



## Introduction

Linguistic and cultural translations are always fraught with misunderstandings and misinterpretations; much is lost in translation. The two terms at the heart of this exploration of classical Indian thought—law and *dharma*—make translation even more difficult. The English word “law” is a term about whose definition, extent, and application much has been written with little agreement. Its translation into an appropriate Sanskrit term therefore becomes doubly complicated. The Sanskrit word *dharma* has perhaps the most extensive semantic range of any term in the Sanskrit vocabulary; its very centrality within Indian culture, religion, and philosophy prompted thinkers to take it in a myriad different directions. Most modern scholars of ancient India confess to its untranslatability. Yet, large areas of its semantic compass, especially those relating to rules of morality, ritual, religious life, civil and criminal law, and norms of social interaction, intersect with what is commonly understood as law in contemporary societies and academic discourse.

This sourcebook does not simply survey the ways Indian thinkers have grappled with issues relating to *dharma* in its multiple meanings during a period of over a millennium and a half; it is not a semantic and cultural history of that term.<sup>1</sup> Neither does it seek to present the history of law, taken in its narrow sense of criminal and civil law or in its broad sense of rules governing social, ethical, and religious behavior, in India.<sup>2</sup> It is rather an exploration of the ways Indian thinkers down the centuries have wrestled with fundamental issues pertaining to law in a geographically vast, multiethnic and pluralistic society with multiple polities and a multiplicity of customs, rules, norms, and laws that governed the lives of individuals as parts of larger groups—be they family, lineage, caste, professional or religious association,

village, or region—and the lives of these groups as they interacted with each other in the wider society.

First, what terms did they use to identify these norms of varying degrees of authority, range, and power operating at different levels of society? Did they arrive at an abstract concept of “law” beneath and beyond the specific manifestations in particular rules of limited scope? How did they theorize law? Second, how did they resolve the inevitable conflicts between different kinds of rules? What rule should one follow, for example, when a village law is in conflict with a caste rule, or a norm of morality with a commercial contract? Third, and most centrally, what is the epistemology of these various rules and laws? How do we come to recognize law? And how do we know whether any given source of law is legitimate? Are laws simply learned from observation and custom or are they codified in written texts? If they are so codified, what is their relationship to unwritten but equally authoritative laws handed down by tradition? Are all the sources of law ultimately religious—that is, founded on a transcendent and suprahistorical source of knowledge? Or are they contingent, dependent on time and place? Finally, how do people resolve disputes and deal with those who violate accepted and established laws? What are the judicial apparatus and procedures that permit communities to ensure that justice is done, that verdicts are fair, and that the guilty are appropriately punished?

H. L. A. Hart's<sup>3</sup> magisterial, controversial, and justly famous book on jurisprudence and philosophy of law, *The Concept of Law*, proposes a significant and basic classification of law into primary and secondary rules. Primary rules are the norms that govern individual and group activities, of the “Thou shalt not steal” variety. This is easy to understand, and it is to this variety that most people apply the term “law.” More significant for the philosophy of law, however, is Hart's concept of secondary rules, which encompass rules of recognition, change, and adjudication. The theory of secondary rules, especially the rule of recognition, has been subject to criticism. This is not the place to enter into that debate, but I think the basic premise underlying Hart's theory is not only sound but, as Shapiro (2009: 1) has shown, incontrovertible:

For as Hart painstakingly showed, we cannot account for the way in which we talk and think about law—that is, as an institution which persists over time despite turnover of officials, imposes duties and confers powers, enjoys supremacy over other kinds of practices, resolves doubts and disagreements about what is to be done in a community and so on—without supposing that it is at bottom regulated by what he called the secondary rules of recognition, change and adjudication.

The secondary rules, as Hart (2012: 94) puts it, are all *about* primary rules:

While primary rules are concerned with the actions that individuals must or must not do, these secondary rules are concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.

The rules of recognition, simply put, provide both ordinary citizens and state officials, especially judges, the criteria for identifying what is a valid law and what is not. Rules of change identify the legitimate ways existing laws can be modified and annulled and new laws can be enacted. Rules of adjudication provide criteria for determining whether a primary rule has been violated, identify individuals who are competent to adjudicate, confer judicial powers on them, and provide legal procedures to be followed in adjudicating cases in a court of law.

This sourcebook is limited to the Hartian “secondary rules.” The first part focuses on the rules of recognition, that is, the epistemology of law/dharma. How does an individual recognize a valid law/dharma, or identify and repudiate an invalid one? In modern nation-states with legislatures empowered to enact laws and with official records that catalogue those laws, the rules of recognition may not be too complicated. For his native England, Hart gives the pithy rule: “The queen in parliament” as the criterion for a valid law. For traditional India, where law as dharma is often viewed as not humanly created but founded on a transcendent source, and various kinds of law pertaining to different regions, villages, and corporate, religious, and ancestral groups are recognized, the rules of recognition become enormously complex and convoluted. In modern nation-states, rules of change also are clearer, because the legislature has the power not only to enact new laws but also to change or abrogate existing laws. For traditional India, where no law-making body such as a legislative branch of government is recognized, the legal and theoretical issues are more complex. If law is based on a transcendent and suprahistorical source, such as the Veda, then how can it account for the multiplicity and variety of laws observed on the ground? And how can one enact new laws or change or abrogate existing ones? Whatever the theoretical and theological problems, laws have to and do change. We will explore the strategies the legal philosophers employed to understand and explain the variety of observed laws and to account for and facilitate change in laws.

The second part of this sourcebook deals with what Hart calls “the rules of adjudication.” In modern nation-states, laws setting up the judiciary and conferring power on judges are enacted by legislatures or constitutions. In traditional India, along with executive power, judicial power was, for the most part, also concentrated in the person of the king. Given the complexity of administering law in a relatively large territory, *de facto* adjudication of lawsuits was carried out by a professional

judiciary with an established court system. The rules that governed the system were not viewed as dependent on the will or caprice of the king. Rather, they were also considered to be universally applicable across kingdoms and territories. How then are we to account for these rules? What is their epistemology?

These then are the questions, and the ways the legal scholars of ancient India grappled with them, that will occupy this sourcebook. Law and dharma will be put into dialogue, not because dharma is law as such, but because for much of the period under discussion it was under the category of dharma that, for the most part, discussions of issues pertaining to law took place. In other words, the modern category of law gives us the theoretical tools to ask the right questions and theorize the Indian intellectual labors on these issues, while dharma provides the major, although not the only, indigenous category within which those labors were carried out.

#### LAW AND THE TRADITION OF POLITICAL SCIENCE

The use of the term dharma for law, nevertheless, was neither universal nor inevitable. This is borne out by the first century C.E. author Kautilya's compendium *Treatise on Politics* (*Arthaśāstra*). The significance of Kautilya's work for the history of law in India rests primarily on the fact that it provides a different and in many respects unique lens into that history. His treatise belongs to a distinct scholarly tradition with social and political priorities different from those represented by the science of dharma (*dharmaśāstra*), the primary discipline devoted to jurisprudential reflection within the Brahmanical scholastic tradition. Kautilya makes no attempt to reduce the variety of laws within society into the single category of dharma. Indeed, we do not find a single comprehensive term within the *Treatise on Politics* to refer to law as such, or even to the broad areas of religious and secular norms covered by the term dharma within the discourse of the science of dharma. What is clear, however, is that Kautilya, both formally and in *obiter dicta*, argues for the plurality of law; law is not one but multiple. Although his text is later than the earliest documents of the science of dharma, it nevertheless taps into an alternate intellectual history that probably ran parallel to the one represented by the science of dharma. The *Treatise on Politics* was a product of an expert tradition based within royal chanceries and dealing with political science, theory of governance, and jurisprudence. Although much of this intellectual labor was carried out by Brahmins working as counselors, ministers, and government officials, their outlook and priorities were significantly different from those of their colleagues working within the confines of Vedic institutions of learning—the kind of Brahman intellectual that produced the texts of the science of dharma.

In this sourcebook we will examine documents from both these scholarly traditions dealing with law in ancient India. Unfortunately, Kautilya's *Treatise on Politics* is the sole representative of political science; it is therefore both unique and precious. Other texts produced in later centuries are derivative and, although they provide interesting historical insights, are not included here. The material on governance and law contained in Kautilya's work was incorporated into treatises of the science of dharma at least from the time of Manu (second century C.E.), a factor that may have contributed to the demise of political science as a distinct and independent intellectual tradition. It is also likely that polities emerging after the Gupta Empire around the sixth century C.E.<sup>4</sup> did not consider this scholarly tradition as contributing significantly to governance or to enhancing the power of rulers; political science as a distinct intellectual enterprise was not fostered in the chancery or among the senior political elite. Thus it lacked an institutional vehicle for its survival. By contrast, the science of dharma flourished in a variety of institutional settings, especially in Brahmanical institutions devoted to the cultivation of Vedic and ancillary knowledge systems.

Although Kautilya does not present a theoretical framework for understanding either law as such or the operation of law within society, he provides insights into how different genres of law were perceived within the royal chancery, how they interacted with each other in a hierarchical system, and how conflicts among different kinds of law were resolved, as well as a unique and significant vocabulary for the different genres of law.<sup>5</sup>

The most important reference to this multiplicity of laws is found in the seventh chapter of Book 2. As part of the core of Book 2 ("Activities of Superintendents"), which probably existed as a separate text prior to its incorporation by Kautilya into his own work,<sup>6</sup> this chapter was already present in the sources he used and dates probably to the first century B.C.E. The chapter deals with accounts and book-keeping carried out in the Bureau of Official Records, called *Aksapatala*, where a registry was kept of various activities relating directly or indirectly to state revenue. One entry relates to various laws and customary norms prevalent in different parts of the kingdom (see ch. 3, #1): "In that bureau he should have the following entered in the registry books: concerning regions, villages, castes, families, and associations—dharmaśāstras, conventions, customs, and canons" (*AS* 2.7.2).<sup>7</sup> The four kinds of law are distributed among two geographical divisions: regions and villages; two groups based on kinship: castes<sup>8</sup> and families or lineages; and finally *sangha*, a term that covers any kind of association or confederation, both political and economic. I think here the term probably comprehends different kinds of commercial, trade, professional, and even religious associations.<sup>9</sup> In all these geographical and social divisions and

groupings within a kingdom there exists a variety of laws and regulations that govern social interaction and the lives of individuals. Kautilya reduces this multiplicity to four categories.

These categories are named dharma, convention, custom, and canon.<sup>10</sup> What are their exact meanings? How are they related to one another, and what happens when they are in conflict? Kautilya, unfortunately, does not provide much information on either issue; he appears to assume that his readers are familiar with these concepts and that no further elucidation is necessary. From the bits and pieces of evidence available within his treatise, however, we can tentatively arrive at a few conclusions. The category of dharma refers to the broadest level of normative behavior, and it is especially connected with righteousness, virtue, and morality. Thus, we hear of dharmic and adharmic customs (AS 13.5.14, 24) and of dharmic rates of interest (AS 3.11.1-3). It is also possible that this category included ritual practices that followed the traditions of particular families or regions. In any case, this kind of law appears to have been the one least connected with state revenue, even though officials needed to know such laws in order to properly administer a region. Thus, at 2.7.3 the dharma category is dropped when the bureau sends a written directive to each department regarding revenue expectations.

