

AN ENQUIRY IN COMPARATIVE JURISPRUDENCE

Similarity and Disparity between dharma, li, and nomos

by

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An Enquiry in Comparative Jurisprudence

Similarity and Disparity between dharma, li, and nomos

ABSTRACT

This enquiry deals with comparative jurisprudence in a cross-cultural perspective. Three most prominent indigenous conceptions, the topoi of dharma, li, and nomos, are subsequently investigated and accordingly juxtaposed. Their formative and post-formative periods, the last roughly until between 200 B.C. and 200 A.D., are taken into consideration. No doubt, all three topoi represent significant world conceptions, a deeper understanding of which is prerequisite for an appropriate treatment. The enquiry commences with the Hindu Indian tradition of dharma avoiding as far as possible a descriptive vocabulary that is largely borrowed from an Occidental terminology; the same applies for the topos of li. Due to a still widely-observable ignorance of Hindu Indian jurisprudence, dharma figures in the centre of interest, and is therefore treated comparatively comprehensively. Next, considerable care is taken to focus on the Chinese li; and thirdly an essentially philosophic description of the ancient Greek topos of nomos is juxtaposed to the preceding. As this implicit comparison reveals to an attentive observer, vague correspondences among fundamental disparities outweigh the similarity between the three topoi. Though dharma and li can be described as regulative ways of life, dharma is for India (Hinduism) what li is for China, and both are counterparts of what nomos was and became, the externally imposed constitutional (legal) order of society. After terminating the formative period, where a slight similarity exists in an imagination of order between nomos and dharma, while in China the imagination of harmony prevails instead, the topos of dharma is seen to be promoted under the presupposition of its provision of an overarching order, fit to work as an obligatory signpost through man's life, whereas the initial ritual and ceremonial li-conducts became after their extension into all social spheres the consolidated, socially created and accepted way of life.

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ABBREVIATIONS

ARSP	Archiv für Rechts- und Sozialphilosophie, Wiesbaden
AV	.....	Atharva-Veda
bk.	.....	book
B.S.O.A.S.	.....	Bulletin of the School of Oriental and African Studies, London
c.	.....	circa
ch.	.....	chapter
Dict. of H.	.....	M. and J. Stutley, A Dictionary of Hinduism
E.C.M.H.L.	.....	J.D.M. Derrett, Essays in Classical and Modern Hindu Law, 4 vols.
ed.	.....	edition or edited
esp.	.....	especially
et al.	.....	and others
etc.	.....	et cetera
fn.	.....	footnote
Frg.	.....	Fragment
HD	.....	Kane, History of Dharmaśāstra, 2nd ed.
I.A.	.....	Indian Appeals
ibid.	.....	ibidem, 'in the same place or book'
i.e.	.....	id est, 'that is'
LCL	.....	Loeb Classical Library
lit.	.....	literally
Manu	.....	Manusmṛti, "The Laws of Manu", trans. by G. Bühler
n.	.....	note
P.	.....	Parvan
PEW	.....	Philosophy East and West, Honolulu, Hawaii
pl.	.....	plural
op.cit.	.....	opere citato, 'in the work quoted'
repr.	.....	reprint or reprinted
RV	.....	The Hymns of the Ṛgveda
SBE	.....	Sacred Books of the East, 50 vols., ed. F. Max Müller

sing. singular ..
Skt. Sanskrit
trans. or transl. . translation or translated
ubi cit. where cited
viz videlicet, 'namely'
ZphF Zeitschrift für philosophische
Forschung, Meisenheim/Glan
[] brackets enclosing my own insertion

PREFACE

Often, a legal world-order has been postulated in whatsoever a sense, yet without taking those decisive disparities into careful consideration which a comparison of basic 'legal' conceptions of different cultures reveals. In order to throw some light on those presumably deep rooted incongruities I have attempted to compare dharma, li, and nomos, the indigenous (regulative) topoi as I preferred to say of Hindu India, China, and ancient Greece. A three-cornered cross-cultural enquiry in Comparative Jurisprudence, as far as I know, has not been undertaken. However, it seems that in this way a necessary contribution can be made to introduce a theoretically-established inter-cultural process of 'legal' understanding. Incidentally, we may become more sensitive to the many intra-culturally emerging obstacles that hamper such endeavours. Last but not least we may also increasingly realize that the nomos-bound Occidental culture is not universally valid or transferable and applicable.

Glaring disparities between the topoi of dharma, li, and nomos which by far outweigh their similarities cannot be minimized and must be taken into account, if an inter-cultural process of 'legal' understanding can be meaningful to all parties involved.

This enquiry takes for granted, and apparently verifies that "a system of law is hardly meaningful except within the bosom of the civilization which gave birth to it."* Therefore, I have attempted to pay careful attention to those non-Occidental "systems" which are still little known to an Occidental audience.

It was in 1979, when under the leadership of Professor Derrett (London) the volume on "Beiträge zu Indischem Rechtsdenken" appeared as the first of a series of "Studien zu Nicht-europäischen Rechtstheorien", edited by Theodor Viehweg (Mainz) and myself, that plans matured to study some important

aspects of the Indian (Hindu) 'legal' tradition under the supervision of Professor Derrett, simultaneously continuing my studies in Comparative (Legal and Social) Philosophy. Eventually, I fixed upon the determination to engage in the present enquiry, putting scruples aside based on my own insufficiencies relative to the difficult task ahead.

Now, having finished that particular assignment for the time being, assuredly still incomplete and with many deficiencies, I am greatly indebted to my teacher J. Duncan M. Derrett who first of all gave me the chance to undertake such a piece of work. Whenever necessary he encouraged my progress; without his unceasing kind interest and many valuable suggestions this work would be still unfinished. Furthermore, I owe thanks to Joseph Needham who inspired my Chinese studies when I had the opportunity to meet him in Cambridge 1978; later contacts and my continuous study of his "Science and Civilisation in China" kept me close to the Chinese culture. As to the man behind his books, I owe much inspiration to Marcel Granet. I also wish to repeat my gratitude to my teacher in Legal Philosophy, Theodor Viehweg (Mainz) who has been supporting my studies since many years, and to Alwin Diemer (Düsseldorf)** to whom I owe the opportunity to teach Comparative Philosophy with an increasing number of interested students.

* J.D.M. Derrett, Essays in Classical and Modern Hindu Law, vol. II, (Leiden, 1977), p. XV.

** Professor Diemer is at present Président de la Fédération Internationale des Sociétés de Philosophie, and as such he took personal interest in the progress of my enquiry.

INTRODUCTION

1. This enquiry aims at presenting a contribution to Comparative Jurisprudence in a three-cornered cross-cultural perspective. Therefore, three most prominent indigenous conceptions, the topoi of dharma, li, and nomos, are investigated seriatim and accordingly juxtaposed.

Topoi as I have preferred to say are distinct from concepts and may be regarded as 'undefined' or 'undefinable' logoi, or as signposts to what is still open to an appropriate interpretation.

