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MAXIMS & PRECEDENT IN CLASSICAL HINDU LAW

An important rule of interpretation in Hindu law from the *Yājñavalkyasmṛti* (YS) deals with how to resolve the situation in which two authoritative rules contradict one another. The Sanskrit text reads: "*smṛtyor virodhe nyāyas tu balavān vyavahārataḥ* [When there is a conflict between two *smṛti* texts, reason is stronger than practice]" (YS 2.21ab) [1]. However, none of the traditional commentators on this passage interpret this fairly straightforward sentence in this way. All commentators take the final term, *vyavahārataḥ*, as an ablative of reason and interpret the sentence as "When there is conflict between two *smṛti* texts, reasoning *(nyāya)* from practice *(vyavahāra)* should prevail." The two terms *nyāya* and *vyavahāra* both have multiple meanings and the commentaries provide some useful insights on the traditionally accepted limits of their meanings in this context. However, I want to suggest here that the received meaning of this rule in the scholastic tradition claims an important role for the past in the determination of *dharma* in the present. In other words, the traditional interpretation expresses both a conceptualization of and a valuing of precedent.

Nyāya has a range of meanings from maxim to reason and logic, even to justice and common sense. In this case, an ambiguity is preserved by the commentators as to whether *nyāya* means reasoning or a maxim. In one commentary, *nyāya* is glossed by *tarka*, an common

1. A variant is noted in some texts, namely *smṛter* for *smṛtyor*, but the standard reading accepted by the commentators is also accepted here.

term for logic or logical reasoning [2]. Other commentaries connect *nyāya* with specific maxims of the grammatical and Mīmāṃsā traditions that are used to resolve conflicts between rules [3]. The two meanings relate in that reasoning proceeds through the hermeneutical application of maxims. Thus, the difference is really one of scope, scale, or level of abstraction. *Nyāya* in a broad, general, and abstract sense is reasoning, but when made narrow, particular, and concrete, *nyāya* becomes a maxim. Both senses are relevant to the interpretation of the verse. To be clear, *nyāya* is not here an abstract sense of justice or a general form of reason possessed by all, but rather a training in Mīmāṃsā and grammatical hermeneutics and the specific facility to use interpretive maxims to resolve seeming conflicts between authoritative texts. For this reason, I opt below for the cumbersome, but more inclusive, rendering "reasoning by maxims" [4], which captures the ambiguity without obscuring either meaning in English. The use of *nyāyas* in the more concrete sense corresponds roughly to the now archaic tradition of citing maxims in legal arguments and also to the modern practice of creating legal headnotes, or editorial summaries of the key elements of a legal decision [5].

In Dharmaśāstra, *vyavahāra* possesses two main meanings. It may refer to daily business or transactions, that is to a general set of practices, or it may refer to legal procedures specifically, especially a trial and its components (Rocher 1978: 18). In context, the latter meaning seems clear, though some qualification is still necessary because most instances of vyavahāra in these commentaries also suggest something closer to legal decisions, or at least what has been traditionally transmitted concerning legal procedure. Though *vyavahāra* denotes a practice, or a certain form of legal practice, in this context the commenta-

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2. See the commentary *Vīramitrodaya* at DhK 1.85: "*nyāyaḥ tattadviṣayavyavasthāpakas tarko [nyāya* means reasoning that establishes the scope of each respective rule]."

3. See the commentaries *Mitākṣarā* and *Aparārka* at DhK 1.82 and 1.84, respectively.

4. A translation that makes an opposite emphasis is also possible, i.e. "maxims embodying reasoning." The point is that both these senses of *nyāya* should be understood.

5. The best survey of the use of maxims in Sanskrit texts, with a focus on Mīmāṃsā, is Sarkar 1909.

tors assume that prior practices need not have been actually witnessed by current judges; they may be passed down, presumably through oral reports of how things were done in the past. More interesting for the present purpose is the fact that four commentators gloss *vyavahārataḥ*, "from legal procedures," with the compound term *vṛddhavyavahārāt*, "from the legal procedures of the elders" and connect the original term to *nyāya* as the source of learning about how to reason by maxims. In other words, training in jurisprudence or the development of skills in legal reasoning through the use of maxims is achieved by means of consulting the legal procedures or decisions of the wise and experienced persons of old [6]. Taken together in this way, *nyāya* and *vyavahārataḥ* denote the bare bones of what constitutes practical Hindu jurisprudence in the sense of an experientially learned wisdom and skill in reasoning expressed by a mastery of legal rules and maxims.

At this point, I will look more closely at four commentaries and their interpretations of this important rule of legal decision-making. The four commentaries are the well-known *Mitākṣarā* from the twelfth century AD, the Aparārka also from the twelfth century, the *Sarasvatīvilāsa* from the sixteenth century, and the *Vyavahāraprakāśa* from the seventeenth century. It is clear that the last follows the first rather closely, while still giving some additional insights. Referring to all four, however, I will then elaborate on the idea that legal reasoning and maxims are connected to previous legal procedures or decisions of respected persons.

