Rules and ethics

Perspectives from anthropology and history

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Conscience is tradition: Classical Hindu law and the ethics of conservatism

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The classical Hindu law tradition is conservative, and an instance of conservatism. In this chapter, I draw comparisons between classical Hindu law and traditional Anglo-American conservatism about the topics of rules, ethics, and conscience. In searching for a language through which to express the Sanskrit categories and ideas found in Hindu jurisprudence, I have been repeatedly drawn to the assumptions, arguments, and aspirations of traditional conservatism.[1] The affinities between the two lineages of thought reveal shared ideological commitments. I thus justify the otherwise arbitrary choice to use the language of Anglo-American conservatism in describing Hindu legal views of ethics and conscience on the grounds that the conservative tradition provides a congenial and illuminating set of concepts and assumptions. Conservatism helps Hindu law speak English.[2] Though the comparison breaks down in some areas, of course, the juxtaposition highlights the value to both of rules, order, and obedience in the process of individual and group ethical formation. It should thus serve as a fruitful entry into the comparative exploration of ethical 'ruliness' that this book proposes.

Ethics in classical Hindu jurisprudence begins from the premise that what we do naturally is always inferior – both morally and socially – to what we do and can do by following traditional rules.[3] The natural passions that motivate human beings must be disciplined by rules in order to avoid negative social and soteriological consequences (Glucklich 2011). Hindu law starts, then, from an assumption of human imperfection that may be systematically, though rarely totally, refined through habituation and socialisation. The importance of habit, custom, and well-formed prejudice is repeated in Sanskrit literature, not only in Hindu law texts but also in Hindu epics and mythology (Derrett 1978: 35–43). Hindu law authors view unfettered reason with suspicion and, with few exceptions, disallow change in established precepts. Instead, people should rely on the wisdom of existing social structures and institutions as a tried-and-true guide to ethical decisions. Moral judgement arises from experience and character,

both products of the social opportunities of privileged birth and long training in the legal texts. Similarly, individual conscience is experienced as an emotional affirmation of what tradition through a rule tells you is good and an aversion to what it tells you is bad – 'conscience is the mind of a man [*sic*] governed by a rule' (as cited in the Introduction).

I summarise the ethics of Hindu law in such terms precisely in order to bring out striking similarities between its assumptions and conceptual frameworks and those of traditional conservatism. Ethics does not form a distinct topic in any Hindu law text, but I put together a composite description by drawing on discussions of other topics. In order to capture the legalism underlying ethics and conscience in Hindu jurisprudence, I rely on the vocabulary and outlook of classical conservatives, because both appeal to a moral sensibility forged in a crucible of rules from the past.

Why we need rules and how to spot a good one

Hindu jurisprudence is found in the Sanskrit texts called Dharmaśāstra, the 'prescriptive treatises' (*śāstra*) on 'religious and legal duty' (*dharma*). One may liken the scholastic elaboration of this religious law with that of the Jewish or Islamic law traditions discussed elsewhere in this book. Technically, the primordial commands of the revealed Veda come to us as injunctions and prohibitions and the Dharmaśāstra tradition presents itself as remembrance or recollection (*smṛti*) of the totality of Vedic rules even as it acknowledges the central place of customary law and elite standards in the formulation of *dharma* (Wezler 2004). Knowledge of the Veda, however, is less learning the rules and more shaping the character. Vedic knowledge transforms a person's dispositions, interests, and sentiments. This tradition is very old with the earliest texts dating from the second century BCE and the latest commentaries from the eighteenth century CE. Though Dharmaśāstra's scope, style, and substance changed over this long period, it is also remarkably stable in its basic worldview.[4] For the broad comparison of this chapter, I will (unfairly) treat Hindu law in synchronic terms and ignore the very different contemporary Hindu law that has been subsumed within the legal system of modern India.

The vocabulary of classical Hindu law is replete with categories of refinement and discipline. 'Natural' (*prākṛta*) language is inferior to 'refined' (*saṃskṛta*) language; the sixteen consecratory rites that mark the ritual passage of an observant Hindu male through life are called 'refinements' (*saṃskāra*). Along with refinement, discipline (from the Sanskrit root *śās*) is the application of rules and rituals to ordinary actions: 'legal texts (*śāstra*) are said to discipline people and to impel proper action; decrees (*śāsana*) rectify and punish deviations from this order; students (*śiṣya*) are trainees in a process which culminates in the achievement of the status of a fully disciplined and educated person (*śiṣṭa*)' (Davis 2006: 289). What makes an act or a person refined or disciplined is adherence to a rule of *śāstra*, which is itself a distillation of tradition presented as a norm. To this extent, the very framework of action and selfhood is bound to a rule-oriented conception of ethics and self-formation. The socialisation of conscience occurs through learning and internalising the rules of tradition in order, ultimately, to embody righteousness and law (*dharma*).

There was a golden age when such rules reigned completely. In the fifth-century CE *Laws of Nārada* (1.1), we read:

> When men had righteousness (*dharma*) as their sole purpose, spoke the truth, and kept their promises, there was no litigation (*vyavahāra*), no enmity, and no selfishness. Litigation came into being when righteousness was lost among men. The king is the overseer of litigation; he is responsible for punishments. (Lariviere 1989: 3, translation slightly adapted)

A perfect society is not rule-free, but rule-saturated. A moral society is one based on embodiment of the rules established in this golden age. In short, law and ethics are grounded in both unassailable revelation and elite consensus. That is important because both ultimately work against an unfettered idea of conscience as personal conviction or moral compass. Thus, we need rules first so that, at a time when adherence to the rules is no longer natural, we may respond to the transcendental commands of the Veda and to the Vedic tradition transmitted by Hindu law and society.

However, the substantive place of Vedic command in Hindu law is minimal and mostly rhetorical. Sankararama Sastri (1926: 46, 95) called the Vedic character of Hindu law its 'leading fundamental fiction' and suggested that Hindu law authors knew full well that it was 'a mere fetish'.[5] Even the more realistic authors of Hindu law such as Medhātithi (ninth century CE) openly acknowledge that 'not all *dharmas* are based on the Veda' (Olivelle 2017: 138). Revelation, therefore, is a symbolic foundation for the moral world that is practically established through human experience and convention. More pointedly, reference to the Veda is a natural law patina on a core of customary law.