Of all three topoi, their formative and post-formative periods, the last roughly until between 200 B.C. and 200 A.D., are taken into a more or less cursory consideration. The chosen procedure is designed to disclose implicitly, and in § 16 explicitly, significant similarities and disparities between dharma, li, and nomos against their respective cultural backgrounds. To be sure, considerable caution has to be applied in order to avoid imposing Occidental concepts upon a description of two non-Occidental topoi, admittedly a difficult task with still unsatisfactory results. However, this enquiry may be taken as a beginning and an experiment too within the little explored field of comparative transcultural jurisprudence or, as one may say, intercultural legal philosophy.

2. In a first part the enquiry seeks to represent the topos of dharma as being available from its Hindu Indian tradition. A comparatively comprehensive treatment is devoted to it under the presupposition that dharma, as a by no means negligible factor of Hindu jurisprudence, is still widely unknown outside its own tradition, in particular to Western jurists and legal philosophers. Not only a want of information is observable, also a distinctive terminology and deep rooted conventions of thought with their corresponding notions of structure hamper an appropriate representation of dharma; for instance, the often unsuitable, random or arbitrary utilization

of the English word 'law', a case which Joseph Needham has already pointed out concerning China. Of course, this applies for the Chinese situation too, certainly even stronger with respect to the peculiarities of the Chinese language. Likewise, an understanding of the ancient Greek nomos risks to be presented in the perspective of Roman legal thinking which does no justice to the Greeks' theory and practice of nomos.

With suitable restrictions the topos of dharma figures after a brief exposition (§§ 1-3) within the context of śruti including the conceptions of ṛta and karma (§§ 4-7). Subsequently attention is paid to the nature and relevance of smṛti in 'promoting' dharma (§ 8), and to the sources and interpretation of dharma (§ 9). Next the constituents of dharma, varṇa and āśrama (§ 10), then svadharma, sādhāraṇa-dharma, and puruṣārtha are considered (§ 11) as well as rājadharmā (§ 12). Finally, dharma and vyavahāra are envisaged with relation to the problem of 'law' and custom (caritra), in § 13.

In what follows in part two, by purely formal analogy with part one, there is a cursory description of the ancient Chinese topos of li (§ 14), and subsequently, rather briefly, a treatment of the ancient Greek topos of nomos (§ 15). Both topoi are characterized in their respective formative and post-formative periods. A conclusion (§ 16) attempts to point out explicitly what we may consider as similar and disparate between these three topoi, particularly in view of their 'jurisprudential' substance and merit.

3. The following are main results of the enquiry: Vague correspondences among fundamental disparities outweigh the similarity between dharma, li, and nomos. While being prepared for what I call Leerstellen, i.e., empty spaces where a cross-cultural comparison produces a zero response, it seems that the similarity between dharma and li amounts to both topoi being existent as wholesome regulative ways of life, while the topos of nomos can be grasped in substance as something like the externally imposed constitutional order of society.

Comparatively we can say that dh̄arma is for India (Hinduism) what l̄i is for China, and both are counterparts of what nomos was and became in the course of its development. In contrast, neither the topos of dh̄arma nor the topos of l̄i has taken a course comparable to the development of the topos of nomos; instead the sm̄rtis in India disclose what I call a 'promotion' (never an innovation) of what was present at the formative period of dh̄arma; and the topos of l̄i shows in the post-formative period an increasing 'extension' of its practice into all social spheres, and is principally free, in contrast to the topoi of dh̄arma and nomos, from supernatural considerations, so that eventually l̄i appears consolidated as the socially created and accepted way of life. Both dh̄arma and l̄i establish a long continuity of a unity of practice and theory.

Originally, the topoi of dh̄arma and nomos share the imagination of cosmic order, however with differences as to exposition and preservation, whereas l̄i-conduct is designed to practise a conception of an all-embracing harmony, the effect of which can be observed, in contrast to dh̄arma and nomos, in a strong preference for a diallagmatic society where litigation should be the exception, or at best superfluous. As to the topos of dh̄arma in contrast to both the other topoi, one can speak of a pre-ordained (and inescapable) way of life, providing sufficient and suitable conflict-solving rules without losing the link to the many and diverse customs all over Hindu India under the unaffected and overarching rule of sanātana (eternal) dh̄arma.

PART ONE

ORIGIN AND 'PROMOTION' OF DHARMA

§ 1 Prolegomena

I. The origin of dharma can be traced back into the very beginning of the Indian cultural tradition. In following these traces it appears to us that over 3000 years ago the ancient intellectual and emotive powers faced a critical problem. Although it seems not too intricate and complex, it is highly significant for their world orientation, both to comprehend and to explain in convenient expressions of their language whence they had once come and where they were bound for, as well as where they had to make their living and to care for coming generations. Their original endeavours in finding their way have a naturally 'real' and an 'ideal', imaginative perspective, the latter of which, existing only in their vision, created an outlook wherein almost all of the later 'promotion' had its commencement and 'sensible' pattern.

Obviously it is extremely difficult to distinguish between a perspective of reality and one of ideality, to determine between facts and imagination, i.e. what can be proven by factual experience and acknowledgement, and what can be merely probable according to the understanding of our own days. As conduct and belief intermingle so do reality and ideality (imaginative vision). Any clearcut distinction applying the hermeneutical tool in too rigid a manner may incautiously separate what belongs together and fits our image more adequately, and our idea of a remote beginning.

II. As early as in the Ṛgveda (c. 1500 - 1000 B.C.) the topos of dharma, as I prefer to say, comes into focus. Here, the assumption and application of topos or topoi is made to denote a special method of approach to a foreign culture.¹ To this extent topoi are characteristically chosen to promote a critical process of cross-cultural understanding.

In the realm of cross-cultural enquiries and comparisons methodical precaution is basic.² Especially such expressions which are referred to as concepts or terms invoke (often falsely) the idea of distinctly defined or definable notions. Topoi, on the other hand, do not provoke ideas of defined or exactly definable notions; it is generally assumed that they denote unlimited, infinite expressions of a thought.

The assumption of topoi denies any expression the readiness to be grasped generally in an abstract (or ab-solute) sense, and thus being open to an inadequate a-situative understanding. In other words: topoi are empty vessels which are bound to be filled as often as a change of situation calls for it.

This seems especially to be the case with dharma, because dharma, as it is open to general characterization (and to many meanings) nevertheless defies all efforts at definition.³ The furthest I should go at the outset of this

1. Evidently "... we should clear our minds of irrelevant aspects of concepts native to our own environment, ..." J. Duncan M. Derrett, The Concept of Duty in Ancient Indian Jurisprudence ..., in: W.D. O'Flaherty/J.D.M. Derrett (eds.), The Concept of Duty in South Asia, (New Delhi, 1978), p. 18.