Mitākṣarā (as cited in DhK 1.82-83)

yatra smṛtyoḥ parasparato virodhas tatra virodhaparihārāya viṣayavyavasthāpanādav utsargāpavādādilakṣaṇo nyāyo balavān samarthaḥ | sa ca nyāyaḥ kutaḥ pratyetavya ity ata āha vyavahārata iti | vyavahārād vṛddhavyavahārād anvayavyatirekalakṣaṇād avagamyate | ataś ca prakṛtodāharaṇe 'pi viṣayavyavasthaiva yuktā | evam anyatrāpi viṣayavyavasthāvikalpādi yathāsaṃbhavaṃ yojyam

6. The term *vṛddha* derives from a root meaning to grow or increase and refers simultaneously to age, maturity, and wisdom, as in the English "venerable" and in most uses of the substantive "elders," though without any necessary implication that this designation refers to a specific living group of persons.

Where a mutual conflict exists between two *smṛti* texts, in order to remove the conflict, *nyāya* "reasoning by maxims" characterized by [the maxim of] rule and exception, etc. is *balavān*, "stronger," meaning *samarthaḥ*, "capable" in the establishing of the scope [of the rule], etc. But from where should *nyāya* be learned? To this, [Yājñavalkya] replies *vyavahārataḥ* "from legal procedures" which should be taken as *vyavahārāt* [the ablative of reason], and this stands for *vṛddhavyavahārāt* "from the legal procedures of the elders" which are defined by [logical] continuity or discontinuity [with the present case] - [from this, *nyāya*] should be understood. And, thus, even in the original example (see YS 2.20) [7], *viṣayavyavasthā* "the establishment of the [proper] scope" is the only appropriate [technique]. In this way, even in other cases, [the hermeneutic techniques of] the establishment of the scope, option, etc. are to be applied insofar as possible.

Aparārka (as cited in DhK 1.84)

adṛṣṭārthayoḥ smṛtyor anyonyanirapekṣatve sati viṣayavyavasthāpakanyāyābhāve ca saty arthayor vikalpaḥ | sāpekṣatve tu sammuccayaḥ | nairapekṣye vyavasthāpakanyāyasadbhāve vyavasthitavikalpaḥ | tasminn asati tv avyavasthita vikalpo grāhyaḥ | tatra ca viṣayavyavasthāpakas tāvat sāmānyaviśeṣanyāyo vṛddhavyavahāre prasiddhaḥ yathā brāhmaṇebhyo dadhi diyatāṃ takraṃ kauṇḍinyāyeti | tena nyāyena smṛtivirodhaḥ parihriyate

When two *smṛti* texts of "unseen purpose" are not mutually required and when there is no *nyāya* to establish the proper scope [of the rules], then there is *vikalpa* "option" between the two. When the two are mutually required, however, *samuccaya* "aggregation" [must be observed]. If they are not mutually required and a *nyāya* for the determination does exist, then there is *vyavasthitavikalpa* "a fixed option" [8]. In the absence of

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7. In the original example, Vijñāneśvara cites the apparently contradictory views of Yājñavalkya and Kātyāyana over the issue of multisided plaints and the effect of proving just one of the many claims in the plaint on the overall case. Vijñāneśvara resolves the conflict by assigning the rules to different spheres of application *(viṣaya)*, namely the difference between a case where the legal reply is a denial and a case where the legal reply is unawareness or ignorance and the difference between civil cases involving claimed property and criminal cases involving violence, theft, or rape.

8. A *vyavasthitavikalpa* is really not an option at all because circumstances,

that, however, it should be accepted that there is *avyavasthitavikalpa* "a non-fixed option." And in that case, the determination of the scope is based on the *nyāya* of "general and particular" which is known through the legal procedures of the elders, for example, "Milk should be given to Brahmins, buttermilk to the Kauṇḍinya *[gotra]*." Through this *nyāya*, the conflict of the texts is resolved.

Sarasvatīvilāsa (Shama Shastry 1927: 70)

vyavahārākhyanirṇayaviśeṣata ity arthaḥ | śrutimūlasmṛtyor virodhe vṛddhavyavahārāvagatasāvakāśatvāditarkabalena yathā vyavasthā tayor jāyate tathā grahitavyam ity arthaḥ | kevalaṃ śāstram āśrityāyaṃ nirṇayo na kartavyaḥ kin tu tarkānugṛhītam eva śāstram āśrityeti

This is the meaning: [reasoning] from the special form of decision called *vyavahāra* [should prevail]. When there is a conflict between two *smṛti* texts that are both rooted in *śruti*, then [the rules] should be understood in such a way that a [proper] application of the two [rules] arises through the strength of reasoning *(tarka)* which consists of [each rule] having its proper range of application *(sāvakāśatva)*, etc. learned from the legal procedures of the elders – this is the meaning. The decision should not be made by relying merely on *śāstra*, but rather by relying on that *śāstra* which is aided by reason.

Vyavahāraprakāśa (as cited in DhK 1.85)

ayam āśayaḥ | nyāyānupasṭabdhasmṛtyapekṣayā nyāyopasṭabdhā smṛtir balavatīti nyāyānupasṭabdhasmṛtes tātparyāntarakalpanā kāryeti | tasya cotsargāpavādaviṣayavyavasthāvikalpādirūpasya nyāyasya pratyāyakam hetum āha vyavahārata iti | vṛddhavyavahārād anvayavyatirekādirūpād anādivyutpattyaparaparyāyāt nyāyaḥ pratyetavya ity arthaḥ

This is the idea. A *smṛti* text which is supported by *nyāya* is stronger than a text which is unsupported by *nyāya*. Because of that *(iti)*, an alter-

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usually time, place, and/or person involved, determine which "option" is required, and it is not held to suffer from any of the eight faults of true option which is the worst possible solution to a textual contradiction. See Kane, HDh 5.1252 and Olivelle 1993: 134-6.

