

Law and “Law Books” in the Hindu Tradition

By Donald R. Davis, Jr.*

A. Introduction

It is by now common knowledge that British colonialism in India transformed or invented many Indian institutions and traditions. Questions of how the transformation occurred, of the extent of Indians’ participation in the changes, and of how to measure the scope of the transformation are all still very much in scholarly debate. The area of law has recently become a productive intellectual site for historians interested in describing the transformative effects of colonial governance.¹ Few of these studies, however, are informed by more than a superficial knowledge of classical and medieval legal traditions in India.

The deep history of law in India is linked inextricably with questions about the place of religion and religious texts in both legal theory and practice. In this essay, I compare the role of sacred Hindu texts in the realm of Indian jurisprudence by contrasting two “periods” of Indian legal history, the classical and the colonial/postcolonial. These “periods” are too simplistic for other purposes, but they are employed here heuristically. The contrast highlights a perhaps surprising difference in the legal appropriation of sacred Hindu texts, namely that traditional legal systems of India rarely used sacred texts *directly* in the administration of law,

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¹ For books containing excellent accounts of various aspects of colonialism and cultural change in India, especially with reference to transformations of law, see BERNARD S. COHN, AN ANTHROPOLOGIST AMONG THE HISTORIANS AND OTHER ESSAYS (1988); BERNARD S. COHN, COLONIALISM AND ITS FORMS OF KNOWLEDGE: THE BRITISH IN INDIA (1996). For materials providing useful studies of colonial impact on law in India, see RICHARD SAMAUREZ SMITH, RULE BY RECORDS: LAND REGISTRATION AND VILLAGE CUSTOM IN EARLY BRITISH PANJAB (1996); RADHIKA SINGHA, A DESPOTISM OF LAW: CRIME AND JUSTICE IN EARLY COLONIAL INDIA (1998); INDRANI CHATTERJEE, GENDER, SLAVERY, AND LAW IN COLONIAL INDIA (1999).

while British colonial courts and modern courts in India regularly made a direct, but superficial use of sacred texts as sources of law.

B. Sacred Texts in Classical and Medieval Hindu Law

1. *Śruti* – Revelation

To speak of sacred texts in Hinduism is to speak in the first place of the *śruti* (lit. “what is heard”), the collections of liturgical materials, ritual exegeses, and esoteric speculations dating from roughly 1500 B.C. to 600 B.C.²

The most famous portions of the *śruti* are the Vedas and the Upaniṣads, which represent the earliest and latest strata of the *śruti* literature respectively. The sacred and foundational quality of these texts is beyond question³ because they are considered the repositories of eternal (*nitya*) and “beyond-human” (*apauruṣeya*) knowledge. When we speak of law, however, it is a disconcerting fact that “strictly speaking the Vedas do not even include a single positive precept which could be used directly as a rule of conduct.”⁴ Law does not emanate directly from the injunctions of the *śruti*. Yet, all later Hindu legal texts, collectively known as Dharmaśāstra,⁵ agree that the Vedas are the “root of *dharma*,” or one’s religious,

² To understand how, in the recent debates over the proper definition of Hinduism, this once uncontroversial statement has received considerable scrutiny, see V. Narayana Rao, *Purāṇa*, in THE HINDU WORLD 97, 104 (Sushil Mittal and Gene Thursby eds., 2004); S. Caldwell & B.K. Smith eds., *Who Speaks for Hinduism?*, 68 JOURNAL OF THE AMERICAN ACADEMY OF RELIGION (SPECIAL ISSUE) 705 (2000). Rao argues justifiably, for example, that the Purāṇas, books of “ancient” mythology, cosmology, and ritual dating from the early centuries A.D., are a better starting point for accessing the historical roots of contemporary Hinduism. She states, “The worldviews that are most characteristic of Hindus are almost completely derived from the teachings of the Purāṇas.” To better understand why the Vedas serve as the starting point for jurisprudential reflection on the law and legal history in India, see STEPHANIE JAMISON, THE RAVENOUS HYENAS AND THE WOUNDED SUN: MYTH AND RITUAL IN ANCIENT INDIA 7–26 (1991) (for an informative synopsis of the *śruti* or Vedic literature and its associated rituals). It is also worth noting that, despite the etymological meaning of *śruti*, classical Hindu texts usually speak of revelation as something that was “seen” by the ancient sages, not “heard.” For a discussion on this last point, see Thomas Coburn, “Scripture” in India: Towards a Typology of the Word in Hindu Life, in RETHINKING SCRIPTURE: ESSAYS FROM A COMPARATIVE PERSPECTIVE 102, 106 (Miriam Levering ed., 1989).

³ See 2.10, MANU’S CODE OF LAW: A CRITICAL EDITION AND TRANSLATION OF THE MĀNAVA-DHARMAŚĀSTRA (Patrick Olivelle ed., 2005).

⁴ ROBERT LINGAT, THE CLASSICAL LAW OF INDIA 8 (1973). See also Ludo Rocher, *Hindu Conceptions of Law*, 29 HASTINGS LAW JOURNAL 1284, 1293, n.6 (1978).

