of their teaching but this is tested by other interpreters and by the community at large.

ascertaining of *dharma* requires the capability to manage this complex system, through distinctions, classifications and technical concepts. In this sense, the practical work of interpreters depends on that underlying structure of thought, which is thus at the roots of Hindu jurisprudence. However, the process of ascertaining *dharma* cannot be restricted to learned interpreters used to complex reasoning. Mīmāṃsā and *dharmaśāstra*, taken by themselves, appear as a coherent and self-sufficient body of knowledge that was developed through centuries, but the theoretical groundings we have studied in the previous chapters are only a part, albeit indeed a fundamental one, of the complex phenomenon that is labelled as "Hindu law".

In this book, we have focused our analysis on the sources of *dharma*, trying to point out some characters that help in the understanding of the complex functioning of Hindu law. In this final chapter, we need to consider the way in which the different sources of *dharma* that are recognised as authoritative in this tradition interplay between themselves and with other factors. We will then consider some general characters of Hindu law, which at the end of our analysis could be better understood.

One of the prominent features of this law is the tension between unity and diversity. What is called Hindu law is actually a *set of normative systems* evolving and interacting from the Vedic period to the modern age (Menski 2003; Davis 2004a). This fact does not prevent to envisage a unity in this legal culture. On the other hand, diversity and interaction between different normative systems, in other words pluralism, can be viewed as the rule everywhere, raising a competition between processes of differentiation and unification that resulted in different historical manifestations.

The problem of unity and diversity is then a fundamental one. We will consider it at first dealing with the question of the universal authority of sources of *dharma* and, secondly, considering which role was played by interpreters in determining local normative systems. We will then make a reappraisal of the way in which the sources were managed by the interpreters in practice.

The theoretical groundings of the sources of *dharma* should be considered as the background for the analysis of Hindu law institutes, such as for instance marriage. The theory of sources as indicators of *dharma* helps in the understanding of the complex process through

which the rules composing any single institute are elaborated. Some rules will possibly be derived from Vedic texts, some others will be derived from *smṛti* texts, and some rules, usually the majority, will be derived from *sadācāras* and *ātmanastuṣṭi*. In other words, our point is that all sources of *dharma* interact dynamically in the doctrinal establishment of the rules of *dharma*.

This process of interpretation is considered by Lingat (1998) as one of the ways in which *dharma* becomes law, that is to say, a historical reality. The other two factors would be the sovereign and customs. This is a debated issue, particularly as concerns the relationship between *dharma* and law, and we will deal with it from a limited perspective, trying to point out the interaction between the sources of *dharma*, which were at the core of our analysis, and other important components of the making of Hindu law.

Finally, summarising some important points that emerged from our analysis, we will try to point out in a comprehensive way the multilayered process of ascertainment of *dharma*. Particularly, the theory of sources we analysed provides relevant insight not only on the work of learned interpreters but also on the way in which all Hindus searched for appropriate behaviour.

## Universal and particular authority

Analysing the concept of *dharma* we saw that differentiation is crucial in the Hindu conceptions of law. It manifests itself both as differentiation on a personal basis and as differentiation on a local basis. *Dharma* has primarily no local dimension and one of the keys to understanding Hindu jurisprudence is the balance that is continuously searched for and realised in different contexts between universalism and local traditions, constantly reconnecting very different forms of life to a single culture.

The complex relationship between unity and diversity may be highlighted through the discussion on the universal or particular authority of sources that is developed by Hindu jurisprudence. In the *Tantravārttika* this topic is addressed in the *holākādhikaraṇa* (I.3.8), which particularly deals with the extent of the authority of local cus-

toms in connection with the extent of the authority of Vedic texts as-
sumed at their support.[4]

We already saw that the practices followed in different parts of
the country can be very different. In fact, there are some customs that
are followed by Eastern people, even though not by everyone and
particularly not by exceptionally good people, while other practices
are peculiar of Western, Northern or Southern people. Considering
that *sadācāras* are not simply facts but, on the contrary, have a norma-
tive value, the problem is whether the authority of local practices is
restricted to the people who actually follow them or if they should be
held as authoritative for all men.

The same problem is considered with regard to *smṛtis* as well. In
fact, while the authority of *itihāsas*, *purāṇas* and the *Manusmṛti* is
accepted everywhere, other important *smṛtis* are accepted as authori-
tative and studied only by specific Brahminical circles. Therefore, this
"limited acceptance" raises the problem whether their teachings and
the rules they include are authoritative only in those contexts or, on
the contrary, are authoritative also for people who do not explicitly
accept and follow them.[5]

According to the *pūrvapakṣa*, those practices and texts have a
limited authority, while the *siddhānta* establishes the universality of
their authority. The main argument of the *pūrvapakṣa* is based on the
consequences that derive from the kind of reasoning that is generally
used to state the authority of sources. This reasoning, as we saw, starts
from the consideration of the acceptance in practice of the authority of
a source, a particular text or custom, and then arrives, through in-
ference, to state the existence of a supporting Vedic text. In other
words, the inference of a supporting Vedic text aims to *explain* the
otherwise unexplainable fact of the authority in ·practice of some
sources and of the observance of the rules they lay down. As a result,
strictly speaking the authority of the supporting Vedic texts should be
limited to those persons who actually follow certain rules and could

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4    The discussion is developed in the commentary on Jaimini's *sūtras* 15-24. *Sūtra*
     15 embodies the *pūrvapakṣa*: "Inferences being restricted in their application,
     usages can have only a limited authority" (Jha 1998: 244), while *sūtra* 16 em-
     bodies the *siddhānta*: "But the duty must be universal, because of the universal
     character of the Injunctions" (Jha 1998: 246).
5    See Jha (1998: 244-245).

not be generalised to all men. Interestingly, in this view the Vedic texts themselves have no universal authority and should be considered as directly addressed to particular groups.[6]

Another argument used in the *pūrvapakṣa* is grounded on the parallelism with other cases of norms applying only to specific classes of persons. In fact, different norms are followed by different castes and families, and they can also vary depending on the stage of life. Nobody doubts that those rules are not general rules that apply also to others and, according to the *pūrvapakṣa*, the same could be repeated as regards the different rules followed in different parts of the country, which therefore would be particular rules having limited authority and restricted application.