> native meaning must be determined for the text which is unsupported by *nyāya*. And, he states the cause of learning that *nyāya* which has the form of *utsargāpavāda* "rule and exception," *viṣayavyavasthā* "establishment of the scope," *vikalpa* "option", and so forth, in the word *vyavahārataḥ* "from legal procedures." This means *vṛddhavyavahārāt* "from the legal procedures of the elders" and takes the form of [logical] continuity or discontinuity [with the present case] or, expressing the same idea another way, [it means] from the knowledge-training for which there is no beginning *(anādivyutpatti)* – [from this] *nyāya* should be learned – this is the meaning.

In the Mītākṣarā, the defining marks *(lakṣaṇa)* of *nyāya* include the use of the maxim of "rule and exception" [9] and other maxims for the purpose of a hermeneutic solution to a contradiction. More significantly, the commentator asks where or from what *(kutaḥ)* this kind of reasoning should be learned, answering "from the legal procedures of the elders." And these procedures are again marked by or defined as *(lakṣaṇa)* continuity/agreement *(anvaya)* or discontinuity/disagreement *(vyatireka)* with a case at hand. Such reasoning, this text suggests, yields a valid resolution of the contradiction in all cases *(anyatrāpi)*. The precise usage of *anvayavyatireka* in this context is not specified in the commentaries, but the link with *vṛddhavyavahāra* suggests a link with the use of the terms in Indian hermeneutics, grammar, and logic. In his detailed study of *anvayavyatireka*, Cardona concludes that the grammarians use the term "to demonstrate that certain meanings are justifiably attributed to certain linguistic items. They establish this by arguing that a given meaning is understood when a certain item occurs and not understood when that item is absent" (1967-68: 351-352). More precisely, Cardona cites a passage from the *Tarkadīpikā* of Annaṃbhaṭṭa which explains that word meanings are learned "by observing the behaviour of the elders *(vṛddhavyavahāra)*" (347) in the observed connection of utterance and action (e.g. "bring the cow"), followed by substitutions (e.g. "bring the horse," "feed the

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9. One of many invocations of this maxim is found in Patañjali's *Mahābhāṣya* 2.1.24 which reads: "*apavādair utsargā bādhyate* [General rules are set aside by exceptions]."

cow") [10]. In this sense, *anvaya* and *vyatireka* mean coordinate presence and absence, respectively. In the context of judicial decisions, the issue becomes the coordination of rules and facts in the light of prior coordinations in similar situations. When a conflict arises and there is a doubt about what is proper or legal, the presence or absence of certain relevant factors as determined by a knowledge of prior procedures and their factors fixes which rule is applicable to the resolution of the conflict and removal of the doubt. Such reasoning is so fundamental that Halbfass writes, "*[anvayavyatireka]* is not just one specific 'mode of reasoning,' but the basic structure of 'reasoning' as such" and "it is the closest approximation to the Indian definition of the nature of rationality and reasoning" (1991: 170,182). Therefore, I have understood *anvayavyatireka* in this context to mean the ability of judges to discern which elements in a doubtful case are continuous with past cases and which are not, and thereby to determine what rule applies.

In the *Aparārka*, the hermeneutic possibilities are explained in more detail, though *vṛddhavyavahāra* is similarly invoked as the source of training in the reasoning skills necessary to remove textual contradictions. An example of the most common technique for resolving conflicts, namely the assignment of a different sphere or scope of operation *(viṣayavyavasthā)* to each of the rules, is also given in the form of the maxim of "buttermilk for the Kauṇḍinya," which refers to a separate offering that is given to those of the Kauṇḍinya *gotra*, even though they are also Brahmins. Aparāditya puts an apparent limitation on the nature of the textual conflict when he speaks of *smṛtis* that are *adṛṣṭārtha* "of unseen purpose." The distinction of *dṛṣṭārtha* and *adṛṣṭārtha* is problematic in both theory and practice (Lariviere 1996: 86-89), though one presumes that Aparāditya means to exclude the possibility that a *dṛṣṭārtha* rule could abrogate an *adṛṣṭārtha* rule. Aparāditya also further specifies the possible circumstances of such a conflict of rules in the term *anyonyanirapekṣatva* "the fact of mutual requirement." If this requirement is present, then both must be fol-

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10. Older explanations than Annaṃbhaṭṭa's may be found (see, e.g., the discussion of Śabara at PMS 1.1.5-19, a portion of which is cited below), but this is the example given by Cardona. My thanks to Ethan Kroll for this and other useful references and suggestions.

lowed whether in sequence of time or in different locations. If the requirement is not present, then either a *vikalpa* "option" must be declared (the least desirable resolution) or another restriction must be found for one or both rules [11].

The *Sarasvatīvilāsa* does not elaborate on *nyāya*, but it does make two interesting comments. First, it asserts that *vyavahāra* itself is a special form of legal decision *(nirṇaya)*, thus confirming an interpretation of *vyavahāra* here in its technical sense of legal procedure. Second, the term *vṛddhavyahāra* is once again used in connection with the reasoning necessary to appropriately assign the relevant rule to a given case. The form of such reasoning is described as determining the appropriate scope *(avakāśa)* for conflicting rules so as to negate their contradiction. A slightly stronger reading of *sāvakāśatva* here would be contextual interpretation. On this reading, we can assume that contextual interpretation would in turn take the form of *anvayavyatireka* as described. For the *Sarasvatīvilāsa*, a final decision can only be made by relying on both *śāstric* rules and a form of reasoning that explicitly invokes past settlements of similar conflicts.