The next two, convention and custom, are closely related to each other, and their exact distinction is not altogether clear. The first probably refers to conventions that governed social and especially commercial interactions broadly conceived, while the second refers to the specific rules and regulations regarding commercial and other transactions in a particular locality. Thus, at *Arthashastra* 2.16.24-25 we have reference to the customs in ports; here the term refers clearly to the duties and other charges levied by port cities on boats and merchandise making use of their facilities. Law as “custom” was, therefore, more specifically connected to commerce. Thus, in numerous places “custom” is used alone, without “convention,” in contexts that deal with state revenue.<sup>11</sup>

The last member of the fourfold division, canon, was probably the most specific and limited; it comprehended bylaws and statutes established in a particular location either by the local authorities or by the king himself as orders or edicts (AS 3.1.39).

A fifth term, procedures,<sup>12</sup> is often associated with convention, custom, and canon, and it referred to the rules and regulations that governed the activities of government officials. It is significant that in several places (AS 2.6.14; 2.7.3, 9-10) “convention” is replaced by “procedure.” This shows that, even if the two terms are not identical, there was a large degree of semantic overlap between them. Together with canon, procedure was also closely associated with the generation of state revenue. Thus, at AS 2.6.14, these two are singled out in arriving at an estimated total of revenue due

from a department: “Canons, procedures, setting out the corpus of revenue, receipts, aggregate of all revenues, and grand total—these constitute the estimated revenue.” The three terms—custom, canon, and procedure—are connected to estimated revenues from government departments at AS 2.7.3: “From that bureau he should deliver in writing to all departments the records of their estimated revenue, established revenue, outstanding revenue, income and expenditure, balance, additional revenue, procedures, customs, and canons.” Yet in a broader sense, as we see from the statements in AS 2.7.2 and 2.7.26-29, all these terms representing areas of law are significant for state revenue, and in the latter passage, for investigations of malfeasance by revenue officers. These passages are given in full with notes in chapter 3.1.

With regard to the relationship among these four areas of law, we do not find any direct statements in the older sections of the treatise that go back to Kautilya or his sources. However, the four seem to be arranged in a descending order of generality and an ascending order of specificity; the ones listed later are more specific and concern a more limited area of applicability. This is confirmed by a verse in the third book of the *Treatise on Politics*: “Dharma, convention, custom, and royal decree: these are the four feet of the subject of a legal dispute; each succeeding one countermans each preceding one” (AS 3.1.39).

This verse, I think, accurately depicts the relationship of the four domains of law to one another. The ones listed later are more specific and thus have greater force than those listed earlier, following the general maxim of Indian hermeneutics that exceptions and specific rules have greater force and supersede generic rules.<sup>13</sup>

Now, it is nice, although not very fruitful, to speculate as to “what might have been”: what the history of Indian law would look like if one of these terms had been adopted as the general term for law in Indian jurisprudence. The most promising candidate would have been “convention,” that is, the Sanskrit term *vyavahāra*. As we will see, it did have a distinguished history in Indian jurisprudential history, not as a term for law but for either a legal transaction or a lawsuit or legal procedure followed in a court of law. With the ascendancy of intellectuals of the science of dharma, however, the term that came to dominate jurisprudential discourse was dharma.

The linguistic history of law reflects the two theoretical traditions of Vedic exegesis and political science. The former, fostered in conservative Brahmanical institutions of learning, came to dominance especially in the science of dharma, while the latter gradually disappeared or was integrated into the discourse of the science of dharma. The influence of Vedic exegesis on the theoretical reflection of Brahmanical jurisprudence accounts both for the centrality accorded to the concept of dharma and for the epistemology of law based on a transcendental source, in this case the Vedas.

## THE SEMANTIC HISTORY OF DHARMA

The term dharma was co-opted early in the literature of the science of dharma as an umbrella concept to gather all the customs, practices, rules, conventions, rights, obligations, contracts, laws, and the like, as well as ritual rules and religious and ethical norms, that guided and governed the lives of individuals and groups within society. This co-option was facilitated by the history of the term and concept of dharma pre-dating the emergence of the science of dharma, first within the early Vedic theological vocabulary and then in extra-Vedic vocabularies, including early Buddhist literature and the imperial ideology of the third century B.C.E. emperor Asoka, preserved in the corpus of his inscriptions. This is the history I want to delineate here.<sup>14</sup>

The history of the term begins with the oldest literary corpus of India, the *Rig Veda*.<sup>15</sup> The earliest stratum of that corpus goes back probably to the middle of the second millennium B.C.E., while the latest is from about the beginning of the first millennium B.C.E. The earliest form of the word, *dhárman*, is grammatically neuter; the masculine *dharma*, which is the normal form in later Sanskrit, already occurs four times in the *Rig Veda*. The two forms of the term together occur sixty-seven times in that text. Although this is not an insubstantial number, as Brereton (2009: 27) points out, the word's relatively modest frequency "implies that it was not a central term in the Rgvedic lexicon or in the Indian culture of the Rgvedic period." It also has no direct Indo-European and Iranian equivalent. Thus, the term was coined possibly as a neologism by the Vedic poets at a very early period, because it is attested in hymns from every chronological stratum.

Brereton takes the basic meaning of dharma in the *Rig Veda* to be "foundation": foundation of the world, gods, humans, human society, ritual, and the moral and legal order. Its early association with the gods Varuna and Mitra, and more generally with the group of gods called Adityas to which these two belong, becomes significant for its later semantic history because "the Ādityas are kings, and the connection between royalty and *dhárman* is a constant in verses describing the *dhárman* of the Ādityas" (Brereton 2009: 56). Brereton (2009: 55) further notes: "For the most part, when it is linked to Mitra and Varuṇa, *dhárman* carries the sense of a foundational authority. The reason for this rests not so much in the semantic resonance that *dhárman* independently possesses, but rather in the character of the Ādityas. These are the gods most closely associated with the principles that govern the actions of humans. Varuṇa is the god of commandments and Mitra is the god of alliances. The distinct characters of these gods then give color to the more neutral *dhárman* and define the kind of 'foundation' it describes, and thus, *dhárman* becomes 'the

foundation of authority' that structures society." So, the term dharma already in its earliest usage has a special connection to royal authority and social order.

These social and royal connotations are further defined in the texts of the middle and late Vedic periods (circa 1000–500 B.C.E.).<sup>16</sup> The earliest texts, the four hymn collections of the *Yajur Veda*—*Maitrāyaṇī*, *Kāṭhaka*, *Taittirīya*, and *Vājasaneyi*—constitute a much larger corpus than the *Rig Veda*. Yet, the term dharma occurs in only twenty-two separate passages, much less than the corresponding number in the *Rig Veda*.<sup>17</sup> When we look at later texts—the *brāhmaṇas*, the *āranyakas*, and the early *upaniṣads*—the picture is not brighter. In three major *brāhmaṇas*<sup>18</sup>—the *Aitareya* belonging to the *Rig Veda*, the *Taittirīya* belonging to the *Black Yajur Veda*, and the *Śatapatha* belonging to the *White Yajur Veda*—dharma occurs just eleven times. I have found the term just three times in the *āranyakas*. It is in the early *upaniṣads* that one would expect dharma, so common and so central in later theological discourse, to be accorded a prominent place. Yet, in the three major texts of this genre—*Bṛhadāraṇyaka*, *Chāndogya*, and *Taittirīya*—it occurs in just nine passages. If dharma was not a central term in the Rig Vedic lexicon, it was even less so in the subsequent theological discourse captured in the later Vedic texts.

Even more important, during this period the semantic range of dharma becomes more restricted than in the *Rig Veda*. Its association with Varuna, the heavenly king, is highlighted, as is its link to his earthly counterpart; the term is used mostly within the royal vocabulary, and in particular within the ritual consecration of a king (*rājasūya*). Dharma is the power that stands above the king, the ruling power of the ruling power. Dharma constitutes the very essence of kingship and the transcendent power that lies behind the visible power and authority of the ruler. The *Śatapatha Brāhmaṇa* (5.3.3.9), within the context of the ritual of royal consecration, makes a significant statement regarding the relation among dharma, Varuna, and the earthly king:

Then to Varuna, the lord of dharma, he offers a cake made with barley. Thereby Varuna himself, the lord of dharma, makes the king the lord of dharma. That, surely, is the highest state when one becomes the lord of dharma. For when someone attains the highest state, people come to him in matters relating to dharma.

Here we get a clearer picture as to what the author of the *Śatapatha* means by dharma. It has to do with matters regarding which people come to the king and in all likelihood refers principally to legal disputes. Dharma is thus placed squarely within the public realm of law, social norms, and governance overseen by the king. Hence, the king is "lord of dharma" just like Varuna, his heavenly counterpart.

The connection of dharma with law and courts of law is presented even more clearly in a significant passage of the *Bṛhadāraṇyaka Upaniṣad* (1.4.14):

Dharma is here the ruling power standing above the ruling power. Hence there is nothing higher than dharma. Therefore, a weaker man makes demands of a stronger man by appealing to dharma, just as one does by appealing to the king. Now, dharma is nothing but the truth. Therefore, when a man speaks the truth, people say that he speaks dharma; and when a man speaks dharma, people say that he speaks the truth. They are really the same thing.

It is dharma, as enforced by the king, that permits weaker persons to make demands of stronger persons; without dharma and the king, the law of the fish would prevail, where the bigger fish eat the smaller fish. The subtext here is litigation. A weaker man can drag a stronger man to the king's court. A significant point in the semantic development of dharma in the middle and late Vedic periods, therefore, is its close association with law and legal process, and with the royal sphere. It is dharma that constitutes the king in his royal status.

We can detect a further semantic development bringing dharma more broadly into the ethical and religious spheres in a significant passage of the *Chāndogya Upaniṣad* (2.23.1). Here three kinds of individual are presented as people whose very being consists of dharma: "There are three types of persons whose torso is dharma. The first is the one who pursues sacrifice, Vedic recitation, and gift-giving. The second is the one who is devoted to austerity. Third is a celibate student of the Veda living at his teacher's house."<sup>19</sup>

In this passage, dharma specifically refers to three modes of religious life, probably the life of a Brahmanical householder, an ascetic given to austerities, and a perpetual Vedic student living out his days at his teacher's house. This is the kind of meaning that we encounter in the next phase of its semantic history, both in early Buddhism and in the inscriptions of Asoka.