2. Cf. Reinhard May, Problematik chinesischen Rechtsverständnisses, in: ARSP LXVI/2 (1980), pp. 193-206.

3. Cf. Betty Heimann, Studien zur Eigenart indischen Denkens, (Tübingen, 1930), pp. 13, 15 ("Am Anfang jedweder Erkenntnis steht für den Inder ein anschaulicher Komplex, niemals ein Begriff." p. 13).

enquiry is to presume now that the topos of dharma figures variously as a signpost on man's way through his individual and communal life. And apparently the topos of dharma is more or less a creation of man in action rather than in mere contemplation.

III. Unfortunately, the historical scene to be depicted within the circumstances of a text (the Ṛgveda) belonging to the remote past supplies us only with few data from which we may gather some practices referring to the topos of dharma in the perspective of reality, possibly not incoherent with the etymological explanations of the expression dharma.

The topos of dharma appears on the scene yet un verbalized when the Āryan invaders of the Indian subcontinent had settled and started to organize a community life of their own pattern derived from their own inventive capabilities. Such a community life had to be stable enough to secure their present and future existence.

The following characteristics focus briefly on their communal organization and practical arrangements, all of which can be shown and be supported by illustrating their beliefs and imagination already present in the hymns of the Ṛgveda.

§ 2 The Origin of dharma and the Historical Situation

I. According to historians a dominant feature of the Āryan tribal community is the division between the monopoly of governmental leadership, both in war and peace, and that of spiritual leadership in sacrificial rituals as between king (rājā) and priest (brāhmaṇa, esp. the purohita)¹ thus conforming to the visionary 'truth' of the ṛṣis² who are said to have 'heard' the hymns of the Vedas, i.e. broadly speaking, the whole contents of what came to be known as śruti and what henceforth has been orally transmitted by Brāhmaṇas (vulgarly 'Brahmins') from generation to generation.³ "The hymns composed by their priests in their new home were carefully handed down by word of mouth, and early in the 1st millennium B.C. were collected and arranged. They were still not committed to writing, but by now they were looked on as so sacred that even minor alterations in their text were not permitted, ..." ⁴ This arrangement or functional type of order can be seen as a decisive and directional beginning. It was widely esteemed and consistently stabilized by mutual aid and acknowledgement on the part of the rājā and the brāhmaṇa.⁵

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1. Vide Dietmar Rothermund, Grundzüge der indischen Geschichte, (Darmstadt, 1976), p. 24.
 2. Margaret and James Stutley, A Dictionary of Hinduism, cit. Dict. of H., (London, 1977), ibid. Ṛṣi(s): "The ṛṣis of the RV may be regarded as an élite group of Vedic priestly families, whose literary gifts and knowledge of sacred lore are chiefly represented in the hymns of the RV."
 3. Vide ibid., Śruti.
 4. A.L. Basham, The Wonder that was India, 3rd. rev. edn., (London, 1967), p. 30. Cf. Fischer Weltgeschichte, Indien, ch. 3 by Friedrich Wilhelm, (Frankfurt am Main, 1967), p. 29.
 5. Vide Dietmar Rothermund, ibid., p. 24; J. Duncan M. Derrett, Rājadharma, in: Journal of Asian Studies, vol. XXXV, 1975-6, pp. 597-609, esp. pp. 606-7, with additional bibliography, pp. 608-9.

II. Special attention should be given to the fact that the rājā's power was additionally limited (though not constitutionally limited) by the sabhā and samiti⁶ who exerted much influence on the rājā whose position was neither divine nor absolute, yet hereditary as a rule. On the whole his position (even granted the religious functions of the king)⁷ was dissimilar to that of the priest whose religious function being greatly appreciated for its imaginative results gained ever more importance and was soon of utmost prominence. The well-being of the whole community in all natural and supernatural respects came to be seen in the light of his function. This holds true of the original three divisions of the community. "When the Āryans first came to India they were divided into three social classes, the warriors or aristocracy, the priests and the common people. There was no consciousness of caste ..."⁸

Only by the end of the Ṛgvedic period a new fourfold division had been inaugurated,⁹ the four great varṇas to be explained as a vertical interdependent stratification of community classes, marking an all-embracing system of order properly upheld, ideally sanctified, and inspired by an overarching regulative power of the regularly repeated primeval sacrifice under the guidance of the brāhmaṇa.¹⁰

6. On the sabhā and the samiti vide J.W. Spellman, Political Theory of Ancient India, (Oxford, 1964), pp. 92-96. Cf. also A.L. Basham, op.cit., p. 33. Romila Thapar, A History of India, (Harmondsworth, 1966), pp. 36 f. Also P.V. Kane, History of Dharmasāstra, (Poona, 1930-1962, 2nd ed. 1968), vol. III, ch. III, p. 92.

7. Vide J.D.M. Derrett, Bhū-Bharaṇa, Bhū-Pālana, Bhū-Bhojana: An Indian Conundrum, in: Derrett, Essays in Classical and Modern Hindu Law, vol. I, (Leiden, 1976), pp. 33-49, with further references; as Derrett explains, the king's function was to maintain, to protect, and to enjoy the earth, pp. 35-37.

8. Romila Thapar, op.cit., p. 37.

9. A.L. Basham, op.cit., p. 35.

10. Vide SBE, vol. XXXII, Vedic Hymns, part I: Ṛgveda X, 90.

III. By now the topos of order was clearly realized and already in high esteem. It was seriously taken for granted that man had the task to move into regular actions with calculable results, to behave in a constant manner so that man could be sure of the support of the gods who themselves were believed to behave correspondingly (i.e. subject to the principle of reciprocation) in answer to the regularly conducted sacrificial 'deed' or act (cf. idea of karma(n), infra).

This reality of order (at least a strong sense for order) in connection with its perceived usefulness (phala, the fruit of every action) was interwoven with the vision of gods regulating unseen questions, including mundane affairs (with the probability of enjoying even tangible phala), for the benefit of man, thus bringing into man's consciousness the topos of dharman and that of ṛtam (infra), through a variety of expressions with a power of communicative refinements.

§ 3 Etymology and Meaning of dharma

I. The traces of dharma refer back on the one hand to ṛta and on the other hand to dharman but also to the expression vrata. There is one passage in the Rgveda where they occur together:

"O wise Mitra and Varuna! you naturally (or according to your fixed rule of conduct) [dhármaṇā] guard your ordinances [vratā] with the wonderful power of an asura, you rule over (or illumine) the whole world according to the principle of cosmic order [ṛténa], you establish the sun, that is (like) a brilliant chariot, in the heaven'.¹

From this central passage we learn (despite some differences in existing translations) how all three topoi are used to indicate an all-embracing idea of action and order to co-ordinate the visible and invisible phenomena. Moreover, we encounter the role of Mitra and Varuṇa, both early and mighty Vedic gods, who are especially concerned with contracts and agreements. But before I turn to this passage in detail, some brief remarks on the word-origin, the formation and meaning of ṛta, vrata, and especially of dharma may seem suitable to complete the 'factual' side under which the origin of dharma can be investigated and visualized.