Finally, the *Vyavahāraprakāśa* directly contrasts texts that are supported *(upaṣṭabdha)* by *nyāya* and those that are not. Once again, reference is made to the standard hermeneutic techniques for removing contradictions and *vṛddhavyavahāra* is declared to be the source of knowledge for such techniques. The explicit comparison between *vṛddhavyavahāra* and *anādivyutpatti* in this final text confirms the fact that what the commentators imagine in this context is an ancient heritage of legal wisdom that has been transmitted or reported over time down to the present moment, and that survives in the *vyavahāra* of respectable people at the present time [12]. At the heart of such wisdom is the capacity to make analogies between old cases and new and, thereby, to determine the applicable rule or law through common judicial techniques.

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11. For an example of legally "mutual requirement" in this sense, see Jīmūtavāhana's *Dāyabhāga* 11.5.16 in which Jīmūtavāhana sets forth the arguments of Śrīkaramiśra concerning the contradictory rules of inheritance for "reunited brothers" and "brothers german," which he then refutes in 11.5.17-20 (Rocher 2002: 216-217, and see the discussion of Jīmūtavāhana below).

12. Compare the description of this process in the context of asserting the

These four commentaries on YS 2.21 contain two forms of deference to the past – *nyāya* and *vṛddhavyavahāra* – that imply the existence of a notion of precedent in classical Hindu law. First, the reverence shown for maxims demonstrates by itself at least a minimal concern for legal principles as encoded in traditional aphorisms, often abbreviated as are Latin legal maxims. Peter Stein's excellent history of Latin maxims in Roman law and their reception in medieval Europe provides a useful point of comparison. Stein (1966) shows how the juristic use of *regulae*, or standards abstracted from practical cases, in early Roman law eventually developed into massive codifications of legal maxims, beginning at least from the final chapter of the Digest of Justinian (50.17). The invocation of maxims became an essential, perhaps the essential, part of law in medieval Europe and Stein repeatedly illustrates "the strength of old maxims. Where they were inconvenient and out of step with the trend of legal development, they could not be ignored; they demanded elaborate explanations to show that they were not applicable" (1966: 107). For later periods, too, Stein writes, "What makes a proposition a maxim for the common lawyers of the late fifteenth century was not so much its degree of abstraction or its epigrammatic form but the fact that it could not be challenged.

Mīmāṃsā view of the eternal connection of words and their meanings in Śabara on PMS 1.1.5: *vṛddhānāṃ svārthena vyavaharamāṇānām upaśṛṇvanto bālāḥ pratyakṣam arthaṃ pratipadyamānā dṛśyante | te 'pi vṛddhā yadā bālā āsaṃs tadānyebhyo vṛddhebhyaḥ | te 'py anyebhya iti nāsty ādir ity evaṃ vā bhavet | athavā na kaścid eko 'pi śabdo 'rthena saṃbaddha āsīt | atha kenacit saṃbandhāḥ pravartitā iti | atra vṛddhavyavahāre sati nārthād āpadyeta saṃbandhasya kārtā | api ca vṛddhavyavahāravādinaḥ pratyakṣam upadiśanti kalpayantītare saṃbandhāram | na ca pratyakṣe pratyarthini kalpanā sādhvī | tasmāt saṃbandhur abhāvaḥ* "We see children learning the meaning [of words] through direct perception as they listen in on the elders interacting, [each] for their own purpose. And when these elders were themselves children, they too [learned] from other elders. And these others too – there is no beginning [to this process], and it should be thus [understood]. Or rather, [the explanation would have to be that] no single word was [previously] connected to a meaning and someone has made the connections. Here where the practice of the elders *(vṛddhavyavahāra)* [clearly] exists, one should not presume that there is an agent of the connection [of the words and their meanings]. Moreover, those who advocate for *vṛddhavyavahāra* point to something directly perceptible, while others [must] postulate an agent of connection. And when direct perception is the opponent, postulation is not good. Therefore, [we conclude that] there is no agent of connection."

Maxims were regarded as part of the original structure of the law, and to object to them was tantamount to denying the law itself" (160).

Moreover, despite the nearly non-existent formal role of maxims in Anglo-American law today, recent arguments have been made "that maxims must reflect some relatively universal principles for interpreting legal rules" (Miller 1990: 1182) and that maxims are "self-evident first principles of legal theory" that might be used in the formulation of universally acceptable statements of human rights and environmental protection (McQuade 1996: 76). At the heart of attempts to revive "reasoning by maxims" in contemporary contexts is the idea that maxims articulate in a formal way what legal scholars call principles or even moral norms. A formal and public expression of and reliance upon such principles or moral norms has sometimes been disparaged in legal circles, despite acknowledgments of its inevitability. In other words, despite their sometimes technical nature, maxims in Western legal systems have been seen as unassailable reference points for forensics. Taken as a whole, maxims embody basic juridical and ethical presuppositions of a legal system and preserve an integrity and continuity in that system, even as change is acknowledged.