Accounts of the foundations of morality among many Anglo-American conservatives similarly pay lip service to religious truths while placing emphasis rather on time-tested institutions and customs as paramount. Acknowledging that many conservative self-representations insist on a 'transcendent moral order', Muller distinguishes conservatism and orthodoxy: 'While the orthodox defense of institutions depends on belief in their correspondence to some ultimate truth, the conservative tends more

skeptically to avoid justifying institutions on the basis of their ultimate foundations. ... Conservatism is also distinguished from orthodoxy by the conservative emphasis upon history' (1997: 4, 7). According to this distinction, Hindu law acknowledges an orthodox foundation in the Veda, but privileges past custom as the substantive guide to moral action. Pious Christian conservatives similarly place explicit value on the Bible, but they interpret it in the light of received tradition. The appeal to ultimate religious truths in Hindu law is a mere prelude to the detailed analysis of daily observances, rites, social norms, political institutions, and so on.

The more important second reason why we need rules, therefore, is to make this world better through coordinated and proven institutions and practices. We direct our passions and interests through time-tested practices and the guidance of our predecessors. The prescriptive treatise in Sanskrit is found everywhere and not just in law (Pollock 1985). The rules for any human endeavour may be captured in a text that sets forth norms for action. A *śāstra* is both a treatise and a disciplinary instrument that trains a person in a particular area. The prescriptive rhetoric of a *śāstra*, however, masks its substantive origins in the socially accepted practices of an intellectual elite, the Brahmin pandits (Lariviere 2004). The rules of Hindu law, therefore, come from accepted past practice. Neither revelation nor reason supplies substance to Hindu law.

The famous *Kāmasūtra* of Vātsyāyana, a prescriptive treatise on sex, gives us a nice, earthy justification for why we need *śāstras*, even for natural acts.

> The Teachers say, 'You don't need a rulebook (*śāstra*) to know how to have sex since it happens naturally and regularly, even among animals.' However, Vātsyāyana says, 'Since a woman and a man depend on each other to have good sex, a prescribed method is required, and one should learn that method from the *Kāmasūtra*.'[6]

The contrast in this case is between a claim that sex is 'natural' or 'spontaneous' (*svayaṃ pravṛtta*) and a claim that it calls for 'a dependence on the other' (*parādhīnatva*). The first conceives of sex as a simple, natural act. The second imagines sex as a cultivated pleasure capable of refinement to the mutual fulfilment of both partners. The implication of the text, however, is that any action that requires the coordination of two or more people also requires a method or technique (*upāya*) that is prescribed in and learned from an authoritative source. If you want sex to be more than mere animalistic intercourse, then you need discipline, specifically a technique for mutuality and cooperation during sex.

The *Kāmasūtra*'s demand for a prescriptively framed method in all things parallels the Hindu law texts' insistence on rules that establish

the aspirational moral horizon for humanity. Both ethics and conscience in this Hindu legalism possess authority only insofar as they conform to traditional rules captured in the texts. A prescribed method enhances all social actions. In Hindu jurisprudence, we learn those methods from the prescriptions of authoritative texts and from time-tested customary norms.[7] However, we live by these prescriptions through an experiential sense that it is in our interest to do so.

Though brief, the *Kāmasūtra*'s argument for the coordination of natural passions through rules resembles Hume's provocative account of justice as grounded in stable possession. He states, 'After men have found by experience ... that society is necessary to the satisfaction of those very passions, they are naturally induc'd to lay themselves under the restraint of such rules, as may render their commerce more safe and commodious' (*Treatise of Human Nature* 3.2.2, Hume 2006: 97). For Hume, our dependence on others to respect property boundaries lies at the root of our willingness to live by rules that restrain our freedom and set the initial parameters of justice. In his view, sentiment, or passion, is the origin of morality, but only when it comes from the 'general point of view' (Sayre-McCord 1994). Hindu law authors do not argue from the same premises, but they arrive at a similar conclusion. For them, unbroken tradition serves the function of Hume's 'general point of view', namely, to coordinate our actions through received rules. Most other Anglo-American conservatives also prefer to avoid the coordination argument made by Hume (and the *Kāmasūtra*) in favour of a simpler case that runs from inherited tradition to general rules to moral standards.

A final reason that we need rules is to ameliorate our inadequacies as human beings through the accumulated wisdom of the ages. Working within established institutions and using proven methods, people overcome their faults and shortcomings as individuals. As Burke argued, 'We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that the stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and ages' (1999: 451). The theme of human imperfection runs deeply in conservative thought and derives from an assumption that social interdependence is innate owing to the need for humanity to overcome selfish individual impulses (Quinton 1978; Muller 1997: 10).

In the course of his explication of the sources of *dharma*, Medhātithi dismisses claims of human perfection: 'All outsiders without exception ... claim that the authors of their canonical texts are extraordinary men or special deities (*puruṣātiśayān devatāviśeṣāṃś ca*) who perceive directly the subjects presented in those texts' (Olivelle 2017: 125). The fatal flaw of Buddhists, Jains, unorthodox Hindus, and others is to put their trust in

individuals who claim special powers or perfections. Medhātithi argues that wise people can understand the primacy of the unauthored Vedic revelation through reason, but ordinary people cannot and need not. Moreover, unless they are manipulated by a false teacher, good people do not agree on an error. The Vedic tradition is primordial and uninterrupted within the same community that still reveres and transmits it through collective memory. Its mere existence, therefore, proves its truth and value. Continuity with the past itself provides the justification for presuming the Hindu law tradition to be valid and good – a cardinal principle of conservatism (Muller 1997: 7–8). Once the rational basis for knowing *dharma* through the Veda has been settled, therefore, one need not redo the proof, so to speak, because the knowledge acquired in searching for *dharma* is always a rediscovery of the same ancient truth, never the discovery of something new. Individual claims to new insight, therefore, are suspicious. In this view, reason always confirms tradition.