⁵ For a fascinating diatribe against the standard designation of Dharmaśāstra as legal literature (Rechtsliteratur), see J.J. MEYER, ÜBER DAS WESEN DER ALTINDISCHEN RECHTSSCHRIFTEN UND IHR VERHÄLTNIS ZU EINANDER UND ZU KAURĪLYA (1927). Meyer insists that Dharmaśāstra texts are “Zauberbücher” by which term Meyer seems to mean something close to a sacred text generally. I only

legal, ethical, and social duties.⁶ Given that the connection of religious and legal duties with the *śruti* is not direct, the connection should be imagined as one of inspiration. The *śruti* is held to be the spirit of the law in Hinduism.

2. *Smṛti* – Tradition

The theological and jurisprudential tradition of Dharmaśāstra belongs to a second class of sacred texts in Hinduism called *smṛti* (lit. “what is remembered”). The most famous Dharmaśāstra text is the well-known *Laws of Manu*, dated approximately to the second century AD.⁷ However, other famous Hindu texts such as the manual of statecraft known as the *Arthaśāstra*,⁸ the epics *Mahābhārata* and *Rāmāyaṇa*, and the sacred narratives of the Purāṇas also belong to the *smṛti* genre.

It is important to note that all *smṛti* texts are sacred, though less so than *śruti*. In India, sacredness is not like an on/off switch, either wholly sacred or not. There can be degrees of sacredness that are ranked hierarchically. The most famous instance of such a hierarchy is the Indian caste system, which theoretically classifies society into four groups.⁹

With respect to the sacred texts on law, the measure of sacredness corresponds to the degree of epistemological authority (*prāmāṇya*) that a text has. For example, the most sacred *śruti* texts constituted a direct and perfect means of knowing one’s sacred duty while the derivative *smṛti* texts, along with the scholastic tradition that

recently discovered that on pages 36-39, Meyer also emphasizes that *ācāra*, or local law, and the law of corporate groups were much more important to the practical law of early India than the rules of Dharmaśāstra. This argument is one I have repeated in other work, albeit rather differently, while failing to notice Meyer’s contributions.

⁶ See 2.6, MANU’S CODE OF LAW, *supra* note 3.

⁷ See MANU’S CODE OF LAW, *supra* note 3, at 19–25 (providing the full details of the problems related to dating this and other ancient Sanskrit texts).

⁸ For commentary regarding how the tradition of Arthaśāstra was early on co-opted by the Dharmaśāstra tradition and how the usual subject matter of Arthaśāstra, the *dharma* of rulers (*rājadharmā*) was first incorporated into the *Mānava-Dharmaśāstra*, see MANU’S CODE OF LAW, *supra* note 3, at 46–50. Though it is difficult because of its contents to consider the *Arthaśāstra* a sacred text of the Hindu tradition, it is an important text for the history of law in India because the Arthaśāstra tradition introduced important innovations into the jurisprudence of Hinduism, most notably the eighteen titles of law. In this essay, the Arthaśāstra tradition will be implicit in its appropriated form in the discussions of Dharmaśāstra.

⁹ For a classic discussion of caste and hierarchy, see LOUIS DUMONT, HOMO HIERARCHICUS: THE CASTE SYSTEM AND ITS IMPLICATIONS (1980).

was built upon them, provided a reliable, though less authoritative means of knowledge. Theoretically, in cases of conflicting rules, the less sacred text must be dismissed. However, the kinds of rules found in the *śruti* differ to such a degree from those in the *smṛti* that, practically speaking, conflict was very limited.¹⁰

Furthermore, the *dharma*s, or rules of religious and legal duty, in each genre had distinct and separate scopes.¹¹ It is, therefore, the genre of *smṛti* that served as the foundation for Hindu jurisprudence and, much less directly and frequently, as a source of positive law. One must remember that the *smṛti* texts' authors understood the spirit of *dharma*, and thus of the law, to come from the *śruti*.

3. Scholastic Commentaries

Commentaries and digests, which comprise the scholastic tradition that interpreted and elaborated on the *smṛti* texts, constitute the final category of texts that must be considered here in order to complete the initial typology of sacred texts bearing an influence on law in Hindu traditions. Commentaries (*bhāṣya*) take the form of linguistic exegeses, hypothetical examples, and theoretical disquisitions on a single Dharmaśāstra text. Digests (*nibandha*), by contrast, collect a variety of opinions from the *smṛti* texts and group them into topics, still interspersed with exegesis, example, and theory as before.

The distinction between the two genres is not absolute as many commentaries incorporate myriad outside opinions in the manner of a digest. The authority of the commentaries and digests is in one sense derivative because it is based on the authority of *smṛti* texts themselves. At the same time, these scholastic works provide an essential interpretive framework for the *smṛti* genre and in many cases, offer original insights on old problems. The most explicit jurisprudential discussions of Hindu law are to be found in the medieval commentaries of the Dharmaśāstra tradition.

¹⁰ See Albrecht Wezler, *Dharma in the Veda and the Dharmaśāstras*, 32 JOURNAL OF INDIAN PHILOSOPHY 629, 629-54 (2004).

¹¹ For a technical discussion of Hindu legal reasoning, including the technique of "establishing the scope" (*viśayavyavasthā*), see Donald R. Davis, Jr., *Maxims and Precedent in Classical Hindu Law*, 33 INDOLOGICA TAURINENSIA 33 (2007).