Even though in the ritual theology of the school of Vedic exegesis dharma is defined explicitly as Vedic injunctions governing rituals,<sup>20</sup> in the early ritual texts represented by the aphorisms on the Vedic ritual and on the domestic ritual it does not figure prominently. Its royal connections far outstrip its connections to the Vedic ritual. In ten texts of aphorisms on the Vedic ritual I have examined, the term occurs in just thirty-nine passages. In all but a handful of them, however, dharma does not have the meaning found in either the earlier Vedic texts or the later theological traditions. It appears that the expert scholastic tradition focusing on the ritual developed a very special meaning of its own: the specific details of a rite. Most of these

passages deal with how dharmas, taken as ritual details, are extended from one kind of ritual, often from ritual archetypes, to others modeled after it. The term is used only occasionally also in the aphorisms on the domestic ritual, but in them we detect the extended meaning of dharma we saw in some of the *upaniṣads* and we will find in the aphorisms on dharma.<sup>21</sup>

The term dharma, now with the more focused semantic field encountered in the texts of the middle and late Vedic periods, was taken over by the rising ascetic communities, including the Buddhist, Jain, and Ajivaka, along with other items of the royal vocabulary and symbolism to mark the new religious leaders and their doctrines—leaders who were considered spiritual world conquerors and religious counterparts to the world-conquering emperors. The founders of the new religions are called "Conquerors" (*jina*), from which is derived the name for the religion of Jainism; the wheel, a metonym for the war chariot and conquest, is a central symbol in Buddhism, the Buddha's very first sermon being called "setting the wheel of dharma rolling"; the Buddha himself is called a "wheel-roller," that is, a world conqueror; and the Buddha's message is called "edict" (*śāsana*), paralleling the edicts containing the messages of a king. These emergent ascetic communities were geographically located in the northeastern region of India, what is today Bihar and was then called Magadha. Bronkhorst (2007) has argued that what he calls "Greater Magadha" constituted a distinct cultural region. He has clearly shown the need to take geography into account, not just chronology, in constructing the religious, cultural, and social history of ancient India. We are able for the first time, therefore, to geographically locate a significant moment in the semantic history of dharma.

More than any of the other ascetic religions, however, it was Buddhism that adopted dharma as the most central concept in its doctrine and ethics. It came to define the substance of what made Siddhartha the Buddha, the Enlightened One; it constituted the content of his enlightenment. The triple gem of Buddhism consists of Buddha, dharma, and the monastic order. The Buddhist dharma in a special way referred to the ethical precepts known as *śīla*, ten of which pertained to monks and nuns and five to laypeople. The latter consisted of abstention from killing, stealing, sexual misconduct, false speech, and liquor.

It was this dharma, mediated by its appropriation into Buddhism and with deep ethical connotations, that the emperor Asoka (c. 268–233 B.C.E.), a convert to and ardent supporter of Buddhism, took up and made the cornerstone of his imperial ideology.<sup>22</sup> Buddhism had spread across India from its Magadhan homeland long before Asoka assumed power. No doubt the concept of dharma, so central to Buddhism, would have been well known by the time Asoka extended his empire to much of the Indian subcontinent. In a series of inscriptions on rocks and exquisitely carved

pillars, the earliest examples of writing in India, Asoka articulated an imperial ideology.<sup>23</sup> From the major Asokan inscriptions, if we exclude some outliers such as the explicitly Buddhist texts and records of donations, it becomes clear that the core of Asoka's effort consisted in preaching dharma to his subjects and in organizing the state bureaucracy to further his mission. Asoka provided several definitions of the dharma that he wanted his subjects to follow and his officials to preach:

Mother and father should be obeyed, and likewise elders. Kindness should be shown to living beings. Truth should be spoken. These are the attributes of dharma that should be propagated. (Major Rock Edict 2: Brahmagiri)

Obedience to mother and father is good. Giving to friends, acquaintances, and relatives, to Brahmins and ascetics is good. Abstention from killing living beings is good. Spending little and storing little are good. (Major Rock Edict 3: Girnar)

This auspicious rite, however, produces great results, namely the auspicious rite of dharma. That is as follows: Proper regard toward slaves and servants. Reverence toward elders. Restraint with regard to living beings is good. Giving to ascetics and Brahmins is good. (Major Rock Edict 9: Girnar)

Putting together the elements contained in these and other definitions he provides, we can come up with this list of virtues that constituted the Asokan dharma:

1. obedience to mother and father, and to elders;
2. kindness to living beings;  
—in a special way, abstention from killing living beings;
3. generosity to friends, relatives, Brahmins, and ascetics;
4. speaking the truth;
5. spending little and storing little; that is, life not given to extravagance;
6. proper regard to slaves and servants.

The centrality that dharma now occupied within both the theologies of the new religions and the imperial ideology of the most powerful emperor of the ancient period made it impossible for the theologians and systematizers within the Brahmanical scholarly community to ignore the term any longer. They too made it the central concept of their own theological discourses, presenting the Brahmanical way of life, norms of society, ethics, duties of the king, and civil and criminal law as dharma. Further, they started a brand-new genre of literature, *dharmaśāstra* or treatises on

dharma, devoted to this concept. We can only speculate here, but we cannot be far wrong in assigning a date of around the third century B.C.E., perhaps a bit earlier, to the beginning of this genre.

#### TEXTUAL TRADITION OF THE SCIENCE OF DHARMA

The jurisprudential literature examined in this sourcebook comprehends, as already noted, two expert traditions: political science and science of dharma. Another expert tradition that exerted a deep influence on the latter is Vedic exegesis.

The literature of the science of dharma bears the generic title *dharmaśāstra*, that is, the *śāstra* of dharma. What precisely is denoted by the Sanskrit term *śāstra* or “science”? Traditional Indian scholarship theorized this concept at an early date. A “science” presents a codification of rules that govern a specific area of human activity. This system of rules, however, is viewed as having priority over actual practice; the former is not derived from the latter. Thus, to use Geertz's terminology, a science is primarily a *model for action and practice*, and only subsequently and derivatively a *model of*. This primacy of theory over practice is embedded in the Indian theorizing of science. Even in such mundane areas as handling horses and elephants or engaging in lovemaking, the theoreticians contend, the practice of these activities would be impossible if an original blueprint had not been provided by the corresponding science.

Pollock's several studies on the nature and history of the concept of science have done much to elucidate this uniquely Indian form of discourse.<sup>24</sup> He defines the term: “*śāstra* was thought of generally as a verbal codification of rules, whether of divine or human provenance, for the positive and negative regulation of particular cultural practices” (Pollock 1989a: 18). The term thus signifies both a discipline and a treatise; a science is both a system of knowledge that a person would seek to master and a treatise codifying such knowledge that a person would read, memorize, and understand. It is this dual aspect of science that makes the term difficult to translate with a single English word.<sup>25</sup>

The term *dharmaśāstra*, then, refers both to the expert tradition of scholarship on dharma/law, that is, the science of dharma, and to treatises on dharma codifying that science. The term *dharmaśūtra*, aphoristic texts on dharma, is frequently used to refer to the early treatises of this genre that were composed in aphoristic prose (*sūtra*). Some scholars make what I think is an incorrect distinction between aphoristic texts on dharma and treatises on dharma, taking the former to be in prose and the latter to be in verse. The category treatise on dharma (*dharmaśāstra*) refers to the texts that encode the science of dharma, not to the literary form of a composition.

Unbroken over two millennia, the literary production of the science of dharma is undoubtedly one of the longest in Indian history. When that history started is difficult to say; the earliest literary products of the tradition are lost.<sup>26</sup> The term *dharmaśāstra* is used for the first time by the grammarian Katyayana, who may be assigned to the late third or early second century B.C.E.,<sup>27</sup> and Patanjali, who wrote a commentary on Katyayana's work probably in the middle of the second century B.C.E., refers specifically to *dharmaśāstra*, aphoristic text on dharma.<sup>28</sup> So, the beginnings of this literary tradition go back to at least the third century B.C.E. Texts dealing with dharma were being composed up to at least the eighteenth century C.E. both in the context of British colonial courts requiring expertise in Hindu law and in the more traditional context of commentaries and legal digests.

This long textual history can be divided broadly into three phases. They roughly track historical periods, but there is considerable overlap especially between the second two; different types of legal texts continued to be produced during roughly the same period. First, there are independent and original treatises on dharma composed in either prose or verse, or a combination of the two. Even though there is considerable interdependence among these texts, they cite or comment on their predecessors only rarely. These are normally referred to as *dharmaśāstra* or even more commonly as *smṛti*, texts of recollection. They are ascribed to celebrated seers and sages of old such as Vasistha, Gautama, and Yajnavalkya, and sometimes even to gods such as Visnu and Brihaspati. Texts of this type continued to be composed well into the second half of the first millennium C.E. Much of this later textual production, however, has been lost; we do not have any manuscripts. We know about them only through citations in medieval texts. Reliable manuscripts of only ten texts have survived: Apastamba, Gautama, Baudhayana, Vasistha, Manu, Yajnavalkya, Narada, Visnu, Parasara, and Vaikhanasa.<sup>29</sup> The first four are written in aphoristic prose and all probably pre-date the Common Era. They refer to seventeen other authors whose works have not survived.<sup>30</sup> Kane (1962–1975, I: 304) estimates that approximately one hundred treatises on dharma are cited in medieval texts. So, roughly 90 percent or more of all the early literary products of this tradition became extinct by about the fifteenth century C.E., if not earlier. Indeed, many of the medieval commentaries and digests appear to cite these extinct treatises not from manuscripts that the authors possessed but from citations in earlier texts. The causes of this large-scale extinction of texts are unclear. Some scholars have suggested that a text lacking an ancient commentary did not survive long. This can only be a partial reason, however, because aphoristic texts on dharma composed before the Common Era—and other ancient texts such as Panini's grammar and Caraka's medical treatise—survived over

a long period of time without the benefit of commentaries, and we also have numerous extant manuscripts that contain only the texts of treatises on dharma without attached commentaries. The voluminous legal digests that were produced during the medieval period starting around the twelfth century and that presented topically arranged citations from the ancient texts may themselves have made experts less dependent on the originals. We know that, given the climate of tropical India and the perishable writing material used, mostly palm leaves, manuscripts deteriorated fast, and if a text was not recopied within a century or two it was likely to fall victim to decay and insects. The earliest manuscripts of even the surviving treatises go back only to about the twelfth century C.E., and most to a much later period.

The second phase commenced in the second half of the first millennium C.E., and it consisted of commentaries on the basic treatises on dharma. Four major commentaries survive from the early period (600–900 C.E.): commentaries on Manu by Bharuci and Medhatithi, on Yajnavalkya by Visvarupa, and on Narada by Asahaya. Numerous commentaries and subcommentaries continued to be written well into the colonial period, the last, to my knowledge, being Krisnapandita's commentary on Vasistha's aphoristic text on dharma composed in the middle of the nineteenth century.

The third phase probably started around the twelfth century, perhaps a bit earlier, when legal digests called *nibandha* or *dharmanibandha* began to be composed. The best-known digests are encyclopedic works divided into topical sections dealing with the entire range of subjects in the science of dharma. Within each section also, topics are arranged in a logical manner so that readers have ready and easy access to any they may wish to investigate. Under each topic citations from original treatises on dharma, often with commentary or explanatory glosses, are given. Two good examples of the encyclopedic kind of digest are Laksmidhara's *Wishing Tree of Duties* (*kṛtyakalpataru*, twelfth century) and Devanna Bhatta's *Moonlight of Texts of Recollection* (*smṛticandrikā*, twelfth–thirteenth century). Other authors adopted a different strategy, writing monographic compositions on individual topics of dharma, such as purification, legal procedure, inheritance, gift giving, adoption, and ancestral offerings. Digests, unfortunately, are often dry and do not engage the intellectual debates seen in the earlier commentaries. They often demonstrate the worst aspects of a legal mind: simply citing sources, as today's lawyers cite case precedents.