Human imperfection in Hindu law is not merely an inability on the part of most to understand scripture and authoritative texts on their own, but also the incapacity to control the emotions and avoid selfish actions. In a typical refrain, the *Laws of Manu* (2.93, circa first century CE) states, 'By attachment to the organs, a man undoubtedly becomes corrupted; but by bringing them under control, he achieves success' (Olivelle 2004: 30). The challenge to control the organs of sense as the tools of one's passions occurs ubiquitously in Hindu literature, common to both rule-centred traditions such as Dharmaśāstra and ascetic traditions that seek a salvific freedom above all category and distinction.

We find an example of the human propensity to seek self-serving ways around the established rules in Medhātithi's discussion of social class and hierarchy, that is, caste. The determination of class pedigree and birth status was of central importance to a tradition in which the main pillar of social organisation was a division of society into four primordial classes and myriad castes. In his commentary on *Laws of Manu* 10.5, Medhātithi argues that both empirical and functional factors are inadequate to determine one's social class. Appearances can deceive, when outcasted individuals bear children. Half-truths can be manipulated, when biological metaphors (two cows always make another cow, so two Brahmins always make another Brahmin) are invoked without due consideration of a simple question about whether the Brahmins are married. Therefore, one has to rely on the rules of the texts regarding the pure class status of the parents, their approved marriage, and their ritual status at the time of conception. At one point in this discussion, Medhātithi states, 'The ways of the world fall under the control of human beings, and since humans have a strong tendency towards deception in matters of social class, this matter cannot be settled from their perspective' (Jha [1920–32] 1999, 2:330, my translation). There is no notion of original sin here, but rather a sense that temptation and self-interest would lead people to lie about their social class. As a result, an external standard is required, namely, the traditional rules of class and caste, especially of their mixture or miscegenation.

'*Śāstra*', Derrett declares, 'is "teaching", impersonal' (1978: 33). Insofar as Hindu law operates on a fiction of Vedic authority, it appeals to the unauthored, impersonal (*apauruṣeya*) character that the Veda imparts to all things derived from it. The conceptual slippage (they would say congruity) between revelation, tradition, and custom in Hindu law allows received social rules to stand in for sacred text. Individuals ideally lose their personality, becoming 'impersonal persons', in the discipline of the *śāstra*'s commands and prohibitions (Davis 2010: 55–6). Borrowing a metaphor from Kumārila, the great seventh-century exegete of the Veda, Medhātithi attests to the depersonalisation achieved through study of the Veda: 'Just as whatever substance entering the salt-mine of Rumā turns completely into salt, so all things are purified by the mental satisfaction that naturally arises in knowers of the Veda' (Jha [1920–32] 1999, 1:68, my translation). The metaphor is not unlike T. S. Eliot's notion of the poet as a chemical catalyst in his classic essay of conservative literary criticism. The ideal author is a disappearing bridge between the poems and weight of the past and the talent of the present moment. The moral progress of a Hindu, like an artist's progress, 'is a continual self-sacrifice, a continual extinction of personality' and morality, like poetry, 'is not the expression of personality, but an escape from personality' (Eliot 1921: 47, 52–3). Richard Weaver would call it the cultivation of the 'unsentimental sentiment' (1948: 17–31).[8] In the domain of morals, rules (conservatives prefer the word 'prescriptions') elevate individuals above their imperfections. Building and growing over time, moral wisdom in the form of received norms from the past shapes individuals into bearers of tradition, the disciplined transmitters of an impersonal law (*śāstra*).

In Hindu jurisprudence, texts are the guide to unseen, transcendent truths and rules, while experience, observation, and convention are the guides to worldly truths and rules. We need rules of both kinds in order to flourish as humans. Revelation commands us to discipline through the application, but also the veneration, of the rules it propounds. It provides the fundamental moral orientation and axiomatic commitment required to motivate a person to accept and internalise tradition. In theory, tradition complements transcendental command; in practice, tradition replaces or is the substitute for revelation. The primary defence against human tendencies towards selfishness and folly is inherited custom and the institutions that transmit it. Tradition thus depersonalises morality by standardising it as the

inheritance of the past. A good rule, therefore, is a distillation of traditional wisdom communicated through an established social institution.

What makes an act moral? Reason, emotion, and tradition

In and of themselves, actions are neither right nor wrong, neither moral nor immoral. In Hindu law, scriptural and traditional commands and prohibitions make a fundamental claim on our behaviour, and those same rules determine their moral quality. For an act to be moral, there must be a rule prescribing it. That rule may legitimately come from textual or conventional sources, or under certain circumstances personal approbation.

The most famous instance of this claim was the justification of killing in specific textually defined circumstances, especially ritual sacrifice. A general prohibition against killing (both humans and animals) circulated widely in classical India. 'Outsider' groups such as the Buddhists, Jains, and some ascetic sects within the broad Hindu tradition used this prohibition to question the value of animal sacrifices enjoined in the Veda. Dharmaśāstra authors saw the question in simple legal terms: specific rules abrogate general ones. Medhātithi argued:

> Violence sanctioned by the texts and defined by a rule is not subject to the general prohibition against killing, because that prohibition applies to ordinary violence. Further, it is not possible to establish the sinfulness of violence sanctioned by Vedic tradition – as one can for ordinary violence – from the act of violence itself as inferred from the general rule, because it is not the fact of violence itself that makes something sinful, but rather the fact that there is a prohibition against it. (Jha [1920–32] 1999, 1:62, my translation)

Though sinfulness (*pāpatva*) is admittedly not precisely immorality, the point remains the same. Unsanctioned violence or killing produces a moral fault, while permitted or prescribed violence does not. Whether general or specific, however, it is the prohibition against violence that makes it sinful or immoral. The inherent nature of violence has nothing to do with it, according to Medhātithi. This view is extraordinary for how much it reveals about the legalism at work in the Dharmaśāstra conceptualisation of morality, here in the sense of the formalism inherent in stressing the value of rules as rules rather than the tradition's undoubted rule density (see the discussion in the Introduction).