1. RV V, 63, 7; trans. P.V. Kane, The word vrata in the Rgveda, in: J. of the Bombay Branch of the Royal Asiatic Society 29 (1954), pp. 1-28, p. 27. Cf. the German translation by P. Horsch, Vom Schöpfungsmythos zum Weltgesetz, in: Asiatische Studien XXI (1967), pp. 31-61, p. 42 where dharman is translated with Gesetz.

Rta discloses according to Horsch the meaning of "Kosmisch-Kultischer Wahrheit und Ordnung"², it stands for the "universal cosmic order"³ and as such it refers to a 'principium' (i.e. the primary and fundamental element, a basis), the immanent universal order, pre-existent without being externally determined by any other force.⁴ Rta may be regarded as a force 'eo ipso'; "The gods came afterwards, with the creation of this universe" (RV X, 129, 6)⁵. So to say, subsequently, vrata appeared on the worldly scene meaning "Gebot" (imperative)⁶, or according to Kane conveying the notion of "the laws or ordinances supposed to be laid down by individual gods or by all the gods"⁷.

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2. P. Horsch, ubi cit., p. 40; vide also ibid., p. 44: "Von r = "gehen" ergibt sich rta = "Gang"." (Regel- und Gleichmaigkeit der phanomenalen Welt werden so andeutbar.) Vide also R.T.H. Griffith, The Hymns of the Rgveda, vols. I-IV, (Benares, 1889-1892), p. 2, fn. 8: "Everything in the universe which is conceived as showing regularity of action may be said to have the rita for its principle."
 3. Kane, The word vrata ..., ubi cit., p. 28; cf. the same, History of Dharmaastra, 2nd. ed., (Poona, 1968), vol. IV, sec. I, ch. I, pp. 1-7; cf. also Heinrich Luders, Varua, Bd. I, (Gottingen, 1951), pp. 24-25.
 4. Cf. Betty Heimann, Facets of Indian Thought, (London, 1964), p. 37.
 5. The Rig Veda, An Anthology, selected, translated and annotated by W.D. O'Flaherty, (Harmondsworth, 1981), p. 25. Cf. V.M. Apte, Rta in the Rgveda, in: Annals of the Bhandarkar Oriental Research Institute (ABORI), Poona, XXIII, (1941/3), pp. 55-60, pp. 55-6.
 6. Horsch, op.cit., p. 42; vide Dict. of H., ubi cit., p. 339 (vrata): "The 'Will', from the root vr, signifying the exercise of the will", with further references.
 7. Kane, op.cit., p. 28.

II. In contrast to ṛta and vrata, dharman (the Vedic term) has several spheres of denotation and a wider scope of meaning. To P. Horsch we owe a careful and learned investigation, drawing our attention to the following aspects,⁸ namely to the mythical origin of dhárman, to dhárman in a cosmical, ritual sense, and an ethical-social sense, finally to dhárman covering the meaning of "Gesetz, Recht und Pflicht"⁹.

Dharman stems from the verbal root dhṛ which means to uphold, to support, to nourish,¹⁰ i.e. "that which forms a foundation and upholds"¹¹. From this root a "nomen actionis"¹² (neuter) is built, always to be met with as dharman in the R̥gveda¹³ meaning "upholding (or sustenance)", etc.¹⁴ In the masculine gender it is to be taken as "nomen agentis"¹⁵ meaning "supporter, upholder or sustainer"¹⁶. As such it is not used more than four times in the R̥gveda,¹⁷ eventually to disappear from the scene except for its usage

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8. Vide Horsch, op.cit., pp. 32, 36, 39, 41.
9. Horsch, ibid., p. 44.
10. Vide P.V. Kane, History of Dharmasāstra, (henceforth HD), ubi cit., p. 1; cf. Horsch, ibid., p. 32.
11. Dict. of H., p. 76.
12. Horsch, ibid., p. 32.
13. Vide Kane, The word vrata ..., op.cit., p. 26: "In some passages dharman is in the masculine gender and generally an adjective." Cf. Horsch, ibid., p. 32.
14. R.C. Hazra, Dharma - Its Early Meaning and Scope, in: Our Heritage (Calcutta), vol. VII (1959), pp. 15-35, p. 17 with fn. 13; see also p. 16 (bottom); Kane, HD, p. 1: "In most cases the meaning of dharman is 'religious ordinances or rites' ...".
15. Horsch, op.cit., p. 32.
16. Hazra, op.cit., p. 17.
17. Vide Horsch, op.cit., p. 45, with reference to the R̥gveda I, 187, 1 / IX, 97, 23 / X, 21, 3 / X, 92, 2.

in later Saṃhitās and in the Brāhmaṇas.¹⁸

So far we may conclude on the origin of dharma with the first summarizing remark by P. Horsch in his above mentioned article, thus leading over simultaneously from the perspective of reality to that of ideality, the imaginary visions of the ancient tradition: "Der Ursprung des dharman-Begriffes liegt im Schöpfungsmythos vom Auseinanderhalten (vi-dhr-) und Stützen (dhr-) von Himmel und Erde, wodurch aus der urzeitlichen Undifferenziertheit des wankenden Chaos Ordnung und "Halt" geschaffen wurde."¹⁹

18. Vide Hazra, op.cit., p. 17.

19. Vide Horsch, op.cit., p. 60; in other words: a transformation process from chaos to cosmos took place by means of vi-dhr and dhr effectuating a worldly stability between sky and earth.

§ 4 Early Imagination of ṛta and dharma

I. The Ṛgvedic expressions just referred to (presumably not fixed in written form before the end of the second century B.C.) work out in distinct topoi, the visionary background of which comes to the surface of śruti (what was 'heard') and is viable to the degree that they draw back our own imagination into their world of vision, on the one hand to that of ṛta (and vrata) and on the other to that of dharman. With śruti (esp. with the Ṛgveda as foremost) we are thus enabled to be close to the origin of dharma.

The creation-myth reveals the active part of the gods (subsequently after the creation (vide supra)), the part of Mitra and Varuṇa who were believed to act as guarantees of dharma once the basis (ṛta) has been laid (not without the chance of permanence). The 'ideality of dharma' as a 'potentia' available to prevent the world's falling back into the primordial chaos (or at least disorder) is vividly supported by man's imagination of the most prominent Ṛgvedic god Varuṇa.

II. The early Vedic gods seem to have no apparent and palpable individual or manifest personal shape (although there may be in some respects a kind of personal god and personified abstracta exerting power over man)¹. And there is no question of their issuing 'commandments'. They also occupied no fixed position, and there existed no kind of a hierarchical structured Pantheon.² The Ṛgveda determines the role of Varuṇa in many instances.³ He is believed to

1. Cf. J. Gonda, Die Religionen Indiens, Bd. I, (Stuttgart, 1960), p. 29.

2. Cf. L. Petech, Indien bis zur Mitte des 6. Jahrhunderts, in: Weltgeschichte, 2. Bd., hg. v. Golo Mann und Alfred Heuß, (Frankfurt a.M./Berlin, 1962), p. 372.