C. Sacred Hindu Texts and Legal Practice in Classical India

1. *Ācāra* – Customary Law

We have noted already the difference between the subject matter of *śruti* and *smṛti*, especially the Dharmaśāstra, but more needs to be said about the origins of the latter. Whereas the injunctions of *śruti* (mostly concerned with ritual sacrifice) are held to be eternal and therefore without origin, the primary source of the *smṛti* rules is customary law (*ācāra*).¹² However, the *smṛtis* are not *coutumieres*, or mere collections of customs. Rather, "the Dharmaśāstra represents an expert tradition and, therefore, presents not a 'record' of custom but a jurisprudential, or in Indian terms, a *śāstric reflection* on custom. Custom is taken here to a second order of discourse."¹³

If Dharmaśāstra was a second order of discourse, then the first order of discourse for *dharma* and law was customary law in the form of well-known local standards and localized religious and legal systems. More specifically, the first order of practical legal discourse in classical and medieval India was *ācāra*, not *dharma* and Dharmaśāstra.¹⁴ The sacredness of *ācāra*, however, was preserved by certain checks that *theoretically* ensured that only the customary law of those educated in the Vedic tradition, i.e. knowledgeable of the *śruti* and *smṛti*, should be considered as valid. The close connection of person and text in India was significant in the realm of law as well, for it meant that the written law alone had but little authority without the force of a personal authority to corroborate and guarantee the text's value. The sacredness of texts in classical India depended largely on the sanctity of people.¹⁵

¹² See Richard W. Lariviere, *Dharmaśāstra, Custom, "Real Law", and "Apocryphal" Smṛtis*, 32 JOURNAL OF INDIAN PHILOSOPHY 611, 611–622 (2004); WEZLER, *supra* note 10.

¹³ See MANU'S CODE OF LAW, *supra* note 3, at 62.

¹⁴ See DONALD R. DAVIS, JR., *THE BOUNDARIES OF HINDU LAW: TRADITION, CUSTOM, AND POLITICS IN MEDIEVAL KERALA* (2004).

¹⁵ See WILFRED CANTWELL SMITH, *WHAT IS SCRIPTURE? A COMPARATIVE APPROACH* 142–43 (1993).

2. Textual Norms in Theory and Practice

The hierarchy of the three sources (*śruti*, *smṛti*, *ācāra*) is clear in theory.¹⁶ In cases of conflict, the theoretical jurisprudence of Dharmaśāstra declares that no rule of *ācāra* can be accepted over a textual rule from *śruti* or *smṛti*. In practice, however, the contents and concerns of the *smṛti* differ from those of the *śruti* to such an extent that a conflict between the two is unlikely or rare. Similarly, the scope (*viśaya*) of *ācāra* differs in such a way that normative contradiction is minimized.

Thus, it seems likely that conflict between *ācāra* and the textual sources of *dharma* was more a hypothetical than a practical problem. Though *ācāra* is the principal source of rules of Dharmaśāstra, the scope of neither *ācāra* nor *dharma* is exhausted by the Dharmaśāstra. In practice, local law (*ācāra*) informed by the theoretical jurisprudence of Dharmaśāstra—and to a lesser extent its substantive and procedural rules—constituted the core of the Hindu law tradition in classical and medieval India.¹⁷ Textual norms were accepted, rejected, and modified for use in the myriad regional and local legal systems of early India.¹⁸ Unfortunately, little historical evidence remains for the reconstruction of these diverse legal systems.¹⁹

¹⁶ Another source of *dharma*, *ātmatuṣṭi* “what pleases oneself,” is listed in *Mānava-Dharmaśāstra* 2.6 and *Yājñavalkya-smṛti* 1.7. This source of *dharma* never receives much elaboration or examination in the *dharma* texts. See MANU'S CODE OF LAW, *supra* note 3, at 244 (for an different understanding than my own of how this source of *dharma* is closer to “personal preference” than “individual conscience.”). Also, consider the following description from the *Mitākṣarā* of Vijñāneśvara (*Yājñavalkya-smṛti* 1.7): “What pleases oneself (is a source of *dharma*) in matters of technical option such as ‘one should perform the initiation rite in the eighth year from conception or in the eighth year from birth,’ in which one’s preference (*ātmeccā*) is determinative”. Vijñāneśvara confirms that a clear hierarchy exists between the various sources of *dharma*: “in cases of conflict between these (sources) the earlier mentioned is stronger.”

¹⁷ Following this line of thought, see DAVIS, *supra* note 14, at 11–18 (for a description and definition of Hindu law in practice in medieval Kerala). It is imperative to recognize here that not all legal systems in classical and medieval India were Hindu, at least in the sense that I use the term. Only legal systems that were influenced by the norms, jurisprudence, and institutions of Dharmaśāstra can reasonably be called Hindu. Many local legal systems in early India may not have been influenced by Dharmaśāstra in this way. Only sustained historical research on India’s legal history can determine the extent and nature of Hindu law in practice.

¹⁸ See LESLIE PEIRCE, *MORALITY TALES: LAW AND GENDER IN THE OTTOMAN COURT OF AINTAB* (2003) (for an alternate, excellent description of local law in the sixteenth century court of Aintab in Ottoman Anatolia). Peirce’s nuanced study demonstrates in great detail the ways in which Islamic *shari’a* and Ottoman imperial laws were locally interpreted and concretized in the resolution of disputes and the transaction of legal affairs. The case serves as an instructive parallel on which to draw for imagining the practical life of Hindu law in classical and medieval India.