This sourcebook contains extracts from all three kinds of texts within the science of dharma, although, given the obvious limitations of space, only a small but hopefully representative—what I think are the most significant—sampling of them is included here.

## EPISTEMOLOGY OF DHARMA

Dharma, as already noted, became incorporated into Brahmanical scholarly discourse as a central theological and legal term at a relatively late date, probably around the fourth or third century B.C.E. We get a glimpse of its new incarnation in works such as those of Apastamba (third century B.C.E.) and the grammarian Patanjali (second century B.C.E.). A novel and central feature in treating this topic within the science of dharma is the discussion of the epistemology or the sources of dharma at the very outset of each treatise: What is dharma? And where do we find it?

This parallels the rule of recognition of H.L.A. Hart, discussed above. Every legal system must have rules whereby those subject to it and officials in charge of administering it can know how to recognize valid laws. The explicit discussion of the rules of recognition is a unique and unprecedented feature of the early treatises of the science of dharma; no text of other expert traditions deals with this core issue. The parallel ritual texts—the aphoristic texts on the Vedic ritual and on the domestic ritual—have no similar discussion of their epistemic sources. Even in later times, the most offered is the mythical origin of a particular discipline such as medicine or drama. These unique epistemological discussions provide valuable clues regarding the sociological and theological reasoning behind the term *dharma* and its application to various legal sectors.

Unlike Vedic sacrifices and domestic rituals, the topic of the early aphoristic texts on dharma was subject to divergent appropriations and explanations by rival religious and political groups. Especially powerful, no doubt, were the definitions and epistemologies of dharma given by the Buddhists, and the appropriation of the concept by Asoka within a new imperial ideology. I think it is within the context of these theological disputations that we must locate the discussion of dharma and its epistemology in the early treatises. The disputed nature of dharma was probably the impetus to deal with epistemological issues at the very beginning of these works. What is the true and legitimate dharma? And how do we come to know it? Are the sources from which we can derive correct rules for living singular or multiple? And if they are multiple, how are they related to each other? Reading between the lines, so to speak, of these early texts, we can detect a certain defensive posture and arguments against unspecified and silent opponents outside the Brahmanical community. Further, the authors within the Brahmanical tradition show a remarkable ability to engage each other in open debate and dissent.<sup>31</sup> The insistence on “community standards,” for example, where the authoritative community is defined as consisting of Brahmins learned in the Vedas, draws a sharp contrast with the unique charismatic authority of the Buddha with respect to true dharma within the Buddhist

tradition. True dharma flows from the enlightening experience and from the mouth of the Enlightened One. Every Buddhist canonical text begins with the words: “Thus have I heard.” The exegetical theory that the Veda is *apauruṣeya*, without an author human or divine, also confronts the Buddhist definition of dharma as derived from the experience of a human being.

The epistemological problem facing the early Brahmanical jurists was exacerbated by the fact that within the confines of dharma they had to pack a variety of rules governing almost every aspect of human life and behavior: ritual, religion, morality, family law, commercial law, criminal law, punishment, penance, and even etiquette. The jurists themselves recognized the validity of territorially or socially restricted rules, often referred to as the dharma of a region, a village, a corporation, or a family.<sup>32</sup>

The distinguished ninth-century jurist Medhatithi, in his commentary on Manu's treatise on dharma (MDh 1.2), provides a tantalizing glimpse into the complex notion of dharma.

We see that the term *dharma* is used with reference to what should be done (*kartavya*) and what should not be done (*akartavya*), that is, injunctions and prohibitions that have an unperceived purpose, as well as with reference to an action (*kriyā*) falling within their scope. . . . Thus, with respect to the result there is no difference whether dharma is the rite (*karma*) called “Eighth-day” or the obligatory nature of performance (*kartavyatā*) relating to it.

The main point here is whether dharma refers to the act that one is obliged to perform (which would be a rite) or the obligation to perform that act (which would be law). I think this distinction is at the heart of the prevalent confusion with regard to the meaning of *dharma*. Unfortunately, Medhatithi does not explain further, simply referring his reader to his other work, which from elsewhere we know is entitled “Inquisition Into Texts of Recollection” (*smṛtiviveka*), but which has not survived.

The latter meaning dominates the legal discourse within the science of dharma. There, rules and prohibitions are spelled out governing various aspects of human life, including family law such as inheritance, criminal law, and legal procedure. The wonderful Sanskrit term *kartavyatā*, “should-be-done-ness,” the fact that an obligation to perform a particular action exists, comprehends this meaning of *dharma*, a meaning foregrounded in such common expressions as “dharma of kings,” “dharma of social classes,” and “dharma of a region.”

The former meaning takes dharma into the realm of actual moral and immoral actions, that is, into the semantic area normally covered by the theology of karma.

This is the reason quite often *dharma* and *karma* are used as synonyms, and why good conduct is equated with dharma. From this meaning we also get derivative forms, such as *dhārmika*, virtuous or pious, and its opposite, *adharma*, impious or sinful. The multiple references of this kind of dharma are encapsulated in this passage of Manu (MDh 1.108–10):

Good conduct is the highest dharma, both what is declared in the Veda and what is given in texts of recollection. . . . When a Brahman has fallen away from good conduct, he does not reap the fruit of the Veda; but when he holds fast to good conduct, texts of recollection say, he enjoys its full reward. Seeing thus that dharma proceeds from good conduct, the sages understood good conduct to be the ultimate root of all ascetic toil.

Dharma here refers to all kinds of religious, pious, and ascetic activities; it means doing good and being good. This deeply moral substrate of the concept is epitomized by the formal definition of the Emperor Asoka noted earlier.

Related to the latter is the extended meaning referring to the result or the fruit of an action. Often *dharma* in this context is translated as merit, coinciding with the meaning of the Sanskrit term *punya*. We have statements, therefore, about accumulating or growing dharma as if it were a bank account, and about dharma being a friend who accompanies a person even after death.

Gradually and without hurting any creature, he should pile up dharma like termites an anthill, so as to secure an escort in the next world; for in the next world, neither father nor mother stands by him as his escort; nor does son, wife, or relative. Only dharma stands by him. Alone a creature is born, and alone it dies. Alone it enjoys its good deeds, alone also its evil deeds. While his relatives discard the dead body on earth as if it were a piece of wood or a clod of earth and depart with averted faces, dharma accompanies him. To secure a companion, therefore, let him gradually pile up dharma every day; for with dharma as his companion, he will cross over the darkness that is difficult to cross. Dharma quickly leads that man, who is devoted to dharma and whose sins have been erased by ascetic toil, to the next world, glittering with an ethereal body. (MDh 4.238–43)

Buddhist jurists had the good sense to select a different term for their own monastic laws: *vinaya*. Their Brahmanical counterparts, who had opportunities to do so, did not. The extension of the concept to include rules that we would today

recognize as civil or criminal law made the task of finding an adequate rule of recognition difficult. Much intellectual labor was spent on this problem.

The Hartian rule of recognition is inextricably bound to territory, especially to the nation-state, in which the laws so recognized are applicable. So, the rule “the queen in parliament” applies to the United Kingdom, and “bill passed by Congress and signed into law by the President” applies to the United States. For people living in India or China these rules will mean nothing, unless they happen to be visiting these countries and are temporarily under their laws. For the authors of the treatises on dharma, however, the situation was much more complicated. Law as dharma was not territorially limited; it was applicable across political divides. The polities within the larger territory of India, whether large empires or tiny kingdoms, did not play any significant role in the epistemology of law, except perhaps when a king’s edict was considered a valid law. Law as dharma had no territorial or even temporal limits, and its epistemic sources, therefore, had to be universally applicable and recognized.

The invocation of the Veda as the ultimate epistemic source of dharma by the early scholars of the science of dharma made dharma universally applicable, because the Veda was theologically defined within the tradition of Vedic exegesis as suprahistorical, eternal, and not authored by any individual, human or divine. How can such a transcendental notion square with the contingent and geographically specific nature of most human laws?

The adoption of dharma to signify law in all its aspects and ramifications and the prominence given to the Veda as ultimately the single epistemic source of law led to theoretical contradictions that occupied thinkers down the centuries. How, for example, can we derive all the myriad and myriadly diverse laws within widely different social, historical, and geographical settings from a single transcendent source? As already noted, within ancient Indian jurisprudence there was no legislative branch of government, even though a king’s power to rule by decree was recognized. Laws were not enacted; they were discovered.

The restriction of the epistemic source of law to the Veda, however, by an elite segment of the population, male Brahman intelligentsia, had much to do with the arrogation and legitimization of power within society. This was carried out principally within the intellectual tradition of the science of dharma, which Pollock (2005: 57) has called “the explicit program of domination of Sanskrit culture.” As Derrett, in his learned and caustic comments on Louis Dumont’s thesis of the total separation of religious and secular realms divided hierarchically between Brahmins and kings, has shown, such a separation, if it ever did exist, was also a creation of the Brahman ideologues precisely for the purpose of increasing their power: “The Brahmins’ abnegation

of secular power is a myth. Brahmans took power when they could, as they do still.”<sup>33</sup> We must keep in mind that knowledge as such, whether it is of the ritual or of astronomy, is always coupled with power, and also that law and the guardianship of law are in a very special way deeply embedded within social, political, and economic power structures. Law is both necessary and perilous; it is a double-edged sword. As Leslie Green, in the introduction he wrote to the third edition (2012: xv) of Hart’s book, says, law and adjudication are deeply political:

The appropriate attitude to take towards law is therefore one of caution rather than celebration. What is more, law sometimes pretends to an objectivity it does not have for, whatever judges may say, they in fact wield serious power to create law. So law and adjudication are political. In a different way, so is legal theory. There can be no “pure” theory of law: a jurisprudence built only using concepts drawn from the law itself is inadequate to understand law’s nature; it needs the help of resources from social theory and philosophic inquiry.

It is important to remember, therefore, that laws and the enforcement of laws are intertwined with the power structure of a society, as we read the seemingly abstract and impartial ruminations of legal scholars in India spanning over a millennium. For example, the simple act of limiting the epistemic source of law/dharma to the Veda had the effect of granting enormous power to the sole custodians of this orally transmitted document, learned male Brahmins, and excluding all women and non-Brahmins, as well as the texts and traditions of which they may have been the guardians.

The manner in which epistemological issues relating to dharma were raised and resolved changed with time and theological developments, and this sourcebook will follow the twists and turns they take. We can, however, detect three phases in the history of scholarly engagement with these epistemological issues. The first is the initial response found in the texts produced in the last three centuries before the Common Era, a response continued in the texts of the first half of the first millennium C.E. without, however, adding too many significantly new ingredients into the discussion. This phase is covered in the first five chapters. The second phase is represented by the commentators from the traditions of both Vedic exegesis and the science of dharma writing in the second half of the first millennium C.E. These authors engage seriously with the theoretical issues raised by the identification of the epistemic sources of dharma already noted. The third and last phase is represented by commentaries and legal digests produced in the second millennium C.E. Clearly the issues that occupied the scholars of the previous half-millennium had lost their

import and urgency, and writers of this phase for the most part simply give the epistemic sources without seriously engaging the thorny issues they raise. Given that the authors of the last two phases present their arguments well and in great detail, I will deal with the texts of the first phase more exhaustively in both the introduction and the headnotes to the texts of that period. This is also necessitated by the fact that these texts are brief and frequently aphoristic in nature, and the history of scholarly debates that underlie the brief statements have to be uncovered and explored in order to understand the intellectual history of the period.