The primacy of rules in the determination of moral quality meant that reason was always a secondary consideration. Reason as such, the unfettered search for truth starting from self-chosen principles and original inquiry, is scorned as the dangerous doctrine of infidels of various kinds.

The *Laws of Manu* (2.11) set reason and logic against revelation and tradition: 'If a twice-born disparages the Veda or tradition by relying on the science of logic (*hetuśāstra*), he ought to be ostracized by good people as an infidel and a denigrator of the Veda' (Olivelle 2004: 23). Reason of this sort was axiomatically accepted as settled by the Mīmāṃsā tradition, the school of Vedic exegesis, and not worthy of further inquiry.[9] Medhātithi states this directly, 'If you ask why aren't the original reasons for the acceptance of the Veda stated here, the answer is that this is a text of tradition and it speaks to matters that are already well established. Those who want to know the reasons should learn them from the Mīmāṃsā. What we declare here is addressed to those people who are learning solely from traditional texts' (Jha [1920–32] 1999, 1:62, my translation). Burke evinced the same deferral of first philosophy: 'Even in matters which are, as it were, just within our reach, what would become of the world, if the practice of all moral duties, and the foundations of society, rested upon having their reasons made clear and demonstrative to every individual?' (1999: 32).[10] In Hindu law, the need for a rational, first-principles argument is foisted upon another intellectual tradition and Reason is subordinated to revelation and tradition.

The rationalism rejected by Hindu law authors is one that fails to accept the established presuppositions of Vedic tradition and begins instead *ab initio*, from a theory developed through the rational insight of an individual. The pejorative label for this kind of reason is *hetuśāstra* and a *hetuka* is a 'seeker of reasons' (Wezler 1999: 149). These are the theorists and rationalists scorned by most conservatives for their promulgation of ideologies abstracted from the thought of one person and presented as the common, universal truth for all. Other forms of tradition-centred reasoning, however, find affirmation in Hindu jurisprudence. Lingat rightly points out, for example, that legitimate reasoning (*tarka*) for the Hindu law authors is exegesis (*mīmāṃsā*) of the canonical texts in the light of received custom (1973: 159). In other words, reasoning, not Reason, plays an important role in legal and moral judgement. In adjudication, Rocher classes *yukti* under the heading of 'circumstantial evidence' (2012: 385–6). In other places, *yukti* comes close to 'common sense', the ability to put things together in context. The *Laws of Bṛhaspati* (1.114, circa fifth century CE) provides a famous statement of Hindu legal realism, 'One should not render a verdict by relying solely on the texts, for when deliberation lacks common sense (*yukti*), the ruin of justice arises' (Rangaswami Aiyangar 1941: 19, my translation). Here, reasoning means taking context and circumstance into consideration. Finally, we encounter one final type of reasoning, called *nyāya*. In Hindu law, *nyāya* can mean both logic in the sense of syllogistic argument and argumentation from established procedures and maxims (Davis 2007a). This type of reasoning functions on the basis

of historical precedents. Each of these three forms of reasoning work from already established textual or traditional sources. As a result, they are closer to hermeneutics than first philosophy.

The Anglo-American conservative tradition takes an even more sceptical view of reason. For Hume, the rationalism of Descartes ignored obvious experiences of human life. Reason deals with what is true and false and with the relationship of ideas and facts, but it does not by itself compel us to act. Cartesian reason of this sort does not take into account the passion, custom, experience, and human sociality that all drive 'naturalistic reason' (Winters 1979). Therefore, 'the rules of morality are not conclusions of our reason' (Hume 2006: 68). Similarly, Burke excoriated the leaders of the French Revolution for their commitment to understanding 'human actions and human concerns on a simple view of the object, as it stands stripped of every relation, in all the nakedness and solitude of metaphysical abstraction' (1999: 417). Idealistic and ideological abstractions are the work of mere 'men of theory' who lack the experience necessary to make informed decisions about matters of politics and morals (Burke 1999: 433). Reason, in the conservative view, is associated with a priori determinations of how the world should be instead of inquiries into how the world is. Any attempt to decide in advance what ought to be is decried as dangerous without a knowledge of what is (Hume 2006: 77). And what is, for both Anglo-American and Hindu conservatives, is heritage, the basis upon which we put together past wisdom and present circumstance: these are the considerations that should inform the conscience when making real-world decisions.

The idea of a conscience trained in *dharma* by the Dharmaśāstra underlies a concept that we encounter in the *Laws of Manu*, called *ātmatuṣṭi*, literally 'what pleases oneself' (Davis 2007b). This idea forms the fourth source of *dharma* in the classic verse, 'The root of the Law is the entire Veda, the tradition and practice of those who know it, the standards of good people, and what pleases oneself' (*Laws of Manu* 2.6, Olivelle 2004: 23). *Ātmatuṣṭi* illustrates well both the limits of an untutored conscience and the power of a disciplined conscience. In line with the conservative emphasis upon emotion and sentiment as the motivation of moral action, *ātmatuṣṭi* appeals to inner sentiment as a guide to the moral quality of an act. It is not the manifestation of natural or innate feelings, but rather of trained sentiment. Legal commentators were very worried about the antinomian possibilities of such an open-ended idea as 'what pleases oneself'.[11] If morality boils down to whatever feels right, then all rigour and value in *dharma* is lost. The standard of moral approbation must not come from the individual. Instead, of course, revelation and tradition supply the conscience with the requisite external standard.