3. Cf. Dict. of H., op.cit., pp. 323 f ("His responsibility for law and order also extended to sacrificial procedure, a duty shared by Mitra, Agni and Indra, ..." (p. 324)).

be the protector of ṛta (which though having been materialized never existed as a person).⁴ Moreover Varuṇa is said to have fastened the sky in the seat of ṛta ["dhārāyaṃ dīvaṃ sādana ṛtāsya"].⁵ And is also believed to have the ability to separate false from true (RV X, 124, 5)⁶, hence he measures out the many forms of the Law ["ṛtasya"] (RV X, 124, 3)⁷.

Varuṇa⁸ (and Mitra) preside over and guard ṛta, the indicator of regularity in the 'ṛta-world' (ṛta being substance and efficiency, i.e. the 'causa' and as such that which makes a thing what it is, here in efficient operation (cf. RV V, 15, 2)).

Punishment secures the sustenance of dharma for the sake of ṛta and its feared dissolution (RV X, 89, 6-7).⁹ The tendency of man's consciousness towards gods as a superior state of consciousness is to be identified with his strong desire to actively support the gods by means of sacrifices.¹⁰

4. Vide Heinrich Lüders, Varuṇa, Bd. I, (Göttingen, 1951), pp. 13, 24.

5. RV IV, 42, 4 (quoted after Lüders, ibid., p. 25).

6. Cf. The Rig Veda (O'Flaherty) op.cit., p. 111; cf. Betty Heimann, Studien zur Eigenart indischen Denkens, (Tübingen, 1930), p. 27.

7. Cf. The Rig Veda (O'Flaherty) ibid.

8. Vide on the role of Varuṇa with respect to 'legal' topoi as follows, The Rig Veda, op.cit., V, 85; VII, 86/88/89; II, 28, 6 ('Varuṇa, emperor of Order', trans. O'Flaherty, ubi cit., p. 218). Cf. also A.L. Basham, The Wonder that was India, ubi cit., p. 236; Horsch, Vom Schöpfungsmythos ..., ubi cit., p. 41. Also in the Atharvaveda III, IV, 16, 1 (ed. SBE XLII, trans. Bloomfield), Varuṇa appears as great guardian.

9. Vide RV IV, 5, 4; cf. the translations of H. Oldenberg in: Vedic Hymns, Part II, SBE, vol. XLVI, p. 335, and O'Flaherty, op.cit., p. 114.

10. Vide RV X, 51, 5, trans. O'Flaherty, op.cit., p. 108.

III. What can man do to assure himself of ṛta which was held to be existent for his benefit? Once this question arose the answer was easily to be found in man's orderly conducted sacrifices¹¹, especially by offering what one cherishes to equalize taking by giving and vice versa. Correctly conducted sacrifices are to be regarded as the 'pre-ordered' way of human behaviour to secure ṛta in all worldly affairs.

The interdependence of ṛta and sacrifice obviously had a strong effect on the gradual 'promotion' of dharma and the later decline of the consciousness of ṛta. Here, at the beginning of the early imagination of order, ṛta was in the highest esteem. Ṛta, "born from heat as it blazed up"¹², cannot be changed, but it can be harmed by any deviating action (an adharmic action).¹³ To escape this danger man will follow the prescribed ṛta as "the gods followed the laws of Ṛta"¹⁴.

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11. Vide RV I, 75, 5, trans. Oldenberg, op.cit., where a strong desire is expressed by asking the assistance of (the god) Agni to intensify the importance of the sacrifice: "Sacrifice for us to Mitra and Varuṇa. Sacrifice to the gods (a sacrifice conforming to) the Great Ṛta. Sacrifice, O Agni, to thy own house."
 12. RV X, 190, 1, trans. O'Flaherty, The Rig Veda, op.cit., p. 34.
 13. Vide A. Kunst, Use and Misuse of Dharma, p. 7, in: The Concept of Duty in South Asia, ed. by W.D. O'Flaherty and J. Duncan M. Derrett, (New Dehli, 1978), pp. 3-17; cf. H. Oldenberg, Die Religion des Veda, (Stuttgart-Berlin, 1923), p. 195: "Die Vorgänge, deren stetes Sichgleichbleiben oder deren regelmäßige Wiederkehr die Vorstellung der Ordnung erweckt, gehorchen dem Ṛta oder ihr Geschehen ist Ṛta."
 14. RV I, 65, 3, trans. H. Oldenberg, Vedic Hymns, op.cit., p. 54.

The Atharvaveda places even more emphasis on the interdependence of ṛta and the sacrifice to gods,¹⁵ drawing attention to man in the world bound for an active life to support the earth,¹⁶ and also to be still aware of the gods who, "releasing the sun and the ṛitam (the divine order of the universe) from darkness and from grāhi, did take them out of sin"¹⁷.

IV. To sum up, the early imagination of ṛta may be described as follows: Ṛta denotes a topos of a first, basic, regular and general order apprehending what is man's phenomenal (natural) surrounding.¹⁸ Irregular phenomena are placed in a distinct manner and thus structured into a form of regularity, in other words, complexity is reduced into simpler 'entities' (or better 'topoi'), mainly to obviate man's anxiety of the danger of the inexplicable. This process is underlined by the role of gods who are believed (at this early period) to give visible or invisible examples of dharma to take hold of whatever is existing in order (ṛta) and lead man into an evergrowing consciousness of his own active but ordered way of life.

15. Vide Hymns of the Atharva-Veda X, XI, 7, 17, translated by M. Bloomfield, SBE, vol. XLII, p. 228: "Order (ṛita), truth (satya), creative fervour (tapas), sovereignty, ascetism, law and works; past, future, strength, and prosperity, are in the ukkhishta-force in force." - Ukkhishta (ucchiṣṭa): the remainder of the sacrifice, held to be the immanent cause of all what exists (vide Dict. of H., ubi cit., p. 309).

16. Vide Atharva-Veda, X, XII, I, 1, op. cit., p. 199.

17. Ibid., AV I, II, 10, 8, p. 15. Grāhi means (generally) 'Seizers' (vide Dict. of H., op. cit., p. 104).

18. Cf. A. Kunst, Use and Misuse of Dharma, ubi cit., p. 6: "In the ṛta are enclosed all the elements of existence ..."

§ 5 From ṛta to the Dominating Vedic Imagination of dharma

I. The Vedic imagination - so remote and often incomprehensible - seems to convey the expression dharman as a complex but central topos of action, conduct, ordinance, of regularity and order to be discovered in innumerable situations of the imaginary setting of early śruti. To pursue all denotations in detail would be almost impossible, yet, if undertaken, it would be hopelessly difficult "to assign a definite meaning to this word in all these passages"¹. However, the complexity of dharman may be viewed at this stage in three aspects.