¹⁹ For discussions of what little is known about the practical side of law in classical and medieval India, see J.D.M. DERRETT, *RELIGION, LAW, AND THE STATE IN INDIA 171–224* (1968); INGO STRAUCH, *DIE*

The evidence that is available, however, seems to justify a claim that localized systems were influenced by the sacred texts of the Dharmaśāstra tradition, not in the manner of a code but rather in the realms of legal education, legal reasoning, and jurisprudence.

In general, the explicit use of sacred texts in classical Hindu law in practice was very limited.²⁰ Practical law, or positive law, did not depend upon appeals to written authority, whether sacred or not. Interestingly though, the positive law of classical and medieval India was circumscribed and imbued with a jurisprudence that emanated more or less directly from Dharmaśāstra. Sacred texts in the Hindu tradition imparted a technique and a way of thinking about law that had myriad practical consequences. In this way, Hindu law does depend on sacred texts, primarily Dharmaśāstra.

3. *Mīmāṃsā* – Legal Hermeneutics

In order to discern the role of sacred texts in the practical law of classical and medieval India, one must recognize the limitations, or at least the ambiguities, of the Western categories law, legal text, and sacred text. In the Hindu tradition, sacred texts of many kinds,²¹ but especially Dharmaśāstra texts, were used to educate Hindus in orthodox jurisprudence and that this jurisprudential knowledge and methodology was relied upon in many practical legal contexts. There was in early India a significant distance, both intellectually and institutionally, between the production and learning of sacred texts and the implementation of law on the ground. A mutual influence between the two nevertheless existed.

In this realm of jurisprudence, the connection between sacred texts and law is to be found in the tradition of hermeneutics known as *Mīmāṃsā*. In order to see fully the influence of sacred literature of classical and medieval India on the law, one must

LEKHAPADDHATI-LEKHAPAÑCĀSIKĀ: BRIEFE UND URKUNDEN IM MITTELALTERLICHEN GUJARAT (2002); Donald R. Davis, Jr., *Intermediate Realms of Law: Corporate Groups and Rulers in Medieval India*, 48 JOURNAL OF THE ECONOMIC AND SOCIAL HISTORY OF THE ORIENT 92, 92–117 (2005).

²⁰ See Ludo Rocher, *Law Books in an Oral Culture: The Indian Dharmaśāstras*, 137 PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY 254, 254–267 (1993).

²¹ Legal categories, reasoning, and rules are to be found in Hinduism’s sacred texts, including the Vedas, *Mīmāṃsā* (to be discussed in some detail below), the epic texts *Rāmāyaṇa* and *Mahābhārata*, and the *Purāṇas*. The interpenetration of religion and law in Hinduism is very deep. The investigation of Hinduism from a legal perspective would greatly enhance the tradition’s presentations, which typically remain otherworldly. For a discussion of the relevance of law to Hinduism from the perspective of religious studies, see Donald R. Davis, Jr., *Hinduism as a Legal Tradition*, 75 JOURNAL OF THE AMERICAN ACADEMY OF RELIGION 241 (2007).

expand the notion of “sacred text.” One could reasonably argue, for example, that Mimāṃsā texts are not “sacred” in any usual sense. They are not part of a liturgy; they do not recount sacred mythological narratives; and they are not the central religious texts of any Hindu sect. However, it would be harder to argue that Mimāṃsā as a system of hermeneutics was not central to the bearers and transmitters of Hindu theology.²² In this extended sense, therefore, Mimāṃsā and the form of legal reasoning it offers must be considered as part of the sacred textual corpus of Hinduism, as well as the theoretical and practical jurisprudence of Hindu law.

Mimāṃsā is a system of hermeneutics designed to facilitate correct interpretation and performance of the ritual injunctions of the Vedic texts, the *śruti*. Authors of Dharmaśāstra texts applied the same hermeneutical rules used for understanding religious texts for interpreting legal rules in their works.²³ Mimāṃsā accepts certain presuppositions that established a distinctive religious and legal cosmology within which authors of the Hindu law tradition worked.²⁴ The presuppositions include, for example: 1) the eternal and unauthored nature of the Vedas aforementioned, 2) a denial of any creation or creator of the world, 3) the elevation of the ritual act above the gods, 4) the eternal connection of words and their meanings, and 5) the consonance of all authoritative injunctions of *dharma*.

Two important legal consequences result from these presuppositions and their implied cosmology. First, the morally and academically educated and disciplined man (*śiṣṭa*) becomes the central figure in both the proper interpretation of religious and legal texts and in the extension or application of the spirit of those texts to contemporary situations. Secondly, a flexibility and realism with respect to legal questions obtains a theological justification in a rhetoric that generally censures variability, contradiction, and change but permits them nevertheless.²⁵

²² See PATRICK OLIVELLE, *THE ĀŚRAMA SYSTEM: THE HISTORY AND HERMENEUTICS OF A RELIGIOUS INSTITUTION* (1993).

²³ For a thorough treatment of the use of Mimāṃsā in Dharmaśāstra, see P.V. KANE, 5 *HISTORY OF DHARMAŚĀSTRA* 1152 (1962-75).

²⁴ See REBECCA FRENCH, *THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET* (1995) (for a treatment of legal cosmology). I employ the idea of legal cosmology in the sense described by French. The cosmological frame of legal systems acts in a manner parallel to the paradigms of science described by Kuhn or the “sacred canopy” of Berger.

²⁵ See Donald R. Davis, Jr., *A Realist View of Hindu Law*, 19 *RATIO JURIS: AN INTERNATIONAL JOURNAL OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 287 (2006).