At first glance, this position sounds incompatible with Hume's famous inversion of sentiment and reason in morality: 'The hypothesis we embrace is plain. It maintains, that morality is determined by sentiment. It defines virtue to be *whatever mental action or quality gives to a spectator the pleasing sentiment of approbation*; and vice the contrary' (2006: 270, italics in the original). Hume wants to derive morality from approving and disapproving feelings about particular actions seen from a 'general point of view', using a logical argument to explain morality. However, the ambiguity of what counts as general and the possibility that a 'repugnant relativism' might emerge from personal sentiment (Sayre-McCord 1994: 223) bothered most later conservative thinkers and other philosophers. As a result, other conservatives – Hume's friend Adam Smith, for instance – accepted the priority of sentiment as moral motive but found moral substance in more stable external standards such as 'the commands and laws of the Deity' or custom.[12] The Hindu law argument does indeed approach the question from the other side: how does the Vedic tradition manifest in the emotional life of a person as a guide to *dharma*? However, Hindu law also sought a way to avoid an arbitrary moral standard of personal sentiment by appeal to an external standard.

Classical Hindu law's solution to the subjectivism of individual sentiment came in two forms. Either moral approbation (*ātmatuṣṭi*) governs only trivial matters such as which way you tie your sari or how you cut your hair, for which any preference is acceptable within the boundaries of the other three sources of *dharma*; or, *ātmatuṣṭi* refers to a seamless and absolute congruence between the Veda, the standards of good people, and personal sentiment. The first option neutralises any strong effect for moral approbation other than it being a private sense that one is doing the right thing by following other dharmic rules. In already ruled areas, you can feel pleased by what you do; for anything else, in things that don't matter, you can do what you want.

The second stronger sense of *ātmatuṣṭi*, however, points to the potential to be an extraordinary person, a true *śiṣṭa*, through discipline and fulfilment of difficult *dharmas*. The way the commentators describe it, a person is emptied of their natural persona and filled with the Veda, the salt-mine of morality. The extraordinary person embodies the Veda and can thus speak for it: '[B]ecause he retains the Veda, the Brahmin is by Law the lord of this whole creation. ... A Brahmin's birth alone represents the everlasting physical frame of the Law; for, born on account of the Law, he is fit for becoming a Brahmin' (*Laws of Manu* 1.93, 98, Olivelle 2004: 19). A truly disciplined Brahmin and the *dharma* become coterminous, because tradition has transformed into moral sensibility. What they know duplicates how they feel and vice versa.

Hindu law finds a total congruence between tradition and sentiment in very few people, who are always figures from the past. The ability to make *dharma* as a hero of Vedic tradition is, therefore, hardly ever encountered today – *dharma* is ever the morality of yesterday. In general, the classical Hindu law tradition does not recognise a general *dharma*-making power for the living, but it does recognise the existence of 'good people' and their standards (and even the king in certain circumstances). Not as individuals now, but collectively, those who are 'good' can also make *dharma* that serves as a standard for all. There is a lovely, but also frustrating, ambiguity about who is 'good', of course. The texts list general traits of good people, but they are vague: a learned person who knows the Vedas, observes social and ritual proprieties, and is generous, benevolent, and slow to anger. Still questions remain. How much Veda should be known? Which social rules must they follow? And so on. The vagueness, however, seems to have allowed various communities to define what counted as good for themselves. This source of *dharma* offered a mechanism for change and growth with *dharma* viewed as a socially constructed norm passed down through established institutions. The check was 'goodness' as conventionally defined and practised, and, rhetorically, moral goodness only comes from the past. It should be clear, then, that conscience in the form of *ātmatuṣṭi* cannot be considered a form of conscience that serves a basis for or guide to morality. Its standard is external, not internal. The theory of a strong, *dharma*-making conscience slipped into the practice of a conscience moulded by tradition. Only when conscience is tradition does it count as *dharma*, precisely because it is not personal or individual.

Strictly speaking, in classical Hindu law, the practical ideal of tradition is *śiṣṭācāra* or *sadācāra*, the standards accepted by the educated elite and the 'good'. The idea comes very close to 'civility' as described by Ingram (in Chapter 2) in its emphasis on showing publicly that one had internalised rules through manners, sexual restraint, and respectable comportment. However, the texts frequently acknowledge – in fact it is so common as to almost subvert or supplant the textual ideal – that the standards of a region, family, caste, or other group provide a person's most immediate and intimate norms for living. It seems to work like this. We have a need to become socialised within our families, castes, religious communities, and regions in order to live most effectively with others in that group.[13] On top of that, the Dharmaśāstras (and other *śāstras*) provide the avenue for higher refinement.[14] This is a supra-group ideal, limited to a few in its justifications and intricacies, but incumbent upon them as well. Our sense of conscience develops in all these levels, but it becomes most reliable and secure after the conventional *dharmas* of the learned and good have become second nature. The ideal of normative practice (*ācāra*) comes close to the recurrent conservative theme of 'second nature': 'internalized cultural rules ... that are taken for granted, and are acted upon without continuous reflection' (Muller 1997: 20).

What makes an act moral is theoretically its conformity to the Vedic ideal, but in practice what matters is the sanction of the situationally defined local standards of good people. Extraordinary people are those who maximally embody tradition rather than reform it. In the view of classical Hindu law, therefore, conscience is tradition embodied by an individual. What makes conscience moral is not an independent capacity to intuit or discern morality apart from social convention, but rather the ability to accept tradition and act upon it. The traditional conservatives' emphasis on passion or sentiment as the motive force for moral action resonates with Manu's appeal to a feeling of approbation at work in all dharmic action. However, as Medhātithi states, 'both joy and suffering depend on *dharma*' (Jha [1920–32] 1999, 2:80, my translation). Emotions are indeed indicators of morality, but the tradition of *dharma* remains its unquestionable standard.