As we have seen already, dharman, the Ṛgvedic expression, described and communicated (sometimes alongside with ṛta) the very first step in human imagination, the step from chaos to cosmos, i.e. from plain disorder to clearly perceptible order. Henceforth dharman, according to this vision, was urgently needed to prevent a falling back into destructive chaos. Under such a manifest necessity dharman was effectively visualized as a general motif of actual efficacy in three distinctive aspects. These aspects exclude dharman as depicted - only once - in the Ṛgveda in a personified shape, which, however, is neither a personified creator nor a personal god,² remaining eventually altogether without effectiveness.³

II. The three aspects might be viewed, if taken as different stages of human consciousness, in gradual shifts and overlappings; in my opinion, they relate to a

1. Kane, HD, p. 2; p. 3: "'Dharma' occurring hundreds of times in Saṃhitās, Brāhmaṇas and other Upaniṣads."

2. Vide Kunst, op.cit., p. 5 referring to RV 8, 35, 13.

3. Vide Kunst, ibid., p. 5: "In later Epic and Purāṇic literature Dharma as a person was often the focus of various mythical motifs."

complex topos without clear-cut distinctions, more or less intertwined. The first aspect gets hold of dharman (often taking recourse to ṛta) as an extroverted presentation of natural (environmental) phenomena incorporating the most active and eminent parts of nature. It may be assumed that this aspect, turning outwards after some process of visionary diffusion (within the very early human imagination) was subdued, and initiated newly shaped visions, now expressively communicated, e.g. in the Ṛgveda:

"Sky and earth, these two who are good for everyone, hold the Order and bear the poet of space (the sun, in the space between sky and earth). Between the two goddesses the two bowls that give birth magnificently, the pure sun god moves according to the laws of nature" (fixed decrees ["dharmaṇā"].⁴ Or: "Moving along his paths in the middle realm of space, he does not rest even for a single day. Friend of the waters, first-born keeper of the law ["ṛtāvā"], where was he born? What was he created from?"⁵

III. The second aspect of (Vedic) dharman displays a re-presented extroversion of natural and human phenomena, dissipating manifest 'entities' into effective visions. The third aspect marks a deviation from mere phenomenal re-representation of man's surrounding world to the sphere of 'pure' knowledge and the realm of human affairs, coagulated, partly abstract, partly concrete in visible relations

4. The Rig Veda I, 160, 1 (O'Flaherty), ubi cit., p. 203.

5. Ibid., p. 176, RV X, 168, 3 (a hymn to Vāta, "a particular violent and concrete form of the wind" (O'Flaherty, ibid., p. 175)).

and activities.⁶

Further to the second aspect, where dharman already bears a tendency to coagulations, an illustration is wanted:

"The earth is propped up by truth; the sky is propped up by the sun. Through the Law the Ādityas stand firm [ṛtenādityās tīṣṭhanti"].⁷

According to man's vision sacrifices are believed to support man's position within the many uncontrolled forces; however, they are imagined to be only then effective if they are performed in a fixed and devotional manner, working in correspondence with the conception of ṛta. Thus, the position of man is held to be strong and durable as long as the necessary emphasis is laid on the all-effective ritual acts.⁸ No violations of the established ritual fixations

6. Cf. P. Horsch, op.cit., pp. 48 f, he speaks of five steps in the evolution of dharma, whereas I shall prefer to take four (general) aspects of one topos into consideration, vide infra.

7. The Rig Veda X, 85, 1 (O'Flaherty, ubi cit., p. 267), cf. ibid., VI, 55, 1, and VIII, 48, 8 (pp. 194, 135). I exclude consideration of proto-archaeological theories of the Earth-mound and primaeval Tree or Pillar, active in India before the time of the Buddha.

8. Vide Rig Veda X, 90, 16 (or I, 164, 50), ibid., p. 31: "With the sacrifice the gods sacrificed to the sacrifice. These were the first ritual laws" ("Literally, the dharmas, a protean word that here designates the archetypal patterns of behaviour established during this first sacrifice to serve as the model for all future sacrifices" (O'Flaherty, ibid., p. 32)); cf. Hazra, op.cit., p. 17.

were tolerated,⁹ since uneasy anticipations of dissolution and devastating disorder were inevitable. Additionally the early visioned link between human beings and 'super'-human beings (as there are 'gods' and/or 'phenomenal entities') by means of dharman had a powerful influence on later human affairs and relations.¹⁰

IV. The above mentioned third aspect of dharman discloses the preparational stage of minor transitions commencing with the Brāhmaṇas,¹¹ although already visible in the Atharvaveda (the last portion of the whole Vedic corpus), where dharman (nomen actionis) is transformed into dharma.¹²

Yet, finally and explicitly, the smṛtis focus on a fourth aspect of (the now) dharma, although, here too, a transitional period of preparation has to be noticed and taken into some consideration. This period opens up with Upaniṣadic imagination, to be closed (eventually) with what is called śruti, but to continue into a new period of dharma

9. Vide RV III, 3, 1 (Oldenberg, op.cit., p. 232); VIII, 48, 9 (O'Flaherty, ubi cit., p. 135). This accords with traditional exposition of the Indian culture and is repeated constantly. It is influenced by occidental theories, especially of ancient Rome, and presumably has no original intracultural authentication. For example, it must be borne in mind that 'penances' could cure many defects in a ritual sequence, a fact I need not pursue here.

10. Vide, The Rig Veda I, 179, 2 ("For even the men of the past, who acted according to the Law and talked about the Law with the gods, ..." (O'Flaherty, ubi cit., p. 251)); Kunst, op.cit., p. 7, refers to an identification of dharma with action - in other words, focussing on dharma as grounded in the ritual act itself and becoming thus re-presented present, i.e. effective.

11. Vide Hazra, op.cit., pp. 18 f; Horsch, op.cit., p. 61.

12. Vide Horsch, ibid., pp. 49, 61 ("Umformung des Nomen actionis dharman in das Abstraktum dharmah").

with what will be called smṛti, and being retrospectively referred to as a source of dharma (the second in importance after śruti in the four-stages hierarchy of sources). The sūtra-s are (in general) those works which mark within a distinct setting transition and separation of śruti and smṛti. By this period ṛta has been taken up and 'preserved' in dharma, present in its second and third aspect,¹³ whereas vrata had come to be restricted.¹⁴

V. Over a period of about 300 years until c. 500 B.C. the Upaniṣads (at the close of śruti) pay much attention to dharma as supreme and firm force of the world, of nature and life showing signs of shifting emphasis towards the life of man in almost all of its aspects.