The important point to remember in the context of surveying the relevance of sacred texts to the law in Hinduism is that the hermeneutics of religion and law were precisely the same. Religious and legal texts were not distinguished in any way. Moreover, the rules and interpretive cosmology of Mīmāṃsā established a framework for both the theoretical and practical solution of legal problems.

4. *Summary*

To summarize the influence of sacred texts on law in the Hindu tradition, we should look more to the use of sacred texts in schools than in courts. While the sacred literature of Hinduism did incorporate a great quantity of normative legal rules that were occasionally put into practice, the texts more importantly cultivated in the educated classes a jurisprudence and legal cosmology that shaped the intellectual and moral stance, the “hermeneutic situation” in Gadamer’s sense,²⁶ from which legal decisions and institutions developed in local contexts. Sacred texts were not normally sources of positive law, but rather of jurisprudential training. A failure to recognize the nature of the sacred texts on religion and law in the Hindu tradition, particularly the nature of Dharmaśāstra as both text and tradition, led to numerous misconceptions and misappropriations of the classical Hindu law tradition during and after the British colonial period in India. It is to this specific use of sacred texts in the Anglo-Hindu and modern Hindu law traditions that I now turn.

D. Colonial and Postcolonial Legal Appropriations of Hindu Sacred Texts

1. *Theoretical Considerations in the Study of Hindu Law*

The baseline for describing changes and transformations in India’s legal traditions from the “precolonial” to “colonial” to “postcolonial” periods typically has been a brief and stereotypical presentation of law in India, based either on secondary descriptions of the Dharmaśāstra texts or on colonial observers’ remarks about the predominance of “customary law” in the practical law of India.²⁷ On the one hand, the study of Dharmaśāstra has been the province of Indological specialists with a good knowledge of Sanskrit, a fact that isolates it from mainstream legal studies.

²⁶ See HANS-GEORG GADAMER, *TRUTH AND METHOD* 301 (1989).

²⁷ For discussions of the problematic category of “custom” and “customary law,” see MARTIN CHANOCK, *LAW, CUSTOM, AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA* (1983); SALLY FALK MOORE, *SOCIAL FACTS & FABRICATIONS: “CUSTOMARY” LAW ON KILIMANJARO, 1880-1980* (1986); CLIFFORD GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, in *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 167, 167-234 (1983); Sally Engle Merry, *Law and Colonialism*, 25 *LAW & SOCIETY REVIEW* 889 (1991).

On the other hand, labeling any legal system “customary” has often been the kiss of death for any further interest in the law of that area.²⁷ Linking Hindu law with either or both, therefore, has dissuaded most scholars from pursuing a deeper understanding of the state of law in India prior to the British colonial period as a way of enhancing claims about the transformative impact of colonialism, i.e. Hindu law was like that, now it is like this. Instead, as early as 1877, J.H. Nelson could seriously ask, “Has such a thing as ‘Hindu Law’ at any time existed in the world? Or is it that ‘Hindu Law’ is a mere phantom of the brain, imagined by Sanskritists without law and lawyers without Sanskrit?”²⁸ Such sentiments have been rejuvenated from a different rhetorical and interpretive position in recent “invention of tradition” studies on Indian institutions, including Hindu law.

As with the debates surrounding the colonial construction of Hinduism itself,²⁹ the question of whether Hindu law was created *ex nihilo* by the British as part of their desire to administer indigenous law to the Indians hinges on one’s use of and understanding of analytic categories. A primary stumbling block for some in the argument that Hindu law predated the British presence in India is the fact that neither word in the label “Hindu law” has any clear translation in an Indian language. This sort of linguistic determinism, whether crude or sophisticated, is a paralyzing academic game that has been played before in discussions of whether Africans have “law,”³⁰ whether Indians practice “religion,”³¹ and whether indigenous societies have “science.”³² For my purposes here, it is sufficient to suggest that the primary continuity between classical and modern Hindu law is an

²⁷ See, *supra* note 27.

²⁸ J.H. NELSON, A VIEW OF HINDU LAW AS ADMINISTERED BY THE HIGH COURT OF JUDICATURE AT MADRAS 2 (1877).

²⁹ See BRIAN PENNINGTON, WAS HINDUISM INVENTED? BRITONS, INDIANS, AND THE COLONIAL CONSTRUCTION OF RELIGION (2005).

³⁰ See Max Gluckman, *Concepts in the Comparative Study of Tribal Law*, in LAW IN CULTURE AND SOCIETY 349 (Laura Nader ed., 1969) (reviewing the debate between Max Gluckman and Paul Bohannan on the question of folk versus analytic categories in the description of African legal systems, which dominated legal anthropology for a time, but without much lasting effect).

³¹ See S.N. BALAGANGADHARA, “THE HEATHEN IN HIS BLINDNESS...”: ASIA, THE WEST, AND THE DYNAMIC OF RELIGION (1994) (for a provocative, yet difficult work on the intractable connections of the term “religion” to particular institutional forms in Christianity).

³² See EMILE DURKHEIM & MARCEL MAUSS, PRIMITIVE CLASSIFICATION (1963) (for their attempt long ago to show the continuities between “primitive classification” and modern science and the connection of both with social forms). The notion that science is the industrialized, First World societies’ preserve is still commonplace.

interest in and connection to the scholastic tradition of Dharmaśāstra. That continuity does not preclude, as I will argue, the introduction of sweeping changes in the understanding and practice of Hindu law from the late eighteenth century to the present day.