Social institutions and custom as the foundations of ethics and conscience

One recurrent theme of conservatism requires further exploration in describing the ethics of classical Hindu law: the presumptive value of custom and traditional institutions. Derrett summarises the tradition's valorisation of elite custom: 'The ultimate roots of "duty" in practice were the scriptures which embody age-old wisdom tested in the fire of the practice of the "good" of long ago, and modern usages and customs which can be traced back to a consensus of authorized bodies of rule-makers' (1978: 38). Invocations of tried-and-true practices and the communal organisations that promote them arise in myriad contexts in Hindu jurisprudence. Recourse to established practices functions as a substantive source of law-making in cases where the texts do not fix a clear rule. Gaps in substantive law are filled by recognised communal norms. The *Laws of Vasiṣṭha* (1.17, circa first century BCE) provides one early instance of this theme: 'When there is no scriptural text, Manu has prescribed the dharma of the region, the dharma of the caste, and the dharma of the family' (Olivelle 2017: 67). It is very common in Hindu law texts for a long discussion of a topic of substantive law to end with an injunction to follow customary norms for any unspecified elements of the topic.[15] In the area of adjudication, a thirteenth-century Hindu law text states, for example:

> A *dharma* that has at all times prevailed in a place and that does not conflict with the revealed or traditional texts is called 'locally recognised'. A law

(*vyavasthā*) defined in accordance with local convention should always be written down and marked with the king's seal. The king should diligently protect such a law as though it were a legal text and should render legal decisions on the basis of it. (Srinivasacharya 1914: 58, my translation)

When local customs and conventions are invoked in such contexts, the moral quality imparted is not specially mentioned, but it is implied. The theological commitments of the Hindu law authors led them to locate the validity of 'the customs of good people' first in the conduct of virtuous Brahmins. The notion that Brahmins' conduct matters above all others' is very old in Hindu thought, as the sixth-century century BCE *Taittirīya Upaniṣad* (1.11.3) attests: 'If you ever have a doubt regarding a rite or a practice – should there be experienced, qualified, and gentle Brahmins devoted to the Law who are able to make a judgement in that matter, you should observe how they act in that regard and behave likewise' (Olivelle 1996: 184). Scores of similar passages emphasise the virtues that Brahmins should possess in order to serve as moral exemplars. Technically and ideally, therefore, the customs and institutions of Brahmin communities form the core of Hindu law and the tradition unapologetically favours and lauds the Brahminical world and worldview.[16] Brahmins are thus the primary models of the good in Hindu law, but the category of 'good people' was in the end extended well beyond the Brahmin community.

The qualifier 'good' differs from 'local', 'caste', and 'family' as a descriptor of what legitimates custom, but the moral and factual shade into one another in the way the texts sanction normative practice. If pressed, Hindu law authors will say things like 'Local conventions apply only to internal matters between people who belong to a certain village, guild, military unit, family, etc. A dispute *between* these groups, however, should be decided by textual law' (Srinivasacharya 1914: 58, italics in the original). In other words, they will put restrictions on how and when local customs may hold good. But, the truth is that the 'standards of good people' (*sadācāra*) – civility – was a source of *dharma* flexible and ambiguous enough to incorporate almost any well-established conventional rule of any corporate group, so long as the rule did not obviously contradict a socially accepted provision of the texts. I would venture to say that the majority of Hindu law topics include provisions for custom to be recognised as binding in matters not expressly covered by the texts. The specification or enumeration of customs, however, is rare. Classical Hindu law assumes a complex moral and legal world outside of the text that cannot be fully reduced to abstract principles in texts. A comprehensive listing of customs, therefore, was out of the question for Hindu law authors, even though the foundational texts of the tradition are likely 'records of custom' written into the prescriptive idiom of a legal text (Lariviere 2004).

Instead, generic statements about the old ways lend themselves to open-ended interpretations: 'The path trodden by his fathers, the path trodden by his grandfathers—let him tread along that path of good people; no harm will befall him when he travels by that path' (*Laws of Manu* 4.178, Olivelle 2004: 78). The slippage between the Brahmin as moral example and the conservative ideal of time-tested customs as moral standards helped the Hindu law tradition both to preserve and to escape a narrow, theological definition of morality. The question of who is good expands to include righteous kings, virtuous merchants, and loyal servants. What counts as goodness also points to general virtues rather than class-specific traits. The *Laws of Harīta* gives a typical list: 'Loyalty to Brahmans, devotion to gods and ancestors, gentleness, not causing pain to others, not being envious, kindness, not being harsh, friendliness, speaking amiably, gratefulness, providing shelter, compassion, and tranquility – these are the thirteen kinds of good conduct' (Olivelle 2017: 144). Rather than investigate the nature of the virtues – these markers of 'good conduct' – the Hindu law tradition is content to allow virtue or goodness to be contextually determined in the communities.

The importance given to customs and habits among conservatives is well known. The basic idea is that society grows organically and social rules develop without being deliberately invented such that people are '*never* guided *exclusively* by their understanding of the causal connections between particular known means and certain desired ends' (Hayek [1970] 1997: 321, italics in the original). Social rules precede our entry into the world and we learn first to work within existing institutions whether we like it or not. A conservative views this as a positive inheritance: 'But as custom and practice have brought to light all these principles, and have settled the just value of every thing; this must certainly contribute to the easy production of the passions, and guide us, by means of general establish'd maxims, in the proportions we ought to observe in preferring one object to another' (Hume 2006: 26). Morality means custom shaping passion by means of rules. The inherited social world guides how we learn to feel about specific actions, most explicitly through the rules transmitted by multiple social institutions.

On different grounds, Burke upholds custom by objecting to the need for ceaseless rational justification for actions without an appeal to custom. He writes, 'Instead of casting away all our old prejudices, we cherish them ... because they are prejudices; and the longer they have lasted, and the more generally they have prevailed, the more we cherish them. ... Prejudice renders a man's virtue his habit, and not a series of unconnected acts. Through prejudice, his duty becomes a part of his nature' (Burke 1999: 451–2). By prejudice here, Burke means what we have always done, the

tendency to think people, cultures, motives, and social processes are the same as they were before. That disposition for him links habitual actions together instead of requiring a separate justification for each on rational grounds. Habit and custom at least link discrete moral contexts, while reason tries and fails to transcend them.[17] The controlling power of tradition and custom is a near absolute good in both classical Hindu law and traditional conservatism.