At the outset (chapter 1) I take up for examination the two earliest Brahmanical scholars dealing with dharma: Apastamba, the earliest author of an extant treatise on dharma, and Patanjali, whose “Great Commentary” on the Sanskrit grammar of Panini is a mine of cultural information, even though he comes from outside the science of dharma. He provides external insights into the issues that preoccupied scholars within that intellectual tradition.

Apastamba presents a very early attempt to grapple with the issues relating to law and dharma. In him we see for the first time dharma used as an umbrella concept to include all aspects of law. He takes it to encompass a wide variety of norms, both those contained in the Veda with respect to ritual activities and those followed by living communities in their day-to-day activities. Dharma encompasses both the ritual/moral lives of people and the social regulations governing such areas as proper food and food etiquette (1.16–19; 2.2–4), reception of guests (2.6–9), and ancestral rites (2.16–20). But he also includes areas that modern scholars would recognize as law: inheritance (2.13–14), duties of the king and state officials (2.25–26), crime and punishment (2.26–29), taxation (2.26.9–17), and legal procedure (2.29.5–10). These topics became standard in later texts on dharma.

How does one come to know the correct dharma in all these areas? In the absence of a legislative authority, where does one find it? Apastamba uses the technical term *pramāṇa*, also employed by philosophers dealing with logic and epistemology, in this context with the meaning of “means of knowing” or epistemic source, as well as of authority, especially in the context of scriptural sources recognized in Indian logic as verbal authority (*śabdapramāṇa*). This usage was continued by later authors. Apastamba gives a twofold answer to this epistemological question. First, dharma is “derived from agreed-upon normative practice” (*sāmayācārika*),<sup>34</sup> and second, it rests on the authority of the Veda (ch. 1.1: #1). The two words in this compound, “agreement” and “normative practice,” give us an insight into what Apastamba had in mind when he characterized dharma in this way.

The main word is “normative practice” (*ācāra*), and, given that this term was then rather new in the Sanskrit vocabulary, it is important to understand its early

meanings.<sup>35</sup> In Apastamba's vocabulary it means practice, and often more specifically normative practice that becomes a source of knowledge with respect to dharma (model of and model for): one can learn dharma by observing the practice of those who know and follow it just as one can learn good Sanskrit—so Patanjali would argue—by observing the speech patterns of particular individuals and communities. The term's usage in the grammatical texts show that it refers to behavior patterns characteristic of a particular group of people who become models for others to follow.<sup>36</sup>

The first word of the compound, "agreement," has a clearer meaning. In the context of legal texts, it refers to a compact or agreement, either explicit or implicit, such as when a person belongs to a community with special rules governing its members. Frequently, the term refers to the implicit or explicit agreement on major points of community behavior.

The expression that qualifies dharma in the opening sentence of Apastamba, then, indicates that the epistemic source of dharma is the normative behavior patterns that are generally accepted. But accepted by whom? According to Apastamba, by those who know dharma. This is a somewhat circular argument: how would one know that some people know dharma, when it is through their conduct that one comes to know dharma in the first place? This is a problem similar to that confronted by Patanjali (ch. 1.2: #2) in defining the category "cultured elite" (*śiṣṭa*), who determine what correct speech is. Patanjali resorts to the notion of a cultural or sacred geography, the region where the cultured elite live, while Apastamba does not directly address the issue. However, elsewhere he uses the term *Arya* to refer to the kinds of people whose agreement regarding a practice provides the proper authority. It is also possible that Apastamba was aware of the notion of a sacred and authoritative geography but rejected it, because he explicitly states (see ch 1.1: #2) that a person should follow the conduct approved by *Aryas* "in all regions."

The second way to know whether a particular practice is authoritative is to see whether it is enjoined in the Vedas. However, the Vedas are given here only as an external check regarding the validity of a particular practice of a particular community, not as the direct source of dharma.

That for Apastamba the Veda is not the single source of dharma is clear also from his statement at the very end of his treatise (see ch 1.1: #3) that dharma can be known from women and Shudras, the last of the four social classes (*varṇa*), who are excluded from Vedic rites and access to the Veda. This position is astonishing, given that in the mainstream of Brahmanical theology it would have been inconceivable to present Shudras and women as having access to Vedic knowledge or as models of correct behavior.

Dharma, therefore, is derived from the practice of people in the world. But not everything that people in the world do is dharma, and much of the discussion in the early texts revolves around how best to circumscribe the communities whose practices constitute dharma. For Apastamba the criterion is found in the term *Arya*: people should model their behavior after that of *Aryas* (ch 1.1: #2-3). We do not get a clear picture of who they are, however. From the Buddhist appropriation of this term and its very different use in Kautilya's "Treatise on Politics," we see that the definition was not self-evident and was subject to debate and controversy. The presumption is that, for Apastamba, they are Brahmins, but he says that dharma can be derived from Shudras as well. So does *Arya* comprehend Shudras also, in a way similar to its usage by Kautilya, where *Arya* appears to refer to free men as opposed to slaves without reference to social class or caste?<sup>37</sup> Are *Aryas* defined by their conduct or by their birth, or both? These are open-ended questions left unanswered by Apastamba.

In dealing with dharma derived from the Vedas, Apastamba introduces concepts that would become standard in later texts of the science of dharma. Thus we read that not all the ritual rules and procedures are found in the extant Veda; these have to be learned from actual practice. And one must infer the existence of lost Vedic texts as the basis for such practices (ch 1.1: #5-6). We have here for the first time clearly articulated both the concept of a lost Veda (the complete Veda is not currently available) and the hermeneutical principle of "inferred Veda" on the basis of current authoritative practice. I think that Apastamba applies this principle only to Vedic rituals and not to the entirety of dharma. But this step would be taken by his successors (ch. 6).

There is another criterion: a practice to be accepted as dharma must not be something undertaken because of the pleasure derived from it (ch. 1.1: #5). In other words, for a practice to be normative it must have a motive beyond the immediately practical. Elsewhere Apastamba provides a more general principle: for a practice to be dharma it must have a reason that is not tangible or perceptible.<sup>38</sup> That dharma must have a transcendental motive became a centerpiece of later theology; it is found even in Patanjali (ch 1.2: #3) with reference to the use of correct Sanskrit. These are the two sides of the dharma coin: on the one side are rules that must be obeyed within society; on the other are the religious basis of such rules (see ch 1.1: #10). The two exist in tension, because our authors did realize that not all rules could be tied to either the Veda or some transcendental motive.

A final significant notion introduced by Apastamba (ch 1.1: #8) is the plurality of dharmas or laws: different groups, places, and regions can have different dharmas. This plurality was a cornerstone of legal thinking in ancient India, and it remained in

creative tension with the urge to unify dharma under a single notion or umbrella, generally the Veda. Apastamba speaks only of the dharmas of regions and family lineages, but this would be expanded in later times to include other places such as villages and other groups such as guilds and associations. These specific dharmas, however, become authoritative only if they do not contradict Vedic provisions. This is thus a negative criterion; a practice of a community does not have to be based on the Veda, it merely should not contradict an explicit provision of the Veda—a fig leaf for the theological purists.

I turn now to the grammarian Patanjali, who draws an interesting and significant parallel between correct Sanskrit and proper dharma. For him, there are two distinct and parallel domains of correct Sanskrit, the Vedic (*vaidika*) and the worldly (*laukika*).<sup>39</sup> The first is found in the extant Vedic texts, and the second, correct contemporary Sanskrit, in the speech of a special group of Brahmins whom he identifies as “cultured elite” (*śiṣṭa*). What is significant for our discussion is that these two categories also comprehend the Vedic and the worldly realms of law. The dual domains of dharma of Apastamba parallel the two domains of Sanskrit in Patanjali. For Apastamba, dharma can be found in the Vedas and in the contemporary practices and customs of living communities. This dual domain was subjected to critique and rejection in the later phases of the science of dharma, discussed in subsequent chapters.

The examples of worldly speech given by Patanjali are not common everyday expressions but, significantly, are all derived from statements in treatises on dharma. What is significant here is that for grammarians both the Veda and the world are authoritative with respect to correct Sanskrit. This authoritative nature is carried over into the framework of dharma when Patanjali cites worldly injunctions. Clearly, not everything that is said or done is so authoritative. Thus “world” for Patanjali referred to the science of dharma. We have confirmation of this conclusion. The two examples of not killing Brahmins and not drinking liquor (ch. 1.2: #1) that Patanjali (on Panini 6.1.84; III: 57–58) takes to be worldly are cited again in his comments on Katyayana’s statement (*Vārttika* 39 on Panini 1.2.64), which reads: “And so also the treatise on dharma.” And as an example of such a statement Patanjali gives the two injunctions: “One should not kill a Brahman. One should not drink liquor.” Clearly, for him “world” and “treatise on dharma” are, if not synonyms, at least equivalents with respect to authoritative speech.

So for Patanjali, just as for Apastamba, large areas of the science of dharma, the rules regarding proper conduct, were not derived from the Vedas but from normative practices in the world. Moreover, these practices came encoded in injunctions

that are part of texts, and these textual forms, that is, the treatises on dharma, invest them with authority.

Patanjali also takes up the issue of correct speech, in this case good Sanskrit, and why people should be obliged to use it when they can equally well communicate what they want to say in a local dialect or using dialectical forms of words (ch. 1.2: #3). He calls correct Sanskrit *śabda* (literally, speech) and dialectical or vernacular forms *apaśabda* (wrong speech) or *apabhraṃśa* (corrupt speech). Thus, “speech” is not simply speech but, in a pregnant sense, correct and good speech, which is Sanskrit, just as practice (*ācāra*) is not just practice but correct and model practice. Corrupt speech, on the other hand, comprehends the local dialects or common speech. So, why should one use correct Sanskrit when the object of communication can be achieved equally well through the use of “incorrect” speech or local dialects? He gives the example of *gauḥ*, which is the proper Sanskrit word for cow, while there are numerous dialectical variants such as *gāvī*, *goṇī*, *gotā*, *gopatalikā*.<sup>40</sup>

Patanjali answers that restricting communication to Sanskrit is for the purpose of dharma. Here we come across a meaning of dharma noted earlier as religious merit won through such usage. Just as communication of meaning, the primary reason for speech, can be carried out in any language, so the worldly objective behind activities coming under the purview of law can be achieved in numerous ways. Law as dharma, however, restricts these ways to a few, which are the only proper or correct ways of achieving those objectives. This restriction is done for the purpose of dharma, as in the case of similar restrictions imposed on the use of language. Thus, Patanjali says (ch 1.2: #3), one can achieve the objective of eating, namely the allaying of hunger, by eating anything edible, even dog meat. However, the law restricts these edible foods to two categories: what is to be eaten (*bhakṣya*) and what is not to be eaten (*abbhakṣya*). This, of course, can be extended to all areas of human activity governed by rules.