If the *pūrvapakṣa* acknowledges the existence of non-universal Vedic texts and non-universal dharmic rules, the established view reverses this perspective and states their universality. In this view, Vedic injunctions, *smṛtis* and *ācāras* apply to all those who are capable to perform the prescribed acts, if no particular qualification is explicitly required and their performance is not expressly prohibited to specific classes of persons. In other words, the general rule is the universal application, while limits may be recognised in some circumstances.[7]

The point is then to establish whether the inferred Vedic text could present some qualifying expression limiting its application on a local basis. According to the *siddhānta*, while a usage diffused among a particular caste, for instance, could lead to infer a supporting Vedic text that is specifically addressed to that social group, it is impossible to infer a Vedic text specifically addressed to the inhabitants of a part of the country.

Several arguments are developed in this regard. First of all, the hypothetical Vedic text that should be inferred at support of the practice of *holākā* could have a form such as "the *holākā* has to be performed by the Easterners alone". But, according to the *siddhānta*, the term "Easterners", differently from a term such as "Brahmins", cannot denote a definite class including all persons living in the East and excluding all persons living in other parts of the country. As a matter of fact, the *holākā* is accepted by many people who do not live

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6    For the analysis of this and the following argument see Jha (1998: 245-246).
7    See Jha (1998: 247).

in the East and, conversely, is not accepted by some Easterners.[8] More generally, some practices that are followed in a part of the country are actually observed as *dharma* in other parts as well and, in addition, are not followed in a uniform way.

Furthermore, the term 'Easterners' may refer to the inhabitants of the East but also to those born in the East or those who come from there, and, in fact, the *holākā* could be followed also by persons who do not live in the East but descend from originally Eastern families.[9] Therefore, a name such as "Easterners" is not sufficiently delimited and clear to denote invariably the same class of persons. On the other hand, it is impossible to infer a Vedic text containing an expression that denotes Easterners singularly as individuals because clearly that text should qualify all Easterners of all times. Considering that in this view a word can qualify only classes or individuals there is no way to restrict the application of an injunction, which has a general character by its nature, on the basis of the part of the country where it is prevalent.[10]

According to a different and more sophisticated reasoning, once established that it is impossible to infer an injunction containing a qualification of the agent, it could be possible to infer a Vedic text in which the restriction is made directly with reference to place as an element of the act. In this view, a specific act can produce its results only if performed in a specific place, for instance in the East of the country, because the place of performance is a constitutive element of the act. However, this view is rejected because in this case also the word "East" would lack of a sufficient qualifying power, considering that, for instance, the same place could be East or West depending on the point from where it is observed.[11]

As a conclusion, in principle a rule has universal authority but this authority may be restricted on the basis of some specifications such as, for instance, the *varṇa* of the agent, but not on the basis of the place. This means that *dharma* cannot be locally differentiated and

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8    See Jha (1998: 247 and 255).
9    See Jha (1998: 256). This is an interesting reference to the laws followed by persons moving within the country and may be seen as a clear statement on the personal character of laws, which is still a basic aspect of Hindu law, meaning that Hindu law moves with Hindus wherever they go in the world.
10   See Jha (1998: 248).
11   See Jha (1998: 257).

what is *dharma* in the East is *dharma* also in the West. Remarkably, the arguments expounded in the *holākādhikaraṇa* are connected to the general theory of Vedic foundation, for the discussion bears on the form of Vedic texts inferred in support of local rules. Thus, the universality of *dharma* is not stated on the basis of general arguments such as the need of uniformity, considered as a value, or justice.

From these conclusions about the universal authority of *dharma*, and then of dharmic rules included in *smṛtis* or embodied in *sad-ācāras*, some complex problems arise. In fact, if a rule that is followed in the East of the country should be deemed as authoritative in the whole *āryāvarta*, it should be followed in the West also, where a different rules could be actually prevalent. Does this mean that a dharmic rule is violated in the West? And, conversely, do the East-erners violate the rule that is prevalent in the West, which is equally dharmic?

According to Hindu jurisprudence, *dharma* is *dharma* everywhere but, depending on the part of the country, one among different dharmic forms of life emerges as the accepted rule, without negating the validity of others. Different forms of life are arranged side-by-side and justified in dharmic terms starting from diversity. This juris-prudential way of reasoning aims to provide a cultural unity to a plurality of norms and legal orders and, in this sense, it is a powerful factor of legitimation.

This discussion on local rules can be seen as bearing on the existence or less of a single normative system that is valid for all. This question is clearly connected to the problem of conflict, because a conflict may occur only between rules that are part of the same system. As we saw in the previous chapter, in the dharmic system different and even contradictory courses of action can all be con-sidered as valid. The coherence of the system is preserved through the *vikalpa*, that is, through the possibility to choose between different courses of actions. Particularly, in this conception to accept a rule does not mean to reject the authority of the competing rule, and following the first rule one does not violate the other one. The keyword is *emergence*: contradictory models of behaviour can stay together because in a given context one of them *emerges*. Never-theless the other remains valid and, by turn, could emerge in another context.

This shows a peculiarity of the *vikalpa* that presents some interest for general jurisprudence. Two contradictory rules can be considered as part of the same normative system, provided that this system is conceived as inherently differentiated. What is crucial is the existence of a "connecting structure" that is capable to organise this inner variety. Hindu jurisprudence finds this organising principle in the Veda. In this regard, Halbfass (1990b: 63-64) argues:[12]

> The Veda is the self-differentiation of the absolute; and this fundamental internal differentiation is extended into the variety of human "views" and traditions. Whether legitimate or not, all these various "views" seem to be indebted to and originating from the inner variety of the Veda. The Vedic word, though always one, is being handed down in many different recensions; it has numerous local and other varieties and many different "forms"... Human views and interpretations somehow continue the self-differentiation of the absolute; the variety of the perspectives or approaches is internally meaningful and corresponds to the very nature of seeing (*darśana*) ... the Veda is the "arranger" (*vidhātṛ*), that is the organizing structure not only of all legitimate religious or scholarly traditions, but also of society and culture in general and ultimately of the whole world.