The invocation of maxims, whether explicit or oblique, is extremely common in Dharmaśāstra. Maxims are culled especially from the aphoristic *(sūtra)* texts of the grammatical and Mīmāṃsā traditions, though later works in these traditions as well as other Indic philosophical traditions also furnish maxims to dharma texts [13]. The distinction in such texts between a maxim and a reference or quotation is not always clear, nor important for that matter. In fact, the principal root text under consideration here, namely YS 2.21, is frequently cited as a maxim of interpretation in its own right (Sarkar 1909: 338) [14]. A quotation may be invoked functionally as a maxim without any explicit marking of the text as a maxim. This is often the case when quotations are cited from the *sūtras* of Pāṇini or Jaimini or from their early commentators, Patañjali and Śabara, respec-

13. The standard reference for Sanskrit maxims is Jacob 1983 [1907], but Kane, HDh 5.1339-1351 and Apte 1965: 573-575 also contain useful collections of common maxims.

14. One might also compare the similar maxim found in Jacob 1983 [1907]: 81, *"saṃdigdhe nyāyaḥ pravartate."*

tively. On the other hand, certain texts or, more commonly, abbreviations of well-known texts are regularly marked with the word *nyāya* to formally invoke the maxim, as in the excerpt from the *Aparārka* above. Furthermore, maxims are often invoked obliquely or implicitly in the course of textual arguments, often through the use of give-away technical terms. So, for instance, any discussion that focuses on the precise meaning of a plural noun implicitly invokes the *kapiñjalanyāya* (PMS 11.1.38-45) which declares that unspecified plural forms should be understood as three in number, the minimum required to constitute a plural. Similarly, any commentary that takes up the precise meaning of a singular noun automatically invokes in the mind of a learned reader the *grahaikatvanyāya* (PMS 3.1.13-15) by which a singular refers to all members of the same class without a separate rule or a plural form.

If we consider at least one example of the use of *nyāyas* in a legal context within Dharmaśāstra, we can see the prolific use of maxims and prior interpretations generally. The example is not claimed as representative or typical of all Dharmaśāstra discussions, but it at least yields an idea of the use of maxims in Hindu legal reasoning. In a detailed and technical discussion of the law of inheritance among different kinds of brothers, the well-known commentator Jīmūtavāhana makes extensive use of Mīmāṃsā maxims and discussions to refute other interpretations and establish his own (*Dāyabhāga* 11.5, Rocher 2002: 212-223). Specifically, Jīmūtavāhana deals with two verses of Yājñavalkya which, in Rocher's translation, state:

> The widow, daughters, parents, then brothers, their sons, those born in the same *gotra*, kin, disciples, and fellow students: each in order inherits the property failing the prior one. This rule applies to all castes when a man passes away without male offspring. (YS 2.135-6 cited at *Dāyabhāga* 11.1.4)

and

> A reunited brother gives to and gets the share of a reunited brother when the latter is born and when he dies, respectively. Similarly, a brother german gives to and gets the share of a brother german. (YS 2.138 cited at *Dāyabhāga* 11.5.10)

What we are interested in here is not so much the details of Jīmūtavāhana's argument, as its logic, especially its manner of invoking maxims and precedents. Schematically presented, the logic of Jīmūtavāhana's interpretation of these two verses in the context of inheritance by brothers is as follows:

1) **11.5.11-15** – Jīmūtavāhana relies on two maxims – exception overrides general rule (cited above) and the same word should not denote both primary and secondary meaning (*sakṛcchrutasya mukhyagauṇatvānupapatteḥ*, see *Dāyabhāga* 3.30 and Sarkar 1909: 85-89) – to argue that YS 2.135 is a general rule giving inheritance to "brothers," while YS 2.138 is an exception that specifies that (separated/unreunited) whole-brothers *(sodara)* get the inheritance prior to reunited half-brothers *(samsṛṣṭi)*.

2) **11.5.16** – Jīmūtavāhana cites the alternative interpretation of Śrīkaramiśra who argues on the basis of the *dvayoḥ praṇayanti* maxim that the two halves of YS 2.138 itself state two independent rules that can become dependent, when both a reunited half-brother and a separated whole-brother exist. If both rules applied, according to Śrīkaramiśra, then they would create a rule asymmetry *(vidhivaiṣamya)* and negate one another and, as a result, neither would get the inheritance. To avoid this, Śrīkaramiśra takes YS 2.138ab as the general rule and YS 2.138cd as the exception, with the result being that where both existed, only the latter would receive the inheritance.

3) **11.5.17-20** – Jīmūtavāhana refutes Śrīkaramiśra's arguments with implicit references to the maxims and discussions found in PMS 6.5.49-54 and PMS 3.7.8, 8.1.26, and 9.1.11, concerning independent rules that can, but need not, become simultaneously operative under special circumstances. In the two discussions (or precedents) cited concerning conflicts about the sacrificial fee and the full-moon sacrifice, Jīmūtavāhana argues that different circumstances condition rules differently such that a rule may be absolute in one instance and dependent/conflicting in another. Jīmūtavāhana concludes by questioning the applicability of the

dvayoḥ praṇayanti maxim cited by Śrīkaramiśra for the present case.

4) **11.5.21-24** – Next, Jīmūtavāhana supports his claim against the *dvayoḥ praṇayanti* maxim in this case by comparison with maxim of the *ṣoḍaśi* vessel (PMS 10.8.6) concerning technical option *(vikalpa)*.

5) **11.5.25-29** – Four arguments against Śrīkaramiśra are then adduced, each showing an illogical or undesirable result that would occur if Śrīkaramiśra's interpretation were accepted.