Here we have a theological/philosophical reflection on law: law restricts activities naturally flowing from human appetites and needs, and such restrictions are aimed at both satisfying this-worldly needs (allaying hunger) and attaining the otherworldly good (merit). This philosophy remained a cornerstone of later thinking regarding dharma in both the science of dharma and the tradition of Vedic exegesis.

The three texts examined in chapter 2 take law/dharma and its epistemology in new directions when compared to Apastamba and Patanjali. The most striking changes are: the central position assigned to the Veda as the primary and ultimate source of dharma, the prominence given to the category of recollection or text of recollection (*smṛti*), and the adoption by legal scholars of the sacred and normative

geography first advanced by Patanjali, along with the associated concept of “cultured elite.” The multiplicity of law presented in Kautilya’s *Treatise on Politics* is reduced to the univocal concept of dharma, which will from now on coexist in awkward tension with the variety of concrete laws on the ground indicated by expressions such as “dharma of regions” and “dharma of castes.” The theological and theoretical assertion that dharma is rooted in the Veda gave rise to a long and complicated history of hermeneutics that attempted to derive the observed diversity of law from the single font of the Veda, a history I will document in the coming chapters.

This move in the epistemology of law, as already noted, is intimately connected with the attempt by the Brahmanical community and its elites to garner power within society. These theological developments have to be located within the social, political, and religious history of northern India in the last few centuries B.C.E. when political changes, such as the reforms associated with the Maurya Empire and Asoka, and religious innovations, represented by Buddhism and Jainism, challenged Brahmanical exceptionalism and put the Brahmanical theologians on the defensive. If law/dharma comes from the Veda, then the guardians of the Veda, the only ones in whose memory it resided, namely the learned Brahmins, became ipso facto also the guardians and guides with respect to law within society. Society in general had to turn to them to understand the proper norms of behavior; kings had to turn to them to articulate and administer law. The dharma propagated by the Buddhists and by Asoka, furthermore, was counterfeit, because it was not based on the only legitimate epistemic source, the Veda.

For the first time in the available history of the science of dharma, Gautama, the third author we examine (Ch. 2.1), presents the Veda, in the singular, as the root (*mūla*) in which dharma is anchored and from which dharma has sprouted. Further, he identifies two other roots: the recollection and conduct of those who know the Veda.

Note that “Veda” is the very first word of this document, thus highlighting its centrality in the thought of Gautama; by its position he wants to signal the supremacy of the Veda with regard to dharma.<sup>41</sup> It is in the singular, perhaps reflecting the emerging theological view that all of the Veda is authoritative for all, irrespective of the Vedic branch to which a person may belong.<sup>42</sup> It is unclear whether the term “root” has a special significance; this is the first time it is used within an epistemological context.<sup>43</sup> If dharma is rooted in the Veda, this may signify that although it derives vitality from the Veda, in practice its branches may spread far and wide. The second clause posits the recollection and conduct of particular individuals to be also the root of dharma. These individuals are said to be “those who know it,” and the pronoun here quite clearly refers to the Veda. Only their recollection and conduct provide guidance with regard to correct dharma. With this Gautama opened up a

line of thinking that culminated in the theology that Veda is the single source, directly or indirectly, of all dharma, even though Gautama’s own words can be interpreted in other ways as well. This hermeneutical stance became standard in later legal texts, even though, as we will see in later chapters, it posed numerous theoretical difficulties.

Another issue relates to what exactly Gautama means by recollection (*smṛti*) and conduct (*sīla*). The first, in all likelihood, does not mean a text or treatise, as it came to signify in later literature.<sup>44</sup> In compound with conduct, it must mean something that can be learned from people who know the Veda. I think “recollection” here comes close to its etymological meaning of “memory,” but, as Klaus (1992) has shown, in many contexts it means something more than passive memory and refers specifically to the application of close mental attention to something: “Indian people in Vedic and early Buddhist times made no distinction between becoming conscious of things of the past and of those of the present, as far as the psychological process is concerned.”<sup>45</sup>

I think “recollection” in Gautama comes close to this meaning. Originally it probably referred to recollections of learned people: you could ask them, “How should I perform this rite?” and they would think about it and tell you how it should be done, modeled on their recollections of how it was done in the past. This is, of course, how much of human knowledge, especially in nonliterate societies, is handed down from generation to generation. The term gradually began to include also authored texts that presented such traditional knowledge in systematic and textual form, and by the time of Manu (second century C.E.) came to be a synonym of “treatise on dharma.” This ambiguity—oscillating between recollection and texts containing those recollections—runs through all our texts. I have, therefore, translated *smṛti* as “recollection” when the reference is clearly to such nontextual forms, and as “texts of recollection” when it refers to authored, and often written, works. However, in the original Sanskrit the creative ambiguity is always present—something, unfortunately, that has to be sacrificed in the translation—and in debates the arguments flow simultaneously from both senses of the term.

Recollection is distinct from conduct, which one gathers by observing the day-to-day practices of the elite, the kinds of things they would habitually do and the way they would do them. Recollection is articulated in language, while practice or conduct is observed in behavior patterns. I think it is this possibility of linguistic articulation that made possible the later semantic extension of recollection to include versions verbalized in textual form.

In selection #2, Gautama turns to the enforcement of law by the king, and in that context acknowledges the authority of the dharma of different regions, castes, and families. But he makes it clear that these have authority only when they do not

contradict scriptural provisions. He also clearly enunciates the authority of various corporate groups to enact and administer rules for themselves. Here we have a realist view and presentation of law<sup>46</sup> without the theological overlay in the opening discussion of his book, when he dealt explicitly with the epistemology of dharma.

The practical need to enforce “real” law makes the theologian depart from his theological absolutism found in the context of legal epistemology. Even though these specific laws are said to be authoritative only when they are not in conflict with sacred scriptures, as I have already noted, that is simply a fig leaf. Most legal provisions are not covered in the Vedic texts anyway, and thus there simply is no possibility of conflict. Further, there is no attempt to find an epistemic source for these disparate laws, whether Vedic or not. Law on the ground is simply accepted as a given, the recognized and normative customs of regions and groups.

Gautama (see #3), like Apastamba before him, talks about a body of experts entrusted with the power to rule in doubtful matters. But he provides details about the constitution of such a body that are lacking in Apastamba. This body is called “legal assembly” (*pariṣad*) and is said to consist of a minimum of ten people. As noted with regard to the articulation of power within the epistemology of law, here are Brahmins—after all, only they are the cultured elite and have the qualifications to sit in a legal assembly—presiding over councils that are called upon to resolve unclear issues relating to law. Such councils may have also acted as bodies that provided legal consultation to individuals, groups, and even the state.<sup>47</sup>

The two authors who come after Gautama, namely, Baudhayana and Vasistha, advanced the discussion of epistemology only marginally. Both take the category of recollection, introduced as a root of dharma by Gautama, as not simply orally articulated recollections but also actual texts that record the authoritative recollections of the Brahmanical elite. This is the normal meaning ascribed to this important category in later Indian literature. Yet neither Baudhayana nor Vasistha explains what precisely these texts of recollection are. It seems unlikely that the category is self-referential, which would be tautological: the dharma that they are expounding cannot have as its authoritative source the very texts they are composing. We will have to wait until Manu to have this question answered.

These two authors also introduce for the first time two concepts<sup>48</sup> that Patanjali advanced in his discussion of what may be called the epistemology of Sanskrit: how do you know good Sanskrit? These are the notions of “cultured elite” (*śiṣṭa*), who are by definition speakers of correct Sanskrit, and of a cultural-religious geography, the “land of the Aryas,” inhabited by them. Baudhayana and Vasistha not only give definitions that are almost identical with those of Patanjali but also present the two as

sources of dharma: the cultured elite living in the land of the Aryas are models of and models for living and acting in accordance with dharma.

Whereas Gautama presents the practice of “those who know the Vedas” as an epistemic source of dharma, both Baudhayana and Vasistha use instead the expression “cultured elite”; they are the standard for correct dharma, as they are for correct Sanskrit. But we see the authors still groping for a proper technical term to use with regard to the behavior patterns of these individuals that provide the basis for dharma. Baudhayana uses the term *āgama*, with a meaning something like traditions that have come down from generation to generation. Elsewhere in his text he uses the expression *śiṣṭasmyti*, that is, the recollection of the cultured elite. Vasistha, on the other hand, uses the term *ācāra*, normative practice, already employed by Apastamba and Patanjali, and it became the standard in later texts of the science of dharma for the third epistemic source of dharma.

One other significant innovation introduced by Vasistha is the term *śruti* in place of *Veda* in discussing the epistemic sources of dharma.<sup>49</sup> The word literally means hearing or what is heard, and emphasizes the aural nature of the *Veda*; you can at any given point in time actually hear it being recited. And Vedic recitation is a central duty of every Brahman. One can find out the exact textual form of a Vedic passage from this hearing. The term is probably related to the pedagogy of Vedic instruction; the students recite exactly what they hear from the mouth of the teacher and exactly how they hear it—the precise articulation and intonation of the words. Vasistha’s text represents the first use of this important term in the discussion of legal epistemology within the science of dharma,<sup>50</sup> and its use by him in the coordinative compound *śruti-smṛti* (scripture and text of recollection), referring to the dual textual source of dharma, became standard in later legal literature.

We have a parallel use of “hearing” within the Buddhist epistemology of dharma emanating from “the words of the Buddha” (*buddhavacana*). All Buddhist scriptures begin with the words “Thus have I heard” (*evam mayā śrutam*; in Pāli *evam me sutam*), taking a teaching back to the very mouth of the Buddha. This hearing is the basis of Buddhist scriptures, much like *śruti* within the Brahmanical tradition, even though the import of “hearing” in the two differs widely. But the parallel use of the term in the two traditions of interpreting dharma is noteworthy.

The three major treatises of the first half of the first millennium C.E., those ascribed to Manu, Yajnavalkya, and Vishnu (chs. 4–5), do not contribute substantially to the issues surrounding the epistemology of dharma. Manu introduces several literary innovations that I will discuss in chapter 4, and on the issue of the sources of dharma Manu presents not three but five: “The root of dharma is the entire *Veda*, as

also the recollection and conduct of those who know it; likewise the practice of good people, and satisfaction of oneself" (MDh 2.6). The first part of this statement is almost identical to Gautama's, but Manu then appends two other sources: practice (*ācāra*) of good people and satisfaction of oneself.<sup>51</sup> The latter is repeated by Yajnavalkya, but it had little impact on later discussions. The former, on the other hand, in the handy expression *sadācāra* ("practice of good people"), became the standard third source of dharma; Yajnavalkya, for example, gives this while dropping the category "conduct of those who know the Veda." By substituting "good people" for "people (i.e., Brahmans) who know the Veda," Manu broadened the authoritative community. This was a smart move, because broad swaths of dharma, such as the dharma of villages, families, and corporations, cannot be located among just people who know the Veda, and "good people" connects it to the deeply moral connotation of dharma noted earlier in a passage from him.