"Dharma is the stay of the whole world; in society people approach the most ardent follower of dharma; by Dharma (they) remove sin; everything rests on Dharma; so (people) declare Dharma to be most excellent."¹⁵

Furthermore dharma is the all-embracing, life imparting

13. Vide Kunst, op.cit., p. 8.

14. Vide Kane, The word vrata ..., ubi cit., p. 28 ("... vrata came to be restricted to religious rites, vows and rules of conduct to be observed by a person as a member of a certain society or body or as an individual."). Cf. on meaning and understanding Paul Hacker, Vrata, in: Nachrichten d. Akademie d. Wissenschaften in Göttingen, I. Philol.-hist. Klasse, 1973, Nr. 5, pp. 113, 118, 121, 133.

15. Vide Taittirīya-āraṇyaka X, 63, 1 (cit. after Hazra, op.cit., p. 19); vide also the explanation given by F.M. Müller in his introduction p. XXVII of The Upaniṣads, trans. by F. Max Müller, part II, (New Delhi (repr.)), 1975, vol. XV of the SBE.

support of the world.¹⁶ To be aware of the Vedic tradition is to submit to the truth (the Vedic truth, the true 'knowledge', i.e. the Veda) and to do one's duty which implies to practise dharma in the sense of not being negligent of what has reached this present age from primordial times. The Taittirīya-āraṇyaka-Upaniṣad is explicit in demanding the teacher to instruct the pupil:

"Say what is true [satya]! Do thy duty [dharma]! Do not neglect the study of the Veda! After having brought to thy teacher his proper reward, do not cut off the line of children! Do not swerve from the truth [satya]! Do not swerve from duty [dharma]! ..."17

No doubt the Upaniṣads link old Vedic imagination of dharma (sometimes in a conglomeration of all three aspects) with new insights into the due necessities of practical life. This gradually increasing awareness stretches also in deep insight far beyond the sacrificial and mere ritual activities which were imposed on the part of the Brāhmaṇas.¹⁸

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16. Thus the Brhadāraṇyaka-Upaniṣad I, 5, 23, (cit. after F.M. Müller, ubi cit., p. 98) states: "'He from whom the sun rises, and into whom it sets' (he verily rises from the breath, and sets in the breath) - 'Him the Devas made the law ((dharma))', ..." From the translation of R.E. Hume, Thirteen Principal Upanishads, (London, 2 1931, 1975), p. 91, it is clear that this very passage forms parts of a verse long antedating the ancient Upaniṣads itself.
17. TU I, 11, 1 (cit. after F.M. Müller, ubi cit., p. 52), further on in I, 11, 2 and 4 directing attention at the significance of good works and the conduct of Brāhmaṇas to be looked upon as guidance to one's own conduct.
18. Vide e.g. Aitareya-āraṇyaka II, 3, 2, 1-5 (after the trans. of F.M. Müller, The Upanishads, part I, (New Delhi (repr.)), 1975, pp. 222 f (SBE, vol. I)).

It is quite true that the Upaniṣads in most of their parts place a strong emphasis on profound spiritual imaginations, but they do not neglect careful attention to the practical side of this world's living beings. The Chāndogya-Upaniṣad leaves no doubt about it:

"'When one obtains bliss (in oneself), then one performs duties. One who does not obtain bliss, does not perform duties. Only he who obtains bliss, performs duties."¹⁹

Out of circles of similar (though probably later) reflections on man's worldly obligations the idea of Karma arrives at the surface of post-Vedic teaching and attaches even more importance to the now viable imagination of dharma.

19. ChU VII, 22, 1 (cit. after the trans. of F.M. Müller, Khāndogya-Upanishad, in: SBE, vol. I, ubi cit., p. 122).

§ 6 The Idea of karma in Relation to dharma

I. Karma (see below) is doubtless a cornerstone of Indian thinking; it attaches irreversible responsibility on the individual as member of one part of the community.¹ Dharma, being separated according to the Chāndogya-Upaniṣad² into three branches (indicating three stages or āśrama-s), is seen with respect to the individual karma whereas the idea of karma is only working in constant regard to the all-embracing function of dharma. So far dharma may be considered as bifunctional, on the one hand in a sense of conducting one's own affairs in response to those actions which are unmistakably held to sustain (idealiter) the age-old regularity of acts 'consecrated' by Vedic imaginations, and on the other hand as an inner-compulsive force to attain what has to be done involving one's future destiny for good or bad; hence individual conduct is distinguished between fulfillment of dharma or the reverse (a-dharma). This bifunctionality exposes at this stage a fourth aspect of dharma as it is conveyed (still enveloped) in a statement of the Bṛhadāraṇyaka-Upaniṣad, saying:

"Law (dharma) is the Kshatra (power) of the Kshatra, therefore there is nothing higher than the Law. Thenceforth even a weak man rules a stronger with the help of the Law, as with the help of a king. Thus the Law is what is called true. And if a man declares

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1. Cf. Kunst, op.cit., p. 8; I leave aside here the varieties of karma (retribution) theory evinced in the Indian public at different places and times. Vide also R. Panikkar, The law of karman and the historical dimension of man, in: Philosophy East and West XXII (1972), pp. 25-43, 27 f, 30. For O'Flaherty, Karma (1980), vide Bibliog., infra.
 2. Vide the trans. by F.M. Müller, Khāndogya-Upanishad II, 23, 1-2, in: The Upanishads, part I, ubi cit., p. 35.

what is true, they say he declares the Law; and if he declares the Law, they say he declares what is true. Thus both are the same."³

II. Some more remarks on the (intrinsic) imagination of karma should suffice to indicate the shift from the third aspect of dharma which was already drawing attention to the more general side of human affairs, namely to the many detailed precepts and special rules in the widening scope of the 'super-sovereignty' of dharma (according to the just mentioned Upaniṣadic statement).

To begin with, karma (kārman) simply means act, action, performance, business, irrespective of purpose, but (according to the Upanisads) emphasizing the aspect of its result.⁴ For an individual performing an act karma implies all consequences whensoever, positively and negatively. Karma throws an effective stress on action pertinent to everyday-life. On the scenery of śrutī in general karma appears more or less distinctly in the Brāhmaṇas where the expression is used to denote the ritual act of the sacrificial performance (karmakāṇḍa).⁵

The Upaniṣads extended its conception and transferred their peculiar imagination successfully on to the whole scale of human activities in order to create the consciousness of

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3. Brhadāraṇya-Upaniṣad I, 4, 14 (cit. after F.M. Müller, ubi cit., p. 89); cf. TU I, 11, 1 (cit. sup.). The equation of dharma with truth surfaces in the rules of judicial procedure: a trial based on dharma is based on truth (e.g. confessions and admissions).
 4. Vide Monier-Williams, A Sanskrit-English Dictionary, (repr. New Delhi, 1979), p. 258.
 5. Vide Dictionary of Hinduism, ubi cit., pp. 142 f; Monier-Williams, ibid., p. 258.

man's life as within a constant and irreversible process (karmamārga). The vision of samsāra took over the linkage of 'pure' (or neutral) acts with their results.⁶ Lastly "the doctrine of Karma came to be systematized in the broader concept of Dharma"⁷ stipulating individual responsibility for the sake of social order.⁸ And man's achievements are evaluated in relation to dharma.⁹ 'Dharmic' karma as well