2. *Two Views of the Impact of Colonialism on Hindu Law*

Two basic positions have been established regarding the “displacement of traditional law” in India. The first, put forth for instance in the works of Derrett, Rocher, Galanter, Jain, Dhavan, Washbrook, and Lariviere, among others,³³ argues for a significant rupture and disjunction between classical and modern Hindu law. There are still disagreements within this group about, for example, whether the British intended to disrupt traditional legal processes;³⁴ nonetheless, all group members agree that tremendous change did occur. The second position, advocated in different ways by Fuller and Menski,³⁵ is both more provocative and more challenging because it contradicts received wisdom, but in doing so it points potentially to overlooked continuities in both professional and ordinary legal contexts that temper the radical rupture posited by some. In the end, I will side with the first position because the evidence seems overwhelming to me that a major transformation in the practical operation of law in India did occur in the British period and has been continued after Indian independence in 1947.

³³ See DERRETT, *supra* note 19; MARC GALANTER, *LAW AND SOCIETY IN MODERN INDIA* (1989); M.P. JAIN, *OUTLINES OF INDIAN LEGAL HISTORY* 590 (1990); Ludo Rocher, *Indian Response to Anglo-Hindu Law*, 92 *JOURNAL OF THE AMERICAN ORIENTAL SOCIETY* 419, 419–24 (1972); David A. Washbrook, *Law, State, and Agrarian Society in Colonial India*, 15 *MODERN ASIAN STUDIES* 649, 649–721 (1981); Richard W. Lariviere, *Justices and Politics: Some Ironies in Contemporary Readings of the Hindu Legal Past*, 48 *JOURNAL OF ASIAN STUDIES* 757, 757–69 (1989); Rajeev Dhavan, *Dharmasastra and Modern Indian Society: A Preliminary Exploration*, 34 *JOURNAL OF THE INDIAN LAW INSTITUTE* 515, 515–40 (1992).

³⁴ See LARIVIERE, *supra* note 34, at 759.

³⁵ See WERNER F. MENSKI, *HINDU LAW: BEYOND TRADITION AND MODERNITY* (2003); C.J. Fuller, *Hinduism and Scriptural Authority in Modern Indian Law*, 30 *COMPARATIVE STUDIES IN SOCIETY AND HISTORY* 225, 225–48 (1988). Menski makes a complicated and sweeping argument concerning the largely “unofficial” nature of Hindu law in all historical periods, including today. From this position, Menski suggests that Hindu law persists, even flourishes, in India today, separately from and in spite of its partial state-level codification as system of personal laws. Menski’s principal contribution has been to emphasize the fact of legal pluralism in the history of Hindu law, especially the manner in which Hindu law has operated without reliance on governmental or state-based administration. See Donald R. Davis, Jr., *Traditional Hindu Law in the Guise of “Postmodernism”: A Review Article*, 25 *MICHIGAN JOURNAL OF INTERNATIONAL LAW* 735, 735–49 (2004) (for my description of how Menski’s argument, in both its details and general conclusions, is very problematic).

E. An Example: Sacred Texts in Modern Hindu Law

The use of sacred texts in modern Hindu law³⁶ will serve as an illustrative case for demonstrating both the major changes seen in the last two centuries and the persistence of ornamental vestiges of traditional Hindu law after the structural rupturing of legal process in India.

1. *The Consensus View*

The standard interpretation, with specific focus on modern Hindu law, was set forth by Derrett as early as 1957.³⁷ The 1772 policy of Hastings to administer the personal laws of Hindus and Muslims to those communities in India led to creation of the early British digests of Sanskrit Dharmaśāstras and to subsequent translations of key texts by Colebrooke, Borrodaile, Sutherland, and others. The very limited knowledge of British judges regarding the proper interpretation and use of these texts in practice was not much ameliorated by the presence of court pandits, assigned to assist the judge in determining the applicable law from the Dharmaśāstra. The whole language of “applying the Dharmaśāstra” is inappropriate in the context of classical Hindu law as we have seen and, by itself, constitutes a major departure from the traditional use of and influence of this branch of Hindu sacred literature in the law.

Derrett points out that the weak and highly mediated understanding of Dharmaśāstra possessed by nineteenth-century British judges has led to a situation in which “a surprising amount of 19th-century case-law is only partly competent, or even, frankly, bad. The student [of modern Hindu law] should not look at any pre-1930 case in Hindu law which is not mentioned in this book; and even where one is cited he should approach it with reserve.”³⁸ In other words, the British misappropriation of Dharmaśāstra, as the key sacred corpus dealing with law in the Hindu tradition, innocent though it may have been in many respects,³⁹ was the basis for an ill-formed body of case-law that, with the dismissal of court pandits in 1864, resulted in the “death” of Dharmaśāstra as a “living and responsible

³⁶ It is worth noting here that a distinction is usually made between the Anglo-Hindu legal system during the British Raj and the modern Hindu law, more or less fixed by the series of Hindu Code bills in the mid-1950s. Following Fuller, I will concentrate on the use of sacred texts in the modern Hindu law of India.

³⁷ See J.D.M. DERRETT, *HINDU LAW PAST & PRESENT* (1957).

³⁸ See J.D.M. DERRETT, *INTRODUCTION TO MODERN HINDU LAW* 6 (1963).