Another significant development concerns the ambiguous term "recollection." Manu clears up this ambiguity with the straightforward statement: "'Scripture' (*śruti*) should be recognized as the Veda and 'recollection' (*smṛti*) as treatise on dharma" (MDh 2.10). In the early texts, as we have seen, recollection is presented as a source of dharma and thus external to the texts that the authors are engaged in composing. Manu, however, identifies recollection with these very texts on dharma and specifically with his own composition. Recollection that remained ambiguous in the zone between living and textualized is now firmly presented as text.

Manu, however, leaves the exact definition of "treatise on dharma" (*dharmaśāstra* given in the singular) open. A couple of centuries later, Yajnavalkya (1.4–5; see ch. 5.1: #1) goes a step further by presenting a canonical list of twenty authors of such treatises.<sup>52</sup>

A major literary innovation in the three texts from this period also had an impact on the epistemology of dharma. All three locate their exposition within frame stories that narrate the historical circumstances in which the teachings were imparted. In all of them the content of the texts is presented as the authoritative teaching of an exalted and authoritative figure: Manu, the first human being and first king, who was the son of the creator god; Yajnavalkya, a Vedic seer who is the author of the white *Yajur Veda* and one of the main Upanisadic teachers; and the god Vishnu himself. So the authority and authenticity of the dharma taught in these texts are guaranteed by the very person imparting the instruction. Although in the texts of Manu and Yajnavalkya, after the introductory frame story, the author moves on to present the traditional epistemology of dharma, in the text of Vishnu this is dispensed with altogether. The sole epistemic source of dharma for the author of Vishnu's text is the words of Vishnu himself.

The second phase in the epistemology of dharma is represented by the major commentaries composed between the fifth and ninth centuries C.E., presented in chapters 6–7. These commentators take as their basis the epistemology of dharma articulated in the treatises we have discussed. In particular, they all assume as a fundamental principle that Veda is the sole foundation of dharma, even though some, like Medhatithi, acknowledge that some kinds of dharma may be extra-Vedic. This basic principle is articulated at the very beginning of the foundational text of Vedic exegesis: "Dharma is something beneficial disclosed by a Vedic injunction" (*Mīmāṃsā Sūtra* 1.1.2; see ch. 6.1: #1). The commentators also take for granted that texts of recollection represented by the treatises on dharma are a legitimate epistemic source. Even though they accept proper conduct as a third epistemic source, their discussion focuses primarily on texts of recollection and their relationship to the Veda.

The two statements—Veda is the sole epistemic source of dharma, and texts of recollection constitute a valid epistemic source of dharma—create a serious theoretical and theological problem for our authors. The two, *prima facie*, appear to be contradictory. The easy solution is to ditch the second proposition and affirm unambiguously that the Veda is not only the primary but also the sole epistemic source of dharma; what is outside of the Veda, what is not found in the Veda, is not and cannot be dharma. This extreme conservative position is held by a hypothetical opponent<sup>53</sup> whose arguments are presented by all our authors. He could possibly be just a straw man, a foil used to present and then rebut his arguments and thereby buttress their own positions. Yet, I think this hypothetical opponent probably represented the real views of a segment of the thinkers in the tradition of Vedic exegesis and, perhaps, the science of dharma. I base this reasoning on, among others, Visvarupa's commentary (ch. 7.2: #1), which reproduces an almost excessively long and detailed argument of the opponent that, in the printed text of the original Sanskrit, occupies over eight pages, including objections raised by his own opponents. However, this extreme position never established itself in the mainstream of either Vedic exegesis or the science of dharma.

So we are left with both horns of the dilemma: how can one hold on to both the Veda and the texts of recollection as valid epistemic sources of dharma? Two solutions, neither without serious problems and undesirable consequences, are offered.

The first, already proposed by Sabara (ch. 6.1: #2), posits that the Vedic texts extant today do not comprise the entire Veda; many texts have been irretrievably lost. It is the memory of the basic injunctions contained in these lost texts that is preserved in the texts of recollection. So, the latter are actually *based on* the Veda. This theory, therefore, posits two kinds of Vedic texts available to us. The first consist of texts actually recited in contemporary Vedic schools, referred to by the technical term "perceived Vedic texts" (*pratyakṣaśruti*). The second are Vedic texts whose existence

must be inferred on the basis of injunctions given in texts of recollection, referred to as “inferred Vedic texts” (*anumitaśruti*).

Yet, a couple of centuries after Sabara, his most famous subcommentator, Kumarila Bhatta, was quite troubled by this attempt to base texts of recollection on lost Vedic texts for both substantive and strategic reasons. As Larry McCrea (Forthcoming) has shown, Kumarila was a confirmed and thoroughgoing atheist who dismissed any kind of supernatural source for the origin and authority of the Veda, whether a supreme god or some sort of yogic insight or supernatural vision of Vedic seers. The Veda and the Vedic language have existed from eternity within the memory of a continuous and unbroken line of reciters. That is the only reason for the Veda’s unique nature—without author, human or divine (*apauruṣeya*), eternal and infallible. The insertion of the possibility that some Vedic texts may have been lost, and that some parts of the line of reciters may have been broken, would seriously undermine his theory of Vedic authority. Of even greater concern to Kumarila—a concern expressed by later scholars such as Visvarupa and Medhatithi—is the strategic problems created by the theory of a lost Veda. Kumarila (ch. 6.2) says that such a theory will permit heterodox traditions, such as Buddhism, to claim that their own scriptures are likewise based on lost Vedic texts and, therefore, are as authoritative as Brahmanical texts of recollection.

Now, with regard to those who acknowledge that texts of recollection, such as that of Manu, also have as their foundation lost Vedic branches, the Buddhists and others might easily say that their own texts are founded precisely on such Vedic branches. For, who is able to limit the scope of statements in lost Vedic branches to just those texts? Therefore, so long as some people have adhered to something for a certain length of time and it has gained renown, it may appear to have the same authority when one perceives it as having a foundation in lost Vedic branches, even when it may conflict with perceptible ones.

The opponent of Visvarupa I have already alluded to (ch. 7.2, #1) makes a similar point with regard to the problems created by the theory of a lost Veda. He further points out the implausibility that Vedic texts providing a foundation for texts of recollection would have become extinct, drawing attention to the fact that the hypothetically lost Vedic branches cannot be radically different from the extant branches and contain radically different injunctions: the *Maitrāyaṇī* branch, he notes, is not radically different from the *Kāthaka*. In other words, given the vast number of texts preserved in different Vedic branches and their overall similarity in content, it is difficult to see how injunctions in texts of recollection are not supported by any of the extant texts. Medhatithi takes the same position as Visvarupa’s opponent, and

is more sarcastic. We must assume, he says, that just those Vedic texts that had all the injunctions now given in texts of recollection somehow became extinct!

Second, to obviate the drawbacks inherent in the theory of a lost Veda, Kumarila proposes a novel solution. He says that all the texts of recollection are based not on lost Vedas but on currently available Vedic texts. Then why can’t we find them? Because, Kumarila contends, the Vedic branches are scattered across the vast country of India and no single individual is able to collect and study them all at any given moment. To help people find out the entirety of the Vedic dharma contained in the texts of all these branches, the authors of the texts of recollection presented the content not verbatim but in their own words and in a logical order. Thus, Kumarila proposes that there cannot be any contradiction between Vedic provisions and those of texts of recollection. So, all injunctions in the texts of recollection have an authority equal to that of explicit Vedic texts, and when two texts of recollection or a text of recollection and a Vedic text contradict each other, there is an option or, more likely, according to Kumarila, a simple inability on our part to understand the specific scope of each injunction.

Clearly, the same objection that Visvarupa’s opponent raised with respect to the lost-Veda solution, namely that the lost branches cannot be totally different from those we have, could be leveled against Kumarila’s “scattered Veda”; the parts unavailable to a particular individual could not be very different from those that are. Kumarila’s solution to the central epistemological problem relating to dharma, moreover, was not universally accepted.

There is a divide, however, between the scholars representing Vedic exegesis and those belonging to the science of dharma. Although the two scholarly traditions are joined at the hip, their focus is different. Vedic exegesis has a narrow focus in its preoccupation with the Vedic ritual and its correct performance. Scholars in the science of dharma have somewhat different perspectives and interests: they have to deal not only with ritual matters but also and especially with the real-life situations of individuals and social groups, with differing customs and norms of different regions and groups, with court procedures and the resolution of disputes, and with the civil and criminal laws governing societies. Can one expect to find all these diverse laws in the Veda, which by definition is suprahistorical and cannot be seen to engage in temporally or geographically specific issues?

This epistemological conundrum is often left without direct engagement or resolution, but Medhatithi, possibly the greatest jurist of ancient India, provides a forthright answer (ch. 7.3: #6): not all of dharma is based on the Veda. In his comments on the duties of a king (*MDh* 7.1), he acknowledges that “the dharmas explained here have their roots in various epistemic sources; not all of them have the Veda as

their root." He presents five possible answers to the relationship of texts of recollection to the Veda and finds them all wanting. Being one of the most refreshingly frank and honest scholars of the period, he is able to throw up his hands and admit defeat. His basic answer is that there *must be* some sort of connection between the texts of recollection and the Veda, but we have no idea what that connection might be! He concludes enigmatically: "There is no authority, however, to specify the particulars, nor is it useful." But after reviewing the five alternatives, he presents a clearer conclusion:

Therefore, there certainly exists a connection between the Veda and Manu and others with respect to this issue (dharma). It is, however, impossible to determine the specific nature of that connection. When people who know the Veda have the doggedly resolute conviction that something must be carried out, then it is appropriate to assume that it is, indeed, rooted in the Veda and not rooted in something else, such as an error. In this way, an assumption comes to be made with respect to the cause that is in keeping with that conviction.

The third phase of the epistemology of dharma is represented by commentaries and legal digests produced in the second millennium C.E. With rare exceptions, the deep interest in this topic exhibited by the scholars of the earlier period is absent among those of the second millennium. Most frequently they simply give the epistemic sources of dharma found in the treatises on dharma with minimal comment and do not engage seriously with the many theoretical problems raised. The intellectual milieu was probably different, and new issues probably came to dominate the conversation. That dharma was based on the Veda and texts of recollection was taken as a given. Only Apararka (ch. 8.2: #2) takes seriously some of the issues tackled by his predecessors in the context of the rising importance of Hindu sects, both Vaishnava and Shaiva, and the prominence of their respective sacred texts. Buddhists and Buddhist sacred scriptures that loomed large in the discussions of the scholars of the second phase are, for the most part, absent. What occupies the authors are concrete issues concerning family law, such as adoption and inheritance, and in a special way legal procedure. We will see their minute attention to detail with respect to court proceedings in the second part of this sourcebook.

#### ACCOUNTING FOR CHANGE

We noted earlier the threefold division of Hart's secondary rules encompassing recognition, change, and adjudication. I have dealt with the first under epistemology of law in the preceding section. Rules of change identify the legitimate ways existing

laws can be modified and annulled, or new laws enacted. Rules of change are, furthermore, integral to the epistemology of law; an individual or institution with the authority to enact new laws will also have the authority to change and annul existing laws. Without such an explicit agency, Indian epistemology of law needed to come up with hermeneutical principles to account for change.