Neither tradition nor custom functions in a vacuum, however. Society requires institutions in order to fix and transmit the goods of the past to succeeding generations. Institutions are the concrete manifestations of ancient wisdom. The institutions praised by both Hindu and Anglo-American conservatives are familiar: marriage and family, the state, property, neighbourhoods, voluntary associations, and rigid distinctions of class, status, sex, and age (Nisbet 1953). Where Anglo-American conservatives would defend the church, Hindu law authors would defend the Veda and Vedic ritual as essential religious institutions. Typically of the conservative view, Hume views institutions as the social location for the generation of moral sentiments: 'There are certain deferences and mutual submissions, which custom requires of the different ranks of men towards each other. ... 'Tis necessary, therefore, to know our rank and station in the world, whether it be fix'd by our birth, fortune, employments, talents or reputation. 'Tis necessary to feel the sentiment and passion of pride in conformity to it, and to regulate our actions accordingly' (2006: 168). Burke finds the possibility of incremental change in the existence of institutions: 'adhering in this particular, as in all things else, to our old settled maxim, never entirely nor at once to depart from antiquity. We found these old institutions, on the whole, favorable to morality and discipline; and we thought they were susceptible of amendment, without altering the ground' (1999: 460).[18] In general, institutions serve as the categorical boxes to hold tradition, custom, and practice. Institutions impose rules as the substance or contents of these categories. As a result, the presumptive goodness of existing institutions carries with it a 'law and order' legalism in which the status quo is moral by default. Social rules tested in and through institutions come to set the standard of morality against which actions are judged.

The central institutions of Hindu law are class (*varṇa*) and the lifestyle of the married householder (*gṛhasthāśrama*).[19] Other important institutions build upon these two as the pillars of *dharma*. The primary function of the state, for example, is to protect the classes and orders of life, especially the householder's: 'The king was created as the protector of people belonging to all social classes and orders of life who, according to their rank, are devoted to the Law specific to them' (*Laws of Manu* 7.35, Olivelle 2004: 108).[20] The same king must defend the customs of 'castes, regions, guilds and families' because 'even men living far away endear themselves to the world when they stick to the activity specific to each and carry out their specific activities' (*Laws of Manu* 8.41–2, Olivelle 2004: 126). Chaos ensues when a low-class Śūdra interprets the law or when Vaiśyas and Śūdras deviate from their proper duties (*Laws of Manu* 8.21, 418, Olivelle 2004: 124, 153). The dreaded 'mixture of class' (*varṇasaṃkara*) arises from 'adultery among the classes, marrying forbidden women, and abandoning the activities proper to their class' (*Laws of Manu* 10.24, Olivelle 2004: 181). Further examples along these lines abound. What all of them show is the same commitment to protect established institutions that we find among Anglo-American conservatives. Moreover, they show that distinction, inequality, and hierarchy are not only accepted, but positively embraced by classical Hindu law. The conservative defence of inherent and inherited human differences as the basis of fixed social hierarchies thus reproduces Hindu law's advocacy of class distinction by birth and the naturalisation of inequality as part of social order.[21] Though the precise institutions held in esteem vary somewhat,[22] both Hindu and Anglo-American conservatives place great weight on the need for long-established institutions and their rules for the preservation of moral order.

Conclusion

Legalism is the basis of ethics in classical Hindu law in that the rules of tradition set the standard of what counts as moral. This kind of legalism was thoroughly described by Judith Shklar: 'the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules' (1964: 1). I have throughout used the terminology and thought of conservatives in the Anglo-American tradition to describe ethics in Hindu law, because the resemblances between these two traditions facilitate mutually illuminating metaphors, categories, and commitments in the legalistic ethics of both. The two do not match perfectly, but they come to similar conclusions often enough to merit viewing them together. I suspect, more importantly, that Hindu law authors would 'see themselves' in the assumptions and arguments of Anglo-American conservatives in a way that they would not in the ethical language of Kant or Foucault.

As expressed in texts and customs, rules are the primary tools of institutions to coordinate social behaviour. This regulation of collective social action compensates for the imperfections of human beings, both in their motives and in their mistakes. The most reliable practical guide to morality thus becomes established custom, habit, and the model of respected people.

Weaver states the conservative position, 'The word "conscience" signifies in its root meaning something very much like recollection. To have conscience is to remember what we are and what we have been ... History should arm conscience' (2000: 631). By assimilating to past authority, 'we' escape the limits of our individual predilections, suppressing purely personal interests in deference to a shared past.[23]

The appeals to reason in many ethical systems do not make sense in the Hindu law or conservative traditions. Though Hindu law includes a commitment to orthodoxy in the form of the Veda, its substantive core is best viewed as a constant intellectual engagement with custom and tradition. Dharmaśāstra codifies customary rules even as it leaves open the need for a continuous living tradition to supply practical guidance in any given moment. The notion that one could make a 'state of nature' style argument and either justify or reform Hindu law would have seemed absurd in a tradition that reveres revelation and tradition as the constant lodestars of law and morality.

When rational argument is dismissed, then emotion takes its place as the motivation for moral action. Both Hume's and Manu's move to include an appeal to moral approbation as a source of morality or *dharma* survived only with the qualification that moral sentiment find grounding in revelation or tradition. The inner, psychological experience of morality must not succumb to an arbitrary, relativist standard. Both authors want to know what moves people to act morally in practice, and warm feeling seems more likely than cold text. In Hindu law, the sentiment of 'what pleases oneself' or 'what gratifies the mind' never became a strong source of *dharma*. It reduced conscience to either the simple experiential pleasure of knowing that one is acting in accordance with tradition or the ordinary pleasure of personal preference in matters of food, dress, and so on. The idea of conscience in traditional conservatism is not so different. Conscience is a moral sensibility governed by socialisation in established tradition. It is a practice of '*dharma*-mindedness', a constant striving to be within the rule of *dharma*, much like the 'sharia-mindedness' that Clarke discusses below (Chapter 9). Most conservatives were content to ground morality upon established conventions.

In the end, therefore, tradition replaces conscience as the standard of morality. Tradition here means both customary rules and the institutions that promulgate them. In line with conservative views, Hindu law rules and institutions organise the world based on inherent and inherited difference. The formation of 'communities' as social groups of imaginable scale is critical to this conservative vision. To deny people their class, neighbourhood, or family identity is to treat human beings as so many interchangeable widgets. Ethics here consists primarily in the maintenance of distinctions through the inculcation of inherited rules.