³⁹ See LARIVIERE, *supra* note 34, at 763–64.

science."⁴⁰ After 1864, this case-law was considered sufficient to provide judicial guidance for questions of Hindu law and formed the basis for the enactments of the modern Hindu Code bills of the 1950s.

The multiple layers of misunderstanding in the development of modern Hindu law make any argument for continuity difficult in the extreme. British judges were generally⁴¹ ill-equipped to make informed use of and references to Dharmaśāstra, much less discern a legal relevance for other sacred texts of the Hindu tradition. For this reason, the frequent citations of Dharmaśāstra rules in Anglo-Hindu and modern Hindu law created not only a morass of radically different interpretations of śāstric positions from those in traditional sources but also a precedent for a direct appropriation of sacred texts in the law that had not existed in the same way before. The direct application and consideration of sacred texts in this way was new in the Hindu law tradition.

2. *An Alternative View*

Against this more or less canonical position, Fuller has made an intriguing case for the continuation of traditional values and interpretive strategies in the use of and reference to Hindu sacred texts in several leading cases of modern Hindu law. With reference to a set of important cases considered by the Supreme Court of India, Fuller argues that the Court has repeatedly undertaken the direct interpretation of sacred texts for gleaning legal rules pertaining to Hindu law. Referring to the well-known *Seshammal*,⁴² *Venkataramana*,⁴³ and *Satsang*⁴⁴ cases, for instance, Fuller examines the justices' use of Hindu texts such as the Āgamas, the Vedas, and the *Bhagavad-Gītā* as sources of law. He concludes that "if their decisions seem to contradict a textual prescription, the courts will justify their rulings by acting as textual interpreters."⁴⁵ More importantly, though less

⁴⁰ See DERRETT, *supra* note 19, at 250.

⁴¹ In this context, I must mention the fact that exceptional British and Indian judges in the nineteenth and twentieth centuries, owing to their deep knowledge of Sanskrit and Mīmāṃsā, did occasionally offer brilliant traditional interpretations on points of Hindu law. Such capacities (i.e. mastery of two legal systems at once) were rare, however, and, in all fairness, could hardly be expected of most judicial appointees.

⁴² See (1972) 3 S.C.R. 815.

⁴³ See A.I.R. 1958 S.C. 255.

⁴⁴ See A.I.R. 1966 S.C. 1119.

⁴⁵ FULLER, *supra* note 36, at 234.

convincingly, Fuller claims that the legal reasoning used by the justices in these cases mirrors traditional Dharmaśāstra/Mīmāṃsā hermeneutics such that this set of modern judgments “issues from a method of reasoning that is almost entirely consistent with classical precedents” and “reveals a continuity with the modes of reasoning of traditional pandits.”⁴⁶ From these two arguments, Fuller concludes that the sharp demarcation between traditional and modern law in India must be blunted in favor of seeing real continuities between the two systems.

While Fuller has demonstrated very clearly that Hindu sacred texts are being and have been directly used as sources of law for certain kinds of cases in the Supreme Court—a point of considerable importance for this article—I see two fatal problems in Fuller’s larger argument concerning the alleged continuities of traditional and modern Indian law. First, Fuller’s claim for continuity suffers by not establishing a plausible baseline for traditional Hindu legal practice against which to compare modern Supreme Court decision-making. Fuller accepts uncritically that classical Hindu law directly used sacred texts for making decisions.⁴⁷ Classical Hindu law depended upon Dharmaśāstra, and other sacred texts to a lesser extent, but not in the manner presumed by Fuller. Direct appropriations were rare, as I have tried to show in the previous section. Thus, ironically, Fuller’s clear demonstration of the explicit reliance on sacred texts in certain Supreme Court decisions undermines in my view his argument for continuity between traditional and modern law in India, because his evidence shows the new and different manner in which legal decisions might be based on the direct use of sacred texts and their interpretation.

Secondly, Fuller fails to substantiate fully his claim that the type of reasoning employed in the Supreme Court’s decisions is a form of theological-cum-legal hermeneutics that emanates directly from traditional Hindu modes of reasoning. Here, it is important to remember that Dharmaśāstra and Mīmāṃsā are best understood in the first place as part of a scholastic tradition.⁴⁸ The work of modern judges, by contrast, has an immediate practical purpose that is missing from the traditional hermeneutic system. A theoretical solution is not always practicable or enforceable. It is important not to draw too sharp a division between the hermeneutic labor necessary for the scholiast and the judge, but one must

⁴⁶ See, *supra* note 45, at 241, 246.

⁴⁷ See, *supra* note 45, at 226, 247 (invoking Dharmaśāstra explicitly in claiming a similarity between past and present notions of “scriptural authority”).