The normative system maintains its unity because of the common origin in the Veda of contradictory rules and, importantly, because of the acceptance of the inner variety of the Veda. Certainly, the variety of *dharma* does not conform to a modern value of equality.[13] Particularly in modern positivistic thought, the coherence of the normative system is connected to unity, meant as uniformity of the system, but the pluralistic structure of Hindu law shows that unity may be reached organising differences rather than setting them aside.

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12  Halbfass makes reference to Bhartṛhari's thought, but at this level of analysis his statement can be generalised.

13  Consider, for instance, the following statement of Bobbio (1993: 234-235): "It is evident that where two contradictory norms are both valid, and both may be indifferently applied, according to the free judgement of those who are called to apply them, two fundamental exigencies, which inspire, at least as tendency, legal systems, are violated: the exigency of certainty (which corresponds to the value of peace or of order), and that of justice (which corresponds to the value of equality)" (translation of the author).

## The role of interpreters and the nature of *dharmaśāstra*

Although theoretically universal, *dharma* is concretised in particular contexts depending mainly on place and social groups. Which were the factors of determination of the different local normative systems? According to a prominent view, a crucial role was played by the work of interpreters and by the confirm of the practice. In this perspective, Lingat (1998: 171) argues that "different juridical systems actually grew up based on the same totality of texts and drawing their authority from nowhere else but the texts which they all held sacred". The different normative systems that arose were perceived as deriving from the same sources and then as belonging to the same culture. According to Derrett (1970: xxx) *dharmaśāstra* is "the only learning binding all castes and groups together and making them partakers of the same civilization".

Particularly in Lingat's view, the starting point is the *dharma-śāstra*, conceived as a whole including a huge number of texts. From there, different normative systems were derived by interpreters working on texts. In my view, this approach, although highlighting an important aspect of the making of Hindu laws, adopts a too simplistic conception of the role of texts. In fact, suggesting that different normative systems were derived from the same texts, it seems to overlook the fact that differences were already there. Therefore, this perspective could be partially reversed taking into account that multiple pre-existing legal systems were partially unified or connected from this literature tracing them back to the same origin. As a matter of fact, different rules were followed by different castes in different areas of the country in different contexts. These differences were legitimised in the Vedic culture as developed in the Hindu tradition. In this sense it is only partly true that different normative systems derived from the same texts. The other part of the truth is that different normative systems were elaborated in a unitary way, due to the theoretical foundation they found in the work of interpreters.

Differentiation or pluralism is a matter of fact, which may be accompanied or not by an adequate theory. In this regard, certainly Hindu jurisprudence was able to elaborate a conceptual approach that was capable to tie unity and diversity.

A very important point has to be remarked as concerns the nature of *dharmaśāstra*.[14] Following an attitude that explicitly or implicitly suggests that *dharmaśāstras* are a sort of legal code, it is common to use the term "interpreters" to refer to those who interpreted them. On the contrary, in our view, at a first place, the *dharmaśāstra* themselves may be considered as interpretative texts, in the sense that they are the outcome of the knowledge and wisdom of a particular expert of *dharma*, who formulated its teaching to the advantage of others. In this regard, Olivelle (2005: 6) writes:

> ... the composition of these texts did not happen as an unconscious and gradual accumulation at different hands and at different times and places; these texts were *authored* by individuals with clear authorial intent. They gave their texts a particular structure; they argued for particular positions in law and morality; they disagreed with other experts, both their contemporaries and their predecessors; and they had particular social, economic, and political axes to grind. In all this they are not much different from modern authors.

Authors of *dharmaśāstras* select and consolidate some rules, giving them a structure according to a more or less complex unitary plan. In this sense, every single *dharmaśāstra* may be seen as a more or less personal view on *dharma* and as the authoritative establishment of a set of dharmic rules, even if not at all complete.

Analysing the theory of sources elaborated in the *Tantravārttika* and in the commentary of Medhātithi on Manu, we saw that *dharma-śāstra* texts are considered directly connected to the Veda, in the sense that the rules they include would be the recollection and transmission of rules already contained in the Veda, which are either lost, due for instance to the interruption of a line of Vedic transmission, or difficult to recognise because their elements are scattered in different Vedic texts. In this view, the specific function of the *dharmaśāstras* is precisely to help make extrinsic, organise and transmit the knowledge of *dharma*.[15]

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14  In this context we use the term *dharmaśāstra* as including *dharmasūtra* also.
15  This involves a view on interpretation as a way to make rules extrinsic and therefore a view on the role of interpreters. In this sense, *dharmaśāstras* may be conceived as a rearrangement of several kinds of normative materials, including Vedic norms, even fictitiously.

Furthermore, even in the *dharmaśāstras* there are references to the opinions of sages and authors of other texts on *dharma*, which are presented as particularly authoritative or added as alternative views to the opinion of the author of the text, and quotations from other texts belonging to *smṛti*, especially *purāṇas*.[16]

*Dharmaśāstra* texts are therefore far from being *codes of dharma*, containing general and binding norms. But even though they have not by themselves a binding authority, they are authoritative on the ground of their reliability as concerns the knowledge of *dharma* and, therefore, are an authoritative reference. It is easy to understand that some texts, such as those ascribed to Manu and Yājñavalkya, acquired such an authority to be "canonised". This canonisation has probably contributed to the faulty image of considering Manu as the Hindu legislator.[17]

Those texts on *dharma* were further interpreted through the work of authors of commentaries and *nibandhas*, who commented a particular *dharmaśāstra* or arranged normative materials drawn from different texts. According to Lingat (1998) commentaries and *nibandhas* mark a new epoch in the Hindu tradition, for the production of *dharmaśāstras* is basically interrupted and the development of the "science of *dharma*" is left to the literary genre of commentary. Therefore, even if it could be argued that 'modern' *dharmaśāstras* continued to be composed, they did not acquire an authority and diffusion comparable with that of classical texts. Commentaries took as their basis a teaching that had become fixed, in its textual form, and to which an authority almost equal to that of the Vedas was attributed.