6) **11.5.30-31** – Jīmūtavāhana cites the *dīkṣaṇīya* rite as a precedent ("One might compare this case with that...of the *dīkṣaṇīya*") for his argument about circumstances conditioning the application of rules and then argues that his interpretation also avoids rule asymmetry without leading to other problems.

7) **11.5.32-40** – Finally, Jīmūtavāhana cites a passage from Manu (MDh 9.212) to bolster his interpretation of YS and also gives further textual corroboration from Bṛhan-Manu and Yama in support of his four arguments against Śrīkaramiśra. The final conclusion, then, is that "being reunited," i.e. being part of a joint family, "makes a difference" in the succession to inheritance, and that the specification of brothers in YS is merely exemplary.

At least as important as the mere fact of Jīmūtavāhana citing maxims and prior interpretations is the manner in which they are cited. The citations refer to prior judgments about contentious issues (albeit primarily in the realm of ritual performance) that are bolstered by ongoing practice. The precedential maxims themselves are never at issue. They are accepted as true and correct without question. It is only their applicability or not that is at issue, specifically the extension of certain rules of ritual procedure to legal procedures, in this case inheritance. Jīmūtavāhana's use of maxims as unassailable building blocks for legal argument parallels their use in other Dharmaśāstra texts, though it should be acknowledged that this particular discussion

is exceptionally marked by maxims and was obviously chosen as such for the purposes of this essay. At the same time, other Dharmaśāstra texts do not differ qualitatively in their use of maxims, rather only quantitatively.

Turning now to the second form of reference to the past in the commentaries on YS 2.21, I will focus on the compound term *vṛddhavyavahāra*, "legal procedures of the elders." The context of this verse in the YS is clear: a trial, the quintessential legal procedure. The verses preceding this one deal with the staffing of the court, the formation of plaints and replies, the presentation and weighing of evidence, and the nature of decision-making. In this context, it seems quite clear that *vyavahārataḥ* in YS 2.21 and *vṛddhavyavahārāt* as a gloss in its commentaries similarly refer to the knowledge of legal procedures more strictly conceived. In any case, what is at issue is actually the word *vṛddha* and its explicit invocation of the past. The connotations of the term include maturity, ripening, age, and increase. Most commonly, however, it is used as a substantive, meaning "one who has matured, aged, etc." [15]. The compound term probably analyzes best as *vṛddhānāṃ vyavahārāt*, "from the legal procedures of the elders." The importance of ancient sages, seers, and mythological forebears in the religious and legal imagination of Hindu texts is hard to overestimate. The authority of the past is equivalent to the authority of the sages. Their words and actions are the standard against which all later words and actions are measured. The commentaries on YS 2.21 appeal to that authoritative history as the source for decision-making in the present. *Nyāya* is learned by means of *vṛddhavyavahāra*. Skill in legal reasoning marked by the use of maxims is to be sought in the reports, or at least the tradition, of legal deci-

15. Exactly who counted as a *vṛddha*, either in Dharmaśāstra or in practical law, is not clear. A classic description of *vṛddhas* in Hindu law is found at *Nāradasmṛti* Mā 3.17: "*na sā sabhā yatra na santi vṛddhā vṛddhā na te ye na vadanti dharmam | nāsau dharmo yatra na satyam asti na tat satyaṃ yac chalenānuviddham* [A court is not a court is there are no elders. Elders are not elders unless the pronounce dharma. Dharma is not dharma unless there is truth. Truth is not truth is it is mixed with sophistry]" (Lariviere 2003: 271). Thus, in the *śāstra*, it seems likely that only Veda-knowing, upright, and otherwise righteous individuals would qualify (as in most other matters). The possibility for communities beyond the scholastic world to define contextually and socially who is a *vṛddha* also seems likely, however.

sions made by the authorized, learned, and skillful judges of the past. A knowledge of textbook-style examples or hypotheticals, whether drawn from practice or not, for reasoning through common legal problems is also communicated by the term. The specific link between past and present in this context is *nyāya*, the form of legal reasoning by maxims prevalent in the Dharmaśāstra tradition.

To review my argument thus far, precedent in classical Hindu law meant not the specific citation of a past case, but rather the mastery of maxims and hermeneutics that maintained a consistency and fairness in the law, even in the absence of case law. Just as in the development of Roman law, judicial decisions were distilled into maxims that were then invoked as sacrosanct epitomes of legal truths. Prior decisions guided later decisions via the medium of maxims and did so through a process of legal procedures that were explicitly patterned upon or informed by earlier procedures "of the elders."

However, scholars of Hindu law have long argued that the tradition lacked a notion of precedent:

> In the Indian view each set of facts is unique and each dispute is therefore unique. To be bound by precedent is to be bound to give a wrong verdict since no previous decision can be anything more than a general guidepost… In an Indian context there was never the idea that any two crimes or civil wrongs were identical, so there was no reason to be concerned with precedent. (Lariviere 2004: 614-5)

> [The king's legal judgment] cannot makes any lines of authority. It is dharma only for the two parties to the case. It cannot leave any trace in the sphere of law itself. (Lingat 1973: 256)

> Social change and social control could correspond to local and even temporary needs, without the aid of statutes, or of a class of interpreters of regulations or precedents – indeed there was no need for precedent as we know it. This could hardly appeal now to men trained in the common law tradition… (Smith and Derrett 1975: 420-1)