As I wrote this, news reports said that a court in the state of Himachal Pradesh had outlawed the "barbaric slaughter of animals in Hindu temples." The court deemed the long tradition of sacrificing goats and sheep at the beginning of the winter season in the Himalayan region "cruel and barbaric." This is a modern example of the age-old dilemma of traditional practice conflicting with evolving moral codes and ethical sensibilities. As vegetarianism and an ethic based on the principle of noninjury (*ahimsā*) gained ground in ancient India, the basic ritual dharma of the Veda, killing animals in sacrifice, also became the object of serious criticism. Defenders of ritual killing resorted to such double talk as "killing in sacrifice is not killing." But such ethical dilemmas also generated more theoretical reflections.

Given the theory that law as dharma is derived from the Veda and that the Veda is eternal, it is theoretically impossible to (i) change any dharma; (ii) annul any dharma; or (iii) enact any new dharma. But human societies and their customs and mores inevitably change, whatever the theoreticians of dharma may say. Changes in customary laws within various communities reflecting these societal changes are imperceptibly introduced when those laws are unwritten. As laws and customs change, the older ones are simply forgotten by new generations, creating an appearance of immemorial custom. The dharma articulated in treatises on dharma, on the contrary, was written down, and the treatises were studied, commented on, transcribed in new manuscripts, and handed down from one generation to another. How do you introduce change into such immutable and inscribed laws? Or better, how do you theoretically manage and justify any such change? This is the challenge that faced the jurists and their scholastic techniques.

The Sanskrit jurists never directly address the issue of how one may actually change a rule of dharma. I say "directly" because some did deal with the issue by simply creating texts reflecting the changes they wanted: if you can't find them, just invent them. The extant corpus of texts composed over a period of a millennium or more also reflects the customs and mores of the times and places where they were composed. So, these texts contain rules that contradict each other and rules that are repugnant, or at least at variance with current practice and moral sensibilities. The labors of jurists were directed at resolving these two problems. The ingenious and innovative solutions that they came up with are instructive for the study of hermeneutical techniques of the Sanskrit tradition.

An early strategy is employed by Apastamba. He is concerned about the seemingly immoral acts performed by ancient seers and recorded in the Veda. In general, the practices of such great sages, just like the behavior of contemporary elite, would be a source of dharma and something to be emulated. How do you abrogate such a dharma and prevent people from following those ancient practices? Apastamba, of course, cannot abrogate such exemplary activities of ancient sages, but he does the next best thing: he makes such examples inapplicable to his own time. "Transgression of dharma is seen, as also violence, among men of ancient times. They incurred no sin on account of their extraordinary power. A man of later times who, observing that, does the same, perishes" (*ApDh* 2.13.7-9).

Implicit in Apastamba's argument is that times change, and so do the capacities and strength of human beings.<sup>54</sup> At least by the time of Manu, that is the middle of the second century C.E., this general argument was incorporated into the doctrine of the four world ages (*yuga*) that came to be applied to the functioning of dharma in society. As the life span, strength, and virtue of human beings declined in each subsequent world age, the dharma that governed their lives changed correspondingly. Manu enunciates this doctrine: "There is one set of dharmas in the Krta Age, another in the Tretā, still another in the Dvāpara, and a different set in Kali, in keeping with the progressive shortening taking place in each age" (*MDh* 1.85).

The treatise on dharma by Parasara, a text composed in the second half of the first millennium C.E., goes so far as to limit the authority of different treatises on dharma to specific ages, Parasara's own composition being the one most appropriate for the current age: "In the Krta Age the dharmas proclaimed by Manu are said to be operative, in Tretā those of Gautama, in Dvāpara those of Sankha-Likhita, and in Kali those of Parasara" (*PārSm* 1.24).

The hermeneutical strategy based on the world ages permitted jurists to relegate rules of dharma that they found objectionable to a previous world age and thus make them inapplicable to contemporary times. For all intents and purposes, therefore, these rules are abrogated and rendered null and void. A verse ascribed to the treatise on dharma by Brihaspati (*BrSm* 1.25.16) applies this principle to the ancient practice of levirate, where for the benefit of a deceased man, a child is fathered upon his widowed wife by his brother or close relative: "After prescribing levirate, however, Manu himself has forbidden it, given that it is impossible for anyone to carry it out according to rule because of the shortening created by world ages."

The "shortening" here harks back to the verse of Manu cited above, and I think it refers both to the shortening of the human life span and the diminution of human capacities. This principle would be invoked frequently by later jurists to de facto annul any textual rule that they found objectionable.

Exactly when the doctrine of world ages came to be applied in this manner as a hermeneutical device to rules of dharma is unclear. It is not found in any text of recollection pre-dating Brihaspati, and the verse containing this principle is first cited by Apararka (on *YDhs* 1.68-69, p. 97), the twelfth-century commentator of Yajnavalkya. The principle of world ages is not invoked by the early ninth-century commentators such as Visvarupa and Medhatithi.<sup>55</sup> But that at least some jurists of that period did refer to it is indicated by the comments of Medhatithi, who clearly did not agree with this emergent view:

This text of recollection on levirate and the special share of the eldest brother refer to a bygone era, and they are not to be followed in contemporary times, because texts of recollection have specific time limits—this is the view of some. . . . Therefore, texts of recollection on the special share of the eldest brother, on levirate, and on killing a cow are taught, but they are not to be performed.

That is not smart, for we never hear this kind of time specificity anywhere. (Medh on *MDh* 9.112)

In the texts of the Middle Ages, such prohibitions are enunciated in the principle of "prohibitions in the Kali Age" (*kaliyugavarjya*), presenting long lists of things that are forbidden.<sup>56</sup>

There is also another principle, more significant I think as a hermeneutical strategy, invoked to set aside rules given in texts of recollection and even in the Vedas. According to this principle, a rule given in these texts not only can be but also must be set aside if it is abhorrent or repugnant to the world (*lokavidviṣṭa*), or even if it is contrary to the common practice of the world (*lokavirodha*). This turns on its head the old view that the dharma of a region or family can be followed if it *does not contradict the dharma articulated in the texts of recollection and the Veda*. Here the dharma articulated in these very texts can be followed *only if it does not contradict the mores and sentiments of the world*. This principle permits changes to laws or dharma immutably articulated in these texts on the basis of the changes occurring in the actual practices and sensibilities of society.

This principle is clearly articulated by the twelfth-century commentator Vijnanavara. Commenting on *Yajnavalkya* 2.117, he rejects, among other rules, the special share (*uddhāra*) of the oldest brother in the partitioning of the ancestral property proposed by authorities such as Manu:

This unequal partitioning is given in authoritative texts. Nevertheless, it should not be followed because it is repugnant to the world, given the prohibition: "Even an act

of dharma should not be followed when it is not conducive to heaven and is repugnant to the world." Likewise, even though there is the injunction: "One should prepare a big ox or a big goat for a learned Brahman" (YDh 1.109), it is not carried out because it is repugnant to the world. Also likewise, even though there is the injunction to sacrifice a cow—"One should sacrifice a tethered barren cow consecrated to Mitra and Varuna"<sup>57</sup>—it is not carried out, because it is repugnant to the world. It is, moreover, said: "Neither the law of levirate, nor even the killing of an animal tethered for sacrifice, nor also partitioning with a special share for the eldest remains in force today."<sup>58</sup>

We have seen that passages in early texts of recollection support divergent viewpoints, indicating that individuals with those views produced them. Such passages can be found in major treatises on dharma from the early period, such as those of Manu, Yajnavalkya, and Narada. However, there was an explosive production of passages in prose and more frequently in verse from the second half of the first millennium and extending into the second millennium. These passages are either ascribed to various famous individuals of the past, such as Vyasa, Angiras, and Paithinasi, or are cited anonymously, often with the expression "another text of recollection" (*smṛtyantara*). If the presumed treatises from which these passages are cited ever existed, they are no longer extant. We must also consider the real possibility that such treatises never existed; the individual passages could have been fabricated for particular purposes. In the above passage of Vijnanesvara, he conveniently "finds" two verses from texts of recollection that support his own interpretation almost verbatim. These seem to be tailor-made—perhaps "fabricated" is the proper term—either by him or by one of his predecessors. So, there is the distinct possibility that one significant way of introducing change into dharma was to invent new discrete texts of recollection.

The legal fictions created by jurists, both ancient and medieval, to introduce novelty and change into the *de jure* unchangeable and eternal dharma are instructive with respect to the scholastic enterprise within the science of dharma. They also demonstrate the singular importance of customary laws, mostly unwritten, within the edifice of Indian jurisprudence that is theoretically supposed to be derived from and based on the immutable Veda.

#### DHARMA AND LEGAL PROCEDURE

The epistemological issues concerning law examined thus far are to some degree abstract, even though some of the theological positions represented attempts at

enhancing the political and economic power of the Brahmanical community. At the other end of the spectrum of intellectual and practical issues relating to law is enforcement: how does society enforce the laws by which its members are expected to live? Every polity, of course, will have coercive enforcement mechanisms such as police, secret agents, and the military. But justice should be and should be seen to be done impartially and without arbitrariness in order for the majority of citizens to have faith in and to participate in the process. That requires a judicial structure that the citizens at some level can understand and in which they can have confidence, especially in the fields of dispute resolution and remedies for injuries suffered. This is the area of secondary rules that Hart (2012) called rules of adjudication. In this area of jurisprudence, namely legal procedure called *vyavahāra*, the ancient Indian jurists excelled.

The expansion of this topic of inquiry had its own impact on the more theoretical epistemological issues. What is law? and How do we come to know it? are issues of great relevance also to the administration of law in a court system. Thus, in the selections given in the second part of this sourcebook there is a creative tension between the theological stance that takes law as dharma to be univocal and derived from the Veda and the on-the-ground reality of the multiplicity of laws governing various segments of a given population, laws that had to be taken into account in resolving disputes and adjudicating lawsuits. So, in a sense, the very enforcing of laws by courts has a direct impact on the epistemology of law investigated in the first part of this sourcebook.

Yajnavalkya's division of his treatise (ch. 5.1) into good conduct, legal procedure, and expiation (*ācāra*, *vyavahāra*, *prāyaścitta*) presented three broad subdomains of dharma. These can be understood as follows. The first gives the rules by which people should live their lives. The second gives the procedures to be followed when breaches of law occur or when individuals feel that their rights have been violated or others have caused injury to them or their property. The third, a much more religious arena, presents ways breaches of the rules of good conduct, that is, sins/crimes, can be repaired through acts and rituals of confession, repentance, and expiation. If legal procedure is one of the divisions of dharma, then, according to the epistemology spelled out by the authors we have examined, it has to be based on or derived from the Veda. Interestingly, to my knowledge, this point is never made in the legal treatises; they seem to accept implicitly that rules of legal procedure are humanly created and did change and develop over time. There is nothing in the Vedic texts that even remotely resembles these rules.

The Sanskrit term for legal procedure, *vyavahāra*, has a long and broad semantic history.<sup>59</sup> At the broadest and least technical level, the term refers to any kind of