Commentators clarify the meaning of the texts of the *śāstra*, which in many cases had become obscure. However, even at the level of etymological or grammatical discussion, interpretation could arrive at a substantial reformulation of theories and rules, as we saw in many cases analysing Medhātithi's commentary on Manu. Furthermore, commentators extend their discourse beyond the limits of the text that they are commenting on and recall a number of other texts and opinions on the debated points, accepting or rejecting them. In this

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16  See, for instance, Āpastamba 1.18.26 in Olivelle (1999). Generally speaking, many indications on texts that are not any more available may be drawn indirectly from quotations in other texts.

17  See Doniger (1991: xviii).

way they arrive at the view that according to them is the correct one on the subject-matter.

Notwithstanding the existence of different literary genres, there is a substantial continuity of the hermeneutical process developed on *dharma*. Therefore, what we are going to say on the way interpreters worked applies, in our opinion, to authors of *dharmaśāstras* and commentaries, and to other interpreters that were not authors of any text as well.

According to Lingat (1998: 157), "the principal task of the interpreters was to extract the rules of *dharma* from the mass of authoritative texts". The conceptual basis of this exegesis is the *ekavākyatā* principle, which provided to interpreters a point of reference to link several texts, aiming to reconstruct an "institute" considered as one and the same. Lingat (1998: 181) argues:

> According to Jaimini and Śabara, all recensions of the Veda and of the *brāhmaṇas* form a single body, so that a rite like the *agnihotra* must be considered one and the same in all recensions, even though certain details figure in many of them and are omitted in others. The commentators and digest-writers have extended that conception to *smṛti*, so that it lies at the root of their system of interpretation.

The interpretative system elaborated for the ritual by the Mīmāṃsā was the typical way to organise normative texts. Organising texts and actions, interpreters had to cope with a number of conflicts between different texts and made recourse to the methods of practical reasoning we saw previously, for instance the differentiation of scopes of application or the recognising of an *arthavāda*.

Remarkably, the *śāstra* was conceived as a totality and no difference was made on the basis of a temporal criterion, according to which the most recent *smṛti* should prevail over the most ancient, which is actually a criterion that makes sense only as concerns modern legislation. In fact, this criterion hardly matches Vedic texts, which are all viewed as eternal, as well as *smṛti* texts, which, even though composed by human authors at a definite time, are conceived as transmission of a normative knowledge that by its nature is not contingent. In many cases the works belonging to *smṛti* were considered from the tradition as composed by mythical authors. In

addition, texts were modified and subject to interpolation and progressive addition so that there was an organic growth.[18]

Nonetheless, the temporal criterion acquires in this context a peculiar aspect because a way to differentiate the authority of different texts is that of considering some norms laid down as appropriate for a particular age (*yuga*). Moreover, according to some authors one should follow the rules expounded in particular texts, held as provided of a bigger authority, or the *communis opinio* of experts of *dharma*, that is to say, the prevalent opinion emerging from texts. These jurisprudential meta-rules were as much authoritative as the authors who suggested them.[19]

Generally speaking, the logic of authoritativeness is different from the logic of authority, and has a qualitative character rather than a quantitative one. For certain, nothing similar to a general rule should be supposed and if some *smṛti* author says that Manu prevails, or if Parāśara says that his work expounds the rules suitable to the *kali* age, it remains his own opinion, which may be accepted or not by other authors. On the other hand, clearly some texts became more authoritative in practice, despite their equal authority in principle. This also depended on different places where the texts were received. The importance acquired from particular interpretations of the *śāstra* had a role in establishing some rules of behaviour in local contexts.

As for the interaction of different sources, we saw that Mīmāṃsā's theories that underlie the work of the interpreters clearly state that the superior source should prevail over the inferior one. However, equally we saw that the hierarchical criterion, at least in the view that by the time became prevalent, is practically set aside,

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18  On the other hand, a single work is normally the outcome of a tradition and the attribution to an author does not exclude a collective enterprise.

19  See Lingat (1998: 158-159): "Bṛhaspati ... gives superiority to Manu above all the other *smṛtis* and declares that a *smṛti* which contradicts Manu has no authority (*manvartha-viparitā tu yā smṛtiḥ sā na śasyate*). But this opinion has not prevailed, and Bṛhaspati himself often differs from Manu on important points. Likewise no more than an echo has been heard of the verses of the *Parāśara-smṛti* (I. 22-23) according to which the rules proclaimed by Parāśara alone would be valid for the Kali Age ... For its part, the *Gobhilasmṛti* (alias the *Karmapradīpa* of Kātyāyana) declares that in a case of conflict it is the rule accepted by the *majority* of authors which should be observed. This mechanical method of resolving conflicts (which recalls the curious 'Law of Citations' of the late Roman empire) seems never to have been employed by our interpreters".

because all conflicts can be considered as conflicts between even inferred Vedic texts, and then between equally authoritative texts. This involves that conflicting models of behaviour are all valid and the determination of the rule to be followed in practice has to be made evaluating the *preferability* of one of them.