> For a lawyer in the common law tradition, the image of 'precedent' suggests itself with great force, but we are analysing traditional Hindu law here, not some form of English law. Assuming the emergence of royal

> precedent or even legislation, therefore, appears to be another form of Orientalist-cum-legalist construction imported into India by outsiders in the light of their own experiences and assumptions, not based on study of Hindu concepts. (Menski 2003: 82)

> The absence of a need for continuous development of the law (as opposed to the *śāstra*), for recorded precedents, for recorded reasons for judgments; the absence of need for juridical as opposed to *ad hoc* predictions as to what effects an act would have; the absence of concern about prejudice… bribery, corruption of other kinds; the absence of a concern for true justice as opposed to what would suit the majority of influential persons involved; all these absences account for the confused and illogical, though in the circumstances eminently practical, jurisprudence which emerges from a study of Medhātithi's commentary on the *Manu-smṛti*. (Derrett 1976: 196-7)

In its restricted and probably more prevalent sense in the Common Law, precedent refers to the idea that previously judged cases or decisions should serve as *specific* guides or authorities for deciding later cases about related legal questions, what is often called "binding precedent" or the principle of *stare decisis*, and that previous decisions imply legal principles, or *rationes decidendi*, that may, indeed must, be applied to similar cases in the future. The restrictive sense of precedent is of recent historical origin [16] and of limited geographic scope [17]. It is, therefore, doubly parochial and of limited use for comparative purposes.

For a more helpful definition of precedent, we might follow MacCormick and Summers who write: "Precedents are prior decisions that function as models for later decisions. Applying lessons of the

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16. Evans (1987) traces the "hardening" of case-law precedents in English law to the rise of legal positivism in the nineteenth century under the influence of Bentham and Austin, specifically the idea that law consists of positive rules and that precedent binds because "the sovereign tacitly commanded subjects to avoid that behaviour to which the courts were in fact prone to attach a 'punishment' as a consequence of past cases" (69). Postema (1987) gives a very useful overview of the philosophical justifications of precedent in common law theory.

17. A recent survey of the role of precedent in European and American legal systems (MacCormick and Summers 1997) shows a diverse range of attitudes toward and applications of precedent, some quite rigid, others very free, but all undercut the

past to solve problems of the present and future is a basic part of human practical reason. Accordingly, there is no better way for a lawyer to get at the heart of a legal system than to ask how it handles precedent. Precedent represents the law observing itself…" (1997: 1). To deny precedent in this sense is to deny consistency, coherence, and tradition in the resolution of disputes or in the creation of contracts, institutions, etc.

The scholarly denials of precedent in Hindu law, though perhaps accurate when compared with systems of binding precedent such as modern Anglo-American law, tend to primitivize Hindu law by comparison. Any system that denies the relevance of past legal procedures and rulings to present cases is bound to appear nonsensical and unsophisticated. I doubt whether any legal system can deny the relevance of past cases completely. When scholars argue that classical Hindu law lacks a notion of precedent, they simply mean that dispute resolutions occurred without any necessary citation of related prior legal judgments as justification for the decision. Their claim is much smaller than it may appear: Hindu law lacks a modern Common law notion of precedent. Stated in this way, the denial of precedent in Hindu law amounts to only slightly more than claiming that Hindus did not independently develop the same system of precedent as did the British during and after the nineteenth century [18].

To those outside the specialist realms of Indology and legal studies, however, the implication seems to be much larger. One could easily conclude that the context-sensitivity of Hindu legal procedure was so radical as to disallow any consideration of prior legal decisions or

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claim that precedents serve in some mechanical way as a straightjacket for adjudication. Rather, the survey reveals that precedent has generally become more prominent owing to the proliferation of legal reporting but also that adherence to precedent is often context-dependent. A highly restrictive, non-reflective notion of precedent as compulsory and an obstacle to interpretation seems to be largely false.

18. Compare the remarks of Ellis (1827: 12): "It is true that the Hindus have not preserved 'reports,' *after the English fashion*, of the decisions of their courts of justice; but when the 'definitions' of the English common law are sought for, no less regard is paid to those which are found in Lyttelton's Tenures, or, perhaps, in Lord Coke's Commentary, than to those which appear in the 'reports of cases;' and the commentaries of the Hindus are considered more decidedly by them to be integral parts of the body of their law than any commentary is in England." [emphasis added]

traditions. Indeed, this was exactly the conclusion of James Mill in his influential, but ill-informed *History of British India*, originally published in 1817:

> Among them [the Hindus] the strength of the human mind has never been sufficient to recommend effectually the preservation, by writing, of the memory of judicial decisions. It has never been sufficient to create such a public regard for uniformity, as to constitute a material motive to a judge. And as kings, and their great deputies, exercised the principal functions of judicature, they were too powerful to be restrained by a regard to what others had done before them. What judicature would pronounce was, therefore, almost always uncertain; almost always arbitrary. (1858: 199, Book II, Chapter IV)

Mill's vision of a radical prejudice against precedent emanating from a caricature of Indian despots engendered an immediate response from Francis Whyte Ellis of the School of Fort St. George in Madras who declared, "This is as glaring an instance of forced assertion borne out by no authority as ignorance and presumption ever dared to make" (OIOC Mss. Eur.D. 31, Erskine Coll.). In Ellis's view, more in line with the argument given here, "the conclusions or decisions of a succession of writers, ancient and modern...as deduced, not from the ordinances only, but from the principles of the Text books, by reasoning...have become the actual definitions of practical law" (ibid.; cf. Ellis 1827: 11-12). Ellis expresses here the importance of *vṛddhavyavahāra* to the Hindu legal tradition.