⁴⁸ For a discussion on this underappreciated point, which has been made repeatedly in the works of Ludo Rocher and Patrick Olivelle, see, e.g., MĀNU’S CODE OF LAW, *supra* note 3, at 64–65.

acknowledge the difference nevertheless.⁴⁹ Specifically, these decisions of the Supreme Court make only superficial use of categories and logic from the Mīmāṃsā tradition, so crucial to Dharmaśāstra interpretation. Lariviere has called this “Dharmaśāstra as window dressing.”⁵⁰

When Fuller assimilates traditional and modern modes of reasoning, he overestimates the depth of the similarities. I would argue rather that the superficial connections Fuller notices between the interpretive strategies of the modern justices and traditional pandits are barely more than the resemblances that exist between all modes of legal reasoning, i.e. the shared logic that distinguishes certain forms of reasoning as “legal.”⁵¹ There is little indication of any peculiarly Indian or Hindu element in the reasoning exhibited by the justices in these cases. It is telling, for instance, that even Nataraja Ayyar’s book dedicated to explaining the use of Mīmāṃsā in Hindu law can only adduce a single case in which a Mīmāṃsā principle is directly referenced.⁵² In that case, Justice Kumaraswamy Sastry wrote, “The principles of Atidesa where by principles laid down with reference to one case are applied to other analogous cases were recognised...in Mimamsa...” Each of the other ten cases Nataraja Ayyar offers as evidence of “Mīmāṃsā” thought in modern Hindu law speaks only of “analogy.”⁵³ Without describing the complex nature of *atideśa* (better thought of as “transfer”),⁵⁴ we may say that Nataraja Ayyar, like Fuller, reduces jurisprudence to a vague sense of analogy for the modern period and fails to consider any specific Mīmāṃsā rule concerning the restricted bases for transfer or analogy in word, context, syntax, etc.⁵⁵

To put it another way, the legal cosmology presupposed in classical Hindu law has been lost and replaced with a very different legal cosmology in modern Hindu law.

⁴⁹ See GADAMER, *supra* note 26, at 324–41 (discussing with great insight this problem of drawing too sharp of a division).

⁵⁰ See LARIVIERE, *supra* note 34, at 764.

⁵¹ See Jonardon Ganeri, *The Ritual Roots of Moral Reason*, in THINKING THROUGH RITUALS: PHILOSOPHICAL PERSPECTIVES 207–33 (K. Schilbrack ed., 2004) (for an example of one of Ganeri’s writings on “case-based reasoning” in Indian philosophy).

⁵² See I.L.R. 41 (Mad.) 44 (containing the *Subramaniam v. Ratnavelu* decision).

⁵³ See A.S. NATARAJA AYYAR, MĪMĀ SĀ JURISPRUDENCE 77–81 (1952).

⁵⁴ For a more plausible comparison of Mīmāṃsā and modern legal reasoning, see FRANCIS X. CLOONEY, THINKING RITUALLY: REDISCOVERING THE Pūrva Mīmāṃsā OF JAIMINI 88–93 (1990).

⁵⁵ See KANE, *supra* note 23, at 1321–24 (for a thorough discussion of *atideśa*).

One would expect a deep engagement with traditional reasoning as a continuation of that tradition to manifest in more obvious and explicit uses of, and perhaps even acknowledgments of, the categories, axioms, maxims, and logical rules of *Mīmāṃsā* and *Dharmaśāstra*. A deep level of engagement with the classical Hindu law tradition is not evident in the decisions of India's Supreme Court. Instead, the justices have performed or utilized modern interpretations of Hindu sacred texts, notably the views of the philosopher and former President of India S. Radhakrishnan,⁵⁶ that differ in both form and content from the ways in which sacred texts influenced classical Hindu law in practice.

3. Affirming the Consensus View

Both of Fuller's principal arguments, therefore, appear improbable if one more closely scrutinizes his problematic description of the use of sacred texts in classical Hindu law in practice and the alleged continuities of legal reasoning over time. The mainstream position, which postulates a historically complicated, but distinct rupture in the operation of Hindu law during and after British colonialism, is thus affirmed. Sacred texts were for the first time used as direct sources of law in this modern period, but their use was by and large shallow and ornamental because the bases for legal reasoning in India had shifted dramatically toward a strongly precedential case-law and the interpretation of parliamentary legislation. The modern uses of sacred texts in Hindu law differed significantly from the indirect influence that such texts had in the practical administration of law in earlier times.

F. Conclusion

By examining the Hindu materials from different eras, we have learned that sacred texts have generally not been central to the positive law in any period of Indian history, either because their impact was in the realm of jurisprudence and legal education—i.e. at a considerable remove from the positive law—or because their use was an ornamental overlay on legal decisions arrived at by other means. However, one should not infer from this conclusion that sacred texts, represented primarily by the *Dharmaśāstra* in this case, were not and are not taken seriously in Indian society and in Indian legal contexts. On the contrary, following Rajeev Dhavan, we can imagine that the legal cosmology of *Dharmaśāstra* has always been a primary factor in the realm of civil society.⁵⁷

⁵⁶ See FULLER, *supra* note 37, at 236.

⁵⁷ See DHAVAN, *supra* note 34.

In this world beyond the state and the economy, Dharmaśāstra and its theological jurisprudence exerted and, to some extent, still exerts a tremendous hold on the moral imagination of Hindu society.⁵⁸ As such, a consideration of Dharmaśāstra remains crucial for understanding India's legal history and the evolution of the Hindu law tradition: first, because it permits us to establish a better historical view on law against which to judge changes introduced in modern recent history and, second, because it opens us to another system of religious law that might be compared with cognate traditions in Islamic, Jewish, and Christian religious legal systems. "Thicker" descriptions of precisely how and to what extent Dharmaśāstra ideas and rules impacted the practical realm of law are still needed, but I have surveyed here some of the basic contours of the connections and disconnections in order to further establish a responsible and accessible basis for the study of Hindu law.

⁵⁸ See LEELA PRASAD, *POETICS OF CONDUCT: ORAL NARRATIVE AND MORAL BEING IN A SOUTH INDIAN TOWN* (2006).