In this regard, remarkably the interplay between different sources is crucial, for in case of conflict between two *smṛti* texts, the text that is confirmed by *sadācāra* should prevail.[20] This criterion is particularly relevant as concerns local differences. The general principle seems to be that, notwithstanding the validity in principle of different models of behaviour, in practice it is appropriate to follow the rules accepted by good people in one's own environment. In this regard, the highest value is recognised to the path of fathers and forefathers. Thus, the somehow undetermined śāstric solutions are locally concretised. As a result, although theoretically open to many dharmic solutions, a local system will be dependent on the existing path, which is assumed to be the appropriate *dharma* in practice in a certain context.

From a different perspective, the prevalence of *sadācāra* over written texts is a matter of fact, and written texts "follow" the rules accepted in practice. However, in this dynamic between textual and non-textual elements the interpreters carry on a process of evolution of the dharmic system, according to the specific needs of the environment they address. In fact, the theoretical unity of *dharma* provides in principle the possibility to change some rules wherever a new rule could be justified as equally dharmic, and, as Lingat (1998) argues, the interpreters tried to suggest rules which had more chances to be accepted.[21]

On the contrary, a dharmic rule may be set aside if it is not recognised as suitable, that is to say, if it is disapproved or has become repugnant, as expressed through the concept of *lokavidviṣṭa*.[22] The fact that a dharmic rule included in a *smṛti* text could be set aside by the community's perception is not surprising if we consider that, ac-

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20 See Kane (1962-1975, III: 866-867), who mentions several views on this point.
21 In this sense, their approach can be considered as "realist" in the sense of "legal realism". On legal realism and Hindu law see Davis (2006b).
22 On the importance of this concept see Lingat (1998), Menski (2003) and Davis (2006b).

cording to Hindu jurisprudence, to set aside that rule does not mean to completely reject its authority but rather to accept other equally dharmic rules that are perceived as more appropriate. As a result, the foundational concepts of Hindu law make it flexible and open to new forms and "manifestations". In fact, even if at a local level the evolution of laws may be slow, those theoretical underpinnings allow a wide range of solutions, totally new or possibly followed elsewhere, to be accepted preserving the continuity of tradition.

We previously saw that in this process also *ātmanastuṣṭi* has a role to play as an ultimate criterion to judge the appropriateness, that is, the dharmic character of a behaviour. Therefore, the picture is very complex. To sum up, the logic underlying interpretation is inspired by the need to ascertain the most appropriate rule as emerging from a plurality of sources, textual as well as non-textual. On the other hand, the sources of *dharma* are and remain *śruti, smṛti, sadācāra* and *ātmanastuṣṭi* for *smṛti* authors themselves. In other words, the authors of *smṛti*, which is one of the sources, cannot but rely on all sources.[23]

The interpreters, in fact, wherever possible try to consider direct Vedic texts. Secondly, they make reference to the authoritative teachings that are embodied in the *smṛti*. In addition, more significantly, they rely on the approved practices they had before their eyes. To ascertain rules from practice is not an instance of naturalistic fallacy, because those facts-behaviours are seen as compliance with dharmic rules and have by themselves a normative character.[24] Ultimately, they rely on their own intuition of right and wrong, that is, *ātmanastuṣṭi*.

The interpreters are interested to *ascertain the dharmic rule*. Therefore, their work should be conceived, rather than as an interpretation of Veda and *smṛti*, as an investigation into *dharma* that may

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23  In fact, the lists of sources of *dharma* can appear as a declaration by the author on his sources. For instance, the *dharmasūtra* of Āpastamba begins with the following words: "And now we shall explain the accepted customary Laws, the authority for which rests on their acceptance by those who know the Law and on the Vedas" (Olivelle 1999).

24  Naturalistic fallacy is widely discussed by legal theorists. It means that a norm cannot be derived from a mere fact, because that something happens does not mean that it should happen. Equally, from the performance of some acts it does not follow that those acts should be performed. See, for instance, Lombardi Vallauri (1981) and Carcaterra (1969).

be carried out through several means of knowledge, which are considered more or less reliable. As a conclusion, it is hardly possible to think in terms of definite steps and neat distinctions between different normative sources. The hierarchical order of sources thus operates in complex ways and must be read as a principle helping to ascertain different levels of authoritativeness rather than a formal principle, so to say a mechanical process, limiting the freedom of the interpreters in their investigation into *dharma*.

## Customs and the ruler

Lingat (1998) holds that *dharma* as such is not law, or it is an ideal law, and the passage from *dharma* to law requires the intervention of three factors, that is to say, interpreters, customs and political power. This approach, although providing interesting insight, can be questioned because it makes of *dharma* an ideal normative order that is transformed into real law, which thus is neatly distinguished on a conceptual level.

In our view, the distinction between *dharma* and law, if any, should not be made on the ground of the ideal/real distinction, because the rules applied in social practice, also through the work of interpreters, or enforced by the ruler are still *dharma*. In other words, the conceptual groundings of *dharma* allow us now to explain the dynamics between natural laws and effective laws in dharmic terms. Having considered in the previous paragraph the role of interpreters and partly the role of local customs in determining *dharma* as a historical fact, we will now focus on a troublesome distinction between *sadācāra* and custom and on the role of the ruler.

As for *sadācāras*, according to Lingat, they would not be customs in a proper sense, meant as what is commonly done by the majority of people. While *sadācāra* would be the genuine source of *dharma*, customs are viewed as normative facts, which nonetheless would have no dharmic bearing. In this view, customs more properly would be a *source* of *law*. Lingat (1998: 14) writes:

> One must take care to avoid confusing this "ideal" custom with what *we* call custom, that is to say practices confirmed by immemorial usage,

custom followed by everyone, habitual practices of a group, perhaps arising from convention. Custom pure and simple is indeed a source of law, but it is not a source of *dharma*. *Sadācāra* is a religious life, exclusively orientated towards the acquisition of spiritual merit. It amounts to the practices observed from generation to generation by *śistas*, or those who are at once *instructed* and virtuous.