In rejecting the extreme conclusion that Hindu law lacked a notion and practice of precedent, I do not deny the context-sensitivity of Hindu law and of Hindu thought more generally (Halbfass 1988, Ramanujan 1999). However, careful attention to particular circumstances and factual contexts does not, except in some ideal extreme, exclude the consideration of previous legal judgments or settlements. Under a more general definition, classical Hindu law contains notions of precedent that serve as checks against inconsistency, incoherence, and indiscriminate innovation in the law.

Thus far I have focused on two terms – *nyāya* and *vṛddhavyavahāra* – from classical Hindu jurisprudential texts that each relate to

and suggest a notion of precedent in what might be called a procedural sense, i.e. judicial decisions or determinations of the law should be made with the deference to the past as it brought into the present by these concepts. As I move toward a conclusion, however, I want to mention briefly another key concept of law in Hindu thought, namely *ācāra*, that carries an implicit notion of precedent in the area of substantive law as well. In a narrow sense, the formation of *ācāra*, i.e. the recognition of a rule as a community standard or customary law, involves the recognition of prior legal judgments or legal arrangements as normative for a community. Such recognition may or may not occur in the context of a legal procedure, but the normativity of *ācāra* derives from that fact that it expresses the impact of previous or precedential events on current practices. I note, for instance, several references in Strauch's wonderful new edition of the *Lekhapaddhati* (2002: 178, 385, 390) to *ācāra* as a rule of law that conforms to prior legal arrangements in the area of mortgages and interest (e.g. *vṛddhiphalabhogācāraḥ*, "the rule for the enjoyment of the produce [of a field] as interest"). Similar invocations occur in mortgage deeds from medieval Kerala that explicitly state that the deed is drawn up "in accordance with *ācāra*." In such cases, *ācāra* denotes specific acts from the past that are drawn upon as authoritative models for present legal acts.

In an extended or general sense, too, Hindu law recognizes the impact and power of the past on the present. The *Lekhapaddhati* again provides an example of a generic invocation of the past in the term *agrīkarūḍhyā* which Strauch (2002: 199, 422) translates as "entsprechend dem alten Brauch." The general idea of *ācāra* implies that all practical normative rules in Hindu law are thought to be consonant with previous decisions, judgments, arrangements, and settlements. The rules themselves contain the precedents of prior legal events. In fact, the existence of a practice *(ācāra)* is held by the Mīmāṃsakas to imply the existence of a rule *(vidhi)*, even if lost to the tradition. In this way, *ācāra* becomes the lived performance of rules handed down in the tradition – the embodiment of historical precedent. In both strict and general senses, therefore, classical Hindu law also recognizes a notion of substantive precedent. That notion is incorporated into both jurisprudence and practical legal procedures. Precedent in classical

Hindu law is not the same as precedent in the Common law, nor does precedent shape the overall system of Hindu law to the extent that precedent does in the Common law, but it is a mistake to conclude, therefore, that Hindu law lacks precedent altogether.

If precedent refers to the "law observing itself," then Hindu law sees itself as permeated with the past. The denial of precedent to the Hindu law tradition may be connected to the old denials of a sense of history in India. In conclusion, therefore, I refer to the recent work of Narayana Rao, Shulman, and Subrahmanyam (2003) who make a case for a sense of history in India that depends upon not restricting history to a particular textual genre. Instead, they argue that the "texture" of a text can give an informed reader cues to the facticity and historicity of the events described. Applied to the present case, the case-law system dominant in Anglo-American law has encouraged us to look for the separate textual genre of the case report in classical and medieval India and, not finding that, to declare that a notion of precedent is absent from classical Hindu law. If instead we appreciate the texture of Dharmaśāstra's invocations of the past, we begin to see that a notion of precedent, the guidance of present legal decision-making by that of the past, pervades the dharma texts. Central to the concept of precedent in Hindu law is *nyāya*, the maxim and the reasoning that makes use of it. The texture of historical legal precedent in Dharmaśāstra is most noticeable, most tangible in the use of maxims, but this idea of precedent extends quickly to the source and process of *nyāya* signaled by *vṛddhavyavahāra*. Even broader is the present embodiment of this ancient wisdom denoted by *ācāra*. Together, these three terms exemplify at least some of the vocabulary of the legal past in Dharmaśāstra and demonstrate a clear, if distinctive, concept of precedent in classical Hindu law.

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Abbreviations

DhK	*Dharmakośa: Varṇāśramadharmakāṇḍa*. Vol. 5. Pt. 1. ed. Laxmanshastri Joshi. Wai: Prājña Pāṭhaśaḷā Maṇḍala, 1988.
HDh	*History of Dharmaśāstra* by P.V. Kane. 5 Vols. Poona: BORI, 1962-75.
MDh	*Mānava-Dharmaśāstra*. ed. Patrick Olivelle in *Manu's Code of Law: a Critical Edition and Translation of the* Mānava-Dharmaśāstra. South Asia Research Series. New York: Oxford UP, 2005.
OIOC	Oriental and India Office Collections, British Library
PMS	*Pūrva-Mīmāṃsa-Sūtras* of Jaimini.
YS	*Yājñavalkya-smṛti* (as cited in DhK above)

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