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Notes

1 Readers will have to forgive the imprecision of the label 'traditional conservatism'. Broadly, I have in mind the works of authors such as Burke and Hume, but also Hayek, Weaver, and Oakeshott, among others. It has been necessary to flatten the history and complexity of both traditional conservatism and Hindu law to make the comparison.

2 Methodologically, my approach parallels the way Saba Mahmood (2005: 27–9) finds liberal, especially Kantian, theory unhelpful for describing committed Muslim practice and turns instead to Foucault's ethics of self-formation. My analysis in terms of conservatism seeks a framework to describe Hindu law that comes from a similar social position and disposition, namely, that of an elite male intelligentsia. Hindu law can and should be studied from other theoretical, especially critical or transgressive, perspectives.

3 Too often, the English words 'rule' and 'law' assume the state, legislation, and explicit enforcement. A rule (*vidhi*) in Sanskrit comes from an authoritative source – either revelation, traditional text, or custom – not from legislation or direct command, except by analogy.

4 A recent history of Dharmaśāstra and its major topics may be found in Olivelle and Davis (2018).

5 See also Lariviere (2004: 612) and Wezler (2004: 643).

6 *Kāmasūtra* 1.2.17–19, my translation. See also Fosse (2012).

7 For a recent in-depth study of the sources of Hindu law, see Olivelle (2017: 16–38) and the copious translated extracts found in part I of his reader.

8 Weaver may as well have been describing the disciplined ideal man of Hindu law: 'The good man, the man with proved allegiance to correct sentiment, has been the natural trustee of authority' (1948: 33).

9 For a study of how Mīmāṃsā justifies Vedic revelation on philosophical grounds, see Halbfass (1991).

10 I set aside exceptions among traditional conservatives such as Hume.

11 See e.g. Medhātithi in Olivelle (2017: 136) and Davis (2007b: 282).

12 Smith ([1759] 2009: 191): 'Since these, therefore, were plainly intended to be the governing principles of human nature, the rules which they [the sentiments] prescribe are to be regarded as the commands and laws of the Deity, promulgated by those viceregents which he has thus set up within us.'

13 Compare Burke: 'To be attached to the subdivision, to love this little platoon we belong to in society, is the first principle (the germ, as it were) of public affections' (1999: 437).
14 Compare Weaver: 'In the same way that our cognition passes from a report of particular details to a knowledge of universals, so our sentiments pass from a welter of feeling to an illumined concept of what one ought to feel. This is what is known as refinement. Man is in the world to suffer his passion; but wisdom comes to his relief with an offer of conventions, which shape and elevate that passion' (1948: 21).
15 I describe several examples from a medieval Hindu law text in Davis (2017).
16 For two recent accounts of the establishment of Brahminism and the Brahminical worldview, see Squarcini (2011) and Lubin (2012).
17 Compare Oakeshott ([1947] 1997: 296): 'There is no place in the rationalist's scheme for a "best in the circumstances", only a place for "the best"; because the function of reason is precisely to surmount circumstances.'
18 Compare Oakeshott ([1947] 1997: 307): 'And he conceives a contempt for what he does not understand; habit and custom appear bad in themselves, a kind of nescience of behaviour. And by some strange self-deception, he attributes to tradition (which, of course, is pre-eminently fluid) the rigidity and fixity of character which in fact belongs to ideological politics.'
19 On the household as an institution of Hindu law, see Davis (2010: 33–9). The studies in Olivelle (2019) establish that the householder ideology was in fact an innovation in the early phases of Hindu law, but one that became the source for conservative reactions against ascetic ideologies over time.
20 *Laws of Manu* 6.87–90 (Olivelle 2004: 105) clearly states the superiority of the householder lifestyle, or 'order of life' to the other three – student, forest hermit, and ascetic.
21 The classic account of hierarchy in Indic thought by Dumont (1970) is still relevant.
22 Classical Hindu law would place certain ritual systems such as ancestral rites and expiations in the category of essential institutions. I suspect Christian cultural habits might similarly be deemed important by Anglo-American conservatives.
23 Both Hindu and Anglo-American conservatives pass over or actively dismiss the place of women and minorities of all kinds in this shared past.

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2

Manners and morals: Codes of civility in early modern England

Martin Ingram

'Civility' – decorous behaviour as it was thought about, publicised and practised in Europe in the sixteenth, seventeenth and eighteenth centuries – relates closely to the idea of the 'care of the self' explored by Michel Foucault (1988), to the concept of 'legalism' developed by Paul Dresch and others (Dresch and Skoda 2012; as discussed in the Introduction), and to a variety of other big ideas, notably the 'civilizing process' as conceived by Norbert Elias ([1939] 1994). Codes of 'civility' were legalistic in the sense that they were developed more or less systematically in a series of treatises that presented themselves as authoritative. Many elements of the code were set out categorically as precepts to be rigorously adhered to. But for the most part no legal authority actually dictated or enforced them, and they are more readily seen as enabling ethical life than as constraining it. They were upheld partly by the example of prominent members of society who more or less self-consciously promoted them; partly by the social and psychological pressures (embarrassment, shame, exclusion) experienced by those who failed to follow suit; and, more importantly, by the voluntary actions of individuals who chose these modes of conduct for themselves and – here an indirect form of compulsion comes into play, via education – for their children. They were a form of self-fashioning. Among the reasons for making this choice was aspiration, to maintain or enhance one's standing and position.

There is no doubt that ideas of civility proved very powerful over many generations and undoubtedly shaped – perhaps transformed – behaviour, especially among the elites, but in the wider society too. It needs to be said that the subject has no clear boundaries and can include subjects as diverse as levels of violence (including duelling), the use of space in houses and funeral rites (Heal and Holmes 1994; Houlbrooke 2000; Peltonen 2003; Sharpe 2016). Elias ([1939] 1994) associated the idea with long-term developments in state formation in Western Europe, especially France but with side-glances at England and Germany, and with what he argued were the psychological counterparts of these developments in the minds of