This problem is certainly connected to the qualifications that *sadācāra*, and also *ātmanastusti*, should have to be held as authoritative. In Lingat's view, *sadācāra* is the behaviour of *śistas*, of persons who are learned in the Veda and act according to it. Hindu law scholarship generally accepts this view. [25] As we saw, Medhātithi and Kumārila clearly state that only *sadācāra* and *ātmanastusti* of learned men are authoritative. However, the requisites that are laid down in the texts we considered can be interpreted in a more or less restrictive way.

Holding the restrictive view, we could argue that the restriction of *sadācāra* and *ātmanastusti* to some subjects may be understood considering that *dharmaśāstra* and Mīmāmsā texts were written by Brahmins mainly for a Brahminical context. In this context normative practices cannot be anything else than practices of *śistas*, learned Brahmins who obtained great respect and authoritativeness in their community. However, the principle according to which the models of behaviour of authoritative persons belonging to one's own circle are normative and have to be taken into account in the process of ascertaining *dharma* may be easily generalised. In fact, in other contexts the model of women or low-caste persons, who by definition are not learned in the Vedas, is normative and may be used as a source of guidance. The general principle is appropriateness: everyone has to

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25  For a discussion see Davis (2004a). Menski (2000; 2003) criticises the understanding of *sadācāras* as a model of correct behaviour that is exclusive of learned men. It is worth remarking that Lingat himself (1998: 180) acknowledged that: "Certain late writers, like Mitra-Miśra, see nothing in *sadācāra* but the practices of good people, even when they are *not* learned in the Veda; and they admit that even for Śūdras the customs of their ancestors are a source of knowledge of their *dharma* which are authoritatively binding upon the descendants".

conform the behaviour to what is done and approved by respected people of one's own community.[26]

However, a broader view can be held. Actually, what is crucial is that, to be authoritative, a practice must have a Vedic foundation. According to the theory of the lost Veda, the connection with Veda can be recognised presuming that a given existing practice is based on Vedic texts. In this sense, the practices followed by different social groups in different parts of the country can all be considered as *sadācāras* to the extent in which they can claim to be good practice on the ground of their being in keeping with the Vedic tradition. Therefore, *sadācāras* can also not pertain strictly to *śiṣṭa*, while they should be approved by *śiṣṭas* as dharmic. Arguably, Hindu interpreters tried to put some limits to the authority practices, because they needed to discriminate between dharmic and non-dharmic practice. But this is not necessarily an elitarian view, because the practices of good men generally, and not necessarily of learned men, can be in keeping with *dharma*, and thus become a source of knowledge of *dharma*.

As a result, the real issue is not the relationship between *sadācāra* and custom but the relationship between dharmic custom and non-dharmic custom. The practices of good men, which are dharmic, may be not the practices of all groups and individuals. It is worth remarking that we are talking about rules, normative practices, because, as a matter of fact, a behaviour that violates a rule can always occur, without changing the terms of the question.

Rather than opposing different bodies of rules, a dynamic process should be envisaged. Some customs arising in the social context could be approved as dharmic and by this way they become *sadācāras*, while other customs could remain non-dharmic or extra-dharmic. Dharmic inclusiveness does not mean that everything is accepted, as clearly emerges from the criticism of Buddhist practices. Moreover, from that perspective, it could be argued that to be learned in the Veda does not mean necessarily to be a high-caste cultivated person, but to belong to the Vedic tradition, that is to say, to Vedic learning and culture. In this sense, the requisites *sadācāras* and *ātmanastuṣṭi*

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26  On the other hand, we have to consider thát, properly speaking, not only a *śūdra* should not act following the model of behaviour of a Brahmin but also that he could be punished if he does.

should have to be considered authoritative actually aim at defining very broad cate-gories.[27]

The Hindu conception of the role of the ruler is a very complex topic and, at the end of our analysis, we will limit ourselves to open a perspective on the possible interactions with the sources of *dharma*. As we said, the deep conceptual framework of Hindu law is not built in terms of obedience to the will of a ruler who states for everyone and for every situation what is right or wrong (Menski 2003). In other words, the ruler is not the authority who lay down the law as an expression of his will. Even though the Hindu concept of order is independent from the will of the ruler, as an agent within this order, he can and should act according to the same basic principle of ap-propriateness. Considering his special position, he plays a prominent role, conceived first of all as a duty of protection.

The role of the sovereign is also crucial in the settlement of disputes. The general rule, which is a dharmic rule, is that the ruler has to ascertain which rules to apply by investigating into the particular laws of social groups that are involved in the case. Remarkably, the laws applied by the ruler will be dharmic rules and, in this sense, its jurisdiction is not extra-dharmic.[28] Even if this is a contested matter, it is possible to argue that when his subjects follow non-dharmic rules he has to apply those rules. In other words, the plurality of com-munities interacting in the same country would require to take into account non-dharmic customs.

Significantly, in our perspective the king could also be seen as an interpreter of *dharma*. To explain this point I will make recourse to a situation described in the play *Mṛcchakaṭika* (IV-V AD).[29] A Brahmin is held guilty of having murdered a prostitute to steal her jewels. The official (*adhikaraṇika*) reminds the king that Manu (VIII.380) has stated that a Brahmin guilty of murder must be exiled from the

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27  A further distinction should be made between customs of non-Hindu groups and customs having not a dharmic relevance, such as for instance some commercial or administrative practices. They are relevant for local legal systems and a ruler should take them into account. On this topic see Davis (2004a; 2005).

28  On settlement of disputes and *vyavahāra* see Derrett (1968b), Menski (2000; 2003) and Lariviere (1989a).

29  This work, composed by Śūdraka, is quoted in Piantelli (2000) within an interesting discussion on sources of *dharma* and by Olivelle (2005), due to the interest of the quotation for the chronology of Manu.

kingdom, without losing his properties, and should not be subject to capital punishment. The king states, however, that the Brahmin should be killed and exposed with the jewels he stole to serve as an example to the others.

The king here acts independently from a *dharmaśāstra* but this does not mean that he acts independently from *dharma* because, as we said, the *dharmaśāstras* contain suggested solutions, which are not perceived as binding and are taken into consideration in a process aimed at ascertaining the appropriate behaviour in a certain context. In other words, *dharma* is not totally included in *dharmaśāstra* texts and alternative views can exist on appropriate behaviour. We could also suppose that the king ignores the dharmic rule laid down in the *Manu-smṛti* for reasons of political opportunity, but even in this case he would not be necessarily beyond *dharma*. In fact, it could be argued that his *dharma* as a ruler imposes on him to act superseding that rule. In modern parlance, he is engaging in social engineering, wanting to prevent similar crimes. Finally, he could simply ignore *dharma*, but this means that he is a bad ruler.[30] It is hard to say which of the preceding interpretations is most sound in that specific example. Anyway, the claim that *dharma* ends where the action of the ruler begins is highly questionable.

## Conclusions: The ascertainment of *dharma*

The theories of sources of *dharma* we analysed focus on the complex relationship between the Veda and the other sources, aiming at elaborating the apparent conflict between the paramount authority of the Veda, conceived as the sole means of knowing *dharma*, and the

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30  Menski (2003: 83), criticising the interpretations that tend "to assign Austinian law-making powers to the ancient Hindu rulers", writes: "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 *rta* or dharma is always present, even if not explicitly mentioned ... 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".

authority in practice of other sources. The statement on the primacy of Veda is certainly one of the reasons that explains why Hindu law has been often reconstructed along positivist lines of thought, filtered through Western jurisprudence.

This narrow understanding of Hindu law understates the role of practices and individual research in the process of ascertaining *dharma* and overstates the role of texts, misleadingly held to be legal texts containing binding general norms. As a result, scholars are not able to acknowledge the pluralism and informality that inherently characterise Hindu law. In the perspective of this study, it is worth remarking that this approach defines the role of interpretation in Hindu law as basically interpretation of texts and, moreover, considers the Mīmāṃsā's influence as the main cause. For instance, Lingat (1998: 9), referring to Mīmāṃsā, states:

> Since its character is purely exegetical, its effect has been to reduce the scope of interpretation to a mere study of the texts, to distract writers and commentators at an early period from other sources of *dharma* than written sources, and, in that way, to bestow upon Indian jurisprudence a scholastic character which could not but be aggravated with the process of time.[31]

Although a tradition may certainly experience periods in which the work of interpreters assumes a manneristic character, the above view of Lingat implies an understanding of Mīmāṃsā as a more "legalistic" school than it is. Furthermore, when thinking of Hindu law as a total complex legal culture, it is wise to take into account that many contexts of ascertainment of *dharma* exist and that no theoretical jurisprudence can be considered as a description because it is rather a part of the legal culture, provided with its own aims and role.

At a first level of analysis, it is true that the system of sources elaborated by the Mīmāṃsā and adopted in *dharmaśāstra* texts is built

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31  In addition Lingat holds that the Mīmāṃsā resulted in a loss of relevance of *ātmanastuṣṭi*: "When the Mīmāṃsā method came to be applied to the texts of *smṛti* it left very little room for *ātma-tuṣṭi*" (1998: 7) and *sadācāra*: "Finally the adoption of the Mīmāṃsā techniques, which are exclusively exegetical in object, must have contributed towards the evaporation of this source, since it tended to confine commentators to a mere interpretation of the written rules" (Lingat 1998: 16).

in a formal way, according to a hierarchical structure. Veda is at the first place and is considered the apex and the foundation of the whole system. The authority of *smṛtis*, *sadācāras* and *ātmanastuṣṭi* may be recognised only through the connection of these sources to Veda. In practice, however, the consequence would be that one should search for *dharma* at first in Vedic texts, then in *smṛti* texts, and, only if the rule cannot be ascertained in this way, in *sadācāras* and *ātmanastuṣṭi*. Moreover, in case of conflict, the more authoritative source should prevail. However, a closer analysis of the theory of sources of *dharma* underlying the lists we find in *dharmaśāstras*, such as Manu II.6, points out that this formal image of the functioning of Hindu law is misleading not only if we consider the limits of this Brahminical model in the context of Hinduism but also if we remain within this model.

In fact, the primacy of Veda has the specific function to provide an epistemological foundation to the whole system and does not affect the process of ascertaining of *dharma*. As we said, a main distinction must be drawn between the epistemological problem of the valid means of knowing *dharma* and the actual process of ascertaining *dharma*. The conceptual elaboration of the system of sources of *dharma* by tracing back every form of accepted behaviour to the Veda is a way to define the identity of tradition, to legitimise rules that have their origins elsewhere. In other words, the reference to Veda has the role to supply a criterion to decide what may be considered a part of this tradition.

The theory of the lost Veda leads to hold that *sadācāras* and *ātmanastuṣṭi*, which are viewed as Vedic-founded, have a normative relevance that in practice is equal to that of Veda and *smṛti*. In fact, at least in the opinion of Kumārila, in case of conflict between a *smṛti* text and a *sadācāra*, the model of behaviour that is mentioned in a *smṛti* text has to be considered simply *preferable* to that emerging from *sadācāra*, which preserves its dharmic authority and can be actually prevalent in context. Therefore, the dharmic system appears as a practically endless and certainly plural set of models of behaviour, all held to be valid, independently from the authority of the source in which they are contemplated. At this level the system is extremely undetermined, and it needs to be concretised and individualised depending on the context.

Furthermore, we saw that in Medhātithi's view the real difference between *smṛti* and *sadācāra* lies in their formal characters, in their specific way to play the same role of transmission of the knowledge of *dharma*, a difference completely due to the fact that not all dharmic conduct, which is practically endless because it depends on endless situations, may be put in written words and in this sense "codified". *Dharmaśāstra* texts have content limits. They are structured following the *varṇāśramadharma* distinctions and organise the rules of behaviour usually focusing on Brahmins. Even though some texts, such as the *Manusmṛti*, can have a considerably higher degree of complexity, necessarily a huge amount of rules are not included in these texts, singularly or collectively considered. Texts in principle describe a general *dharma*, but in practical life a much more contextualised knowledge is required. However, the extra-textual is not extra-dharmic.

Therefore, also in the Mīmāṃsā's elaboration non-textual and informal elements play a crucial role. Moreover, it is worth remarking that the theory of sources of *dharma* we find in Mīmāṃsā and *dharmaśāstra* is not a constitutive theory of what has normative authority, but more properly an explanation, theoretical systematisation, and thus legitimisation, of what authors had before their eyes.

This is clearly pointed out from the fact the reasoning that leads to recognise the authority of *smṛti* and *sadācāra* has a presumptive character. The existence of a Vedic foundation of other sources is, in this view, the only means to make sense of the fact that those sources were *already* accepted as authoritative. Therefore, first there is the authority of some sources in real life, and then justification of this fact within a theoretical context having at its centre the Veda, meant as *śabdapramāṇa*, the only possible means to obtain a valid knowledge of *dharma* in an epistemological perspective.

Actually, irrespective of the primacy of Veda, a Hindu will normally look at the non-textual level to ascertain *dharma* (Menski 2003: 125). Interestingly, in the Mīmāṃsā we find indirect evidence and justification of this fact. As we saw dealing with the authority of *sadācāras* in the *Tantravārttika*, it is explicitly stated that, even though their foundation should be found in a Vedic text, actually what happens is that, considering that *sadācāras* are recognised as *generally* conforming to Vedic texts, they are viewed as reliable

without the need to proceed to a closer investigation into their conformity to the Veda. Particularly, a practice accepted within one's social context will be assumed to be dharmic and, as a result, the ascertainment of *dharma* will not require to consider *śruti* or *smṛti*. On the other hand, we saw that, according to Medhātithi, *smṛti* in its wider sense, including texts and *ācāra*, is a means to transmit the knowledge of *dharma* to persons who could not otherwise gain this knowledge.

A further remarkable aspect of the interaction between different sources is that a rule that was originally found in a particular source can be later embodied in a different source. For instance, a rule indicated by *ātmanastuṣṭi* can be then embodied in *sadācāra*, and even more significantly rules emerging from *sadācāra* can be – and will have been – included in *smṛti* texts. In a sense, the reverse process also may be sounded, for clearly and in keeping with the jurisprudential theories we analysed, once a *smṛti* rule is commonly followed its authority is equally based on *sadācāra*.

Therefore, the process of ascertaining *dharma* is a complex and informal one, which can have different aspects depending on the subjects involved. In fact, while an expert of *dharma* will normally rely on both textual and non-textual rules, others will simply rely on non-textual sources, particularly *sadācāras*. On the other hand, when we speak of the relevance of Mīmāṃsā in elaborating the conceptual structures of Hindu tradition, we should not forget that the complexities of Hindu jurisprudence were virtually unknown to the majority of Hindus, living their lives following the behaviours they found accepted in their social environment.[32]

Menski has remarked that the order of sources in the process of ascertaining *dharma* is reversed:

> In practical terms, Hindus have never looked to *shruti* texts first and to *smriti* texts next for ascertaining *dharma*. In social reality, the sequence of sources of *dharma* is in fact completely reversed, so we have to read the textual statements about the hierarchy of sources of *dharma* in reverse order to find the actual sources of classical Hindu

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32  This aspect is probably one of the key to understanding modern Hindu law, which remains largely customary, irrespective of modern legislation. See Menski (2003).

> law. Thus, individual satisfaction about 'doing the right thing in the
> right way at the right time', collectively and individually experienced
> is, in fact, chronologically speaking, the first source of *dharma*. (2000:
> 154)

In this regard, it is essential to distinguish between the epistemological
rank of sources and the actual processes carried on by individuals to
ascertain *dharma*. In the orthodox view, the Veda remains the apex
source providing authority to the other sources, and in this sense no
reversal of the hierarchical order may be envisaged, but, as Menski
highlights, *sadācāras* and *ātmanastuṣṭi* come first in the practical
ascertainment of *dharma*.[33] In principle, in case of conflict with a
superior source, the latter should prevail, but, in practice, and for the
reasons we saw previously, the non-textual level of sources of *dharma*
remains the crucial one to understand Hindu law.

As a conclusion, the ascertaining of *dharma*, as an individual and
social process aimed at knowing what is appropriate in a given con-
text, is an everlasting process in which several sources of guidance are
taken into consideration, but, at the end of the day, the result of this
process is not bounded to a fixed set of norms. In this context, *dharma*
is not identified with the content of a *dharmaśāstra* or a specific
practice or model of behaviour, which we saw could be appropriate in
some cases but not in others. Therefore, *dharma* is the *outcome* of a
multi-layered process of ascertaining right and wrong.

What is crucial in the Hindu tradition is the concept of a self-
controlled order based on the perception of a macrocosmic and micro-
cosmic order and of a series of relations that have to be dynamically
preserved. As an ordering principle, *dharma* is essentially pluralistic
and constantly open to change. Certainly, every normative system has
to assure continuity and a clear framework to individuals to orientate
themselves in social life, and local legal systems could be more or less
open to change. Nonetheless, new social instances may be accepted
within this conceptual scheme, in search of new definitions of what is
appropriate.

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33   In this perspective, we could distinguish between primacy, on the one hand, and
     priority, on the other hand. See Lombardi Vallauri (1981) for an application of
     this distinction to the relationship between validity and effectiveness.

At the end of this analysis we can point out how little remains of the common image of *dharma* and Hindu law as a fixed content system based upon the authority of Scriptures. Within this plural legal system many actors cooperated to the making of Hindu law, some through the elaboration of sophisticated theories of *dharma*, some simply through their daily adherence to dharmic rules. We can conclude that the interpreters played a prominent role in the making of Hindu law, provided we acknowledge that every Hindu is potentially an interpreter.

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