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6. Vide the following Upaniṣads (cit. after F.M. Müller, The Upanishads, parts I, II, ubi cit.): Svetāśvatara Upaniṣad (considered to be a genuine Upaniṣad of the Black Yajur Veda, and one of the oldest of its kind (vide Dict. of H, ubi cit., p. 296)) V, 11-12 ("By means of thoughts, touching, seeing, and passions the incarnate Self assumes successively in various places various forms, in accordance with his deeds, just as the body grows when food and drink are poured into it." (V, 11)); Bṛhadāraṇyaka-Upaniṣad III, 2, 13 ("... and what they said was karman (work), what they praised was karman, viz. that a man becomes good by good work, and bad by bad work." ("What is intended", explains F.M. Müller, ibid., "is that the samsāra continues by means of karman, while karman by itself never leads to moksha.")); Maitrāyaṇa-Brāhmaṇa-Upaniṣad I, 4 ("In such a world as this, what is the use of the enjoyment of pleasures, if he who has fed on them is seen to return (to this world) again and again!"); Kāṭha-Upaniṣad I, 3, 7-8 ("He who has no understanding and who is unmindful and always impure ... enters into the round of births.' 'But he who has understanding, who is mindful and always pure ... he is not born again.'"); Kaushītaki-Upaniṣad I, 2 ("And according to his deeds and according to his knowledge he is born again ...").
7. R. Thapar, op.cit., p. 46.
8. Cf. H. Härtel, Indien, in: Weltgeschichte, Summa Historica, hg. v. Golo Mann u.a., (1965), (Frankfurt a.M./Berlin, 1980), p. 207; A.L. Herman, An Introduction to Indian Thought, (Englewood Cliffs, N.J., 1976), p. 138.
9. Cf. F. Edgerton, The Beginnings of Indian Philosophy, (London, 1965), p. 30; P.T. Raju, The Concept of Man in Indian Thought, in: S. Radhakrishnan / P.T. Raju (eds.), The Concept of Man. A Study in Comparative Philosophy, (London, 2nd ed., 1966), pp. 233 f, 260.

as 'a-dharmic' karma work automatically, sustaining or disarraying or even destroying, caused 'unseen' (adr̥ṣṭa) effects. If karma sustains (in the sense of dharma), it may finally lead to mokṣa (release out of saṃsāra, the circle of life, death, and rebirth). To sum up: Karma without dharma would be void, and dharma without karma would be ineffective.

III. Before closing this chapter I still have to mention one additional point concerning Upaniṣadic teaching, obviously a point in some controversy. There is a certain probability of opposition to the Vedas indicated by means of meditations on the relationships of Brahman and Ātman, and on the realization of both, which may lead to the assumption as if Upaniṣadic thinking as a whole abounds in overstressing 'meta-physical' and 'meta-practical' 'meditation' leaving aside what I have pointed out as karmamārga. However, apart from jñānamārga (the way of knowledge (jñāna)) which at a first glance seems to be in opposition to karmamārga, there is a highly significant, sometimes hidden connection between both 'ways' (mārga-s). Thus, the Vājasaneyi-Saṃhitā-Upaniṣad (Īśā-Upaniṣad) 9 reads:

"All who worship what is not real knowledge (good works), enter into blind darkness: those who delight in real knowledge, enter, as it were, into greater darkness."¹⁰

10. Trans. after F.M. Müller, The Upanishads, part I, ubi cit., p. 312; cf. (the identical) Brihadāraṇyaka-Upaniṣad IV, 4, 10 (trans. F.M. Müller, ibid., part II, p. 177); cf. also Taittirīyaka-Upaniṣad I, 9, 1 (trans. F.M. Müller, ibid., part II, p. 51. Another useful explanation concerning jñānamārga and karmamārga is that (according to Kane) knowledge and lack of knowledge are irrelevant in apprehending the ultimate.

From this passage we may guess, 'in accordance with F. Max Müller's explanations¹¹, that both ways do exist independently, but work only effectively on the basis of their finally hidden interdependence, and man must keep to this interdependence through his own way of balancing work and knowledge.

Concerning the Vedas (the 'sacred' fountain of all knowledge), they stressed the sacrificial acts not merely as a voluntary (kāmya) activity but also as an inevitable obligation to hold up universal order, and they did so according to their imagination that "the correct performance of sacrifices brought earthly increase and assured comfort in the heavens above, the ideal of Vedic man"¹². To be sure, they do not neglect that in which the Upaniṣads take so strong an interest, namely jñānamārga¹³, yet not so strongly as to disregard the significance of the necessary sacrificial acts. Not in an antithesis do they refer with emphasis on jñānamārga, but to balance the ritual side in general and to induce man to follow up this path as his respective āśrama calls for it.

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11. Vide F.M. Müller, The Upanishads, part I, ubi cit., pp. 314-320; vide also, ibid., pp. 200-201. From the Muṇḍaka-Upanishad (trans. F.M. Müller, ibid., part II) we may grasp already the importance of the four āśrama-s, namely, that "a man may a hundred times restrain his breath, etc., but without the Upanishad his ignorance does not cease. Nor is it right to continue for ever in the performance of sacrificial and other good works, if one wishes to obtain the highest knowledge of Brahman. The Sannyāsin alone, who has given up everything, is qualified to know and to become Brahman" (F.M. Müller, ibid., p. XXVI).
 12. K.M. Sen, Hinduism, (Harmondsworth, 1961, 1981), p. 46; cf. Khāndogya-Upanishad (trans. F.M. Müller, ubi cit., part I) esp. I, 1, 10; II, 24, 2.
 13. Vide e.g. Maitrāyana-Upanishad VI, 33, 1-11 (trans. F.M. Müller, ubi cit., part II).

IV. Pertinent to the spiritual constellation of the last 500 years B.C. dharma suggests an understanding that comes in its first and second aspect mentioned close to the German expression 'Gesetz', i.e. to a 'fixum' (or, as said above, to a coagulation), according to a special ineffaceable pre-arrangement. However, the Vedas (samhitās), in allowing no separation between divine and human spheres, "do not even include a single positive precept which could be used directly as a rule of conduct"¹⁴. While the third aspect of dharma takes account of the relation of karma-mārga and jñānamārga the fourth aspect discloses the whole range of human behaviour with respect to sustaining man and society in their constant tendency to fall back into disorder, i.e. to fall short of dharma; beyond this, but still firmly grounding on the Vedas, all those efforts of man are considered which conform to his own duty¹⁵ as the individual

14. R. Lingat, The Classical Law of India (trans. J.D.M. Derrett), (Berkeley, 1973), p. 8. It may be added here that the words of this quotation are to be taken strictly literally.

15. Vide Maitrāyaṇa-Upanishad IV, 3 (supra), p. 300 (This important reference reads in the translation of F. Max Müller as follows: "This is indeed the remedy for the elemental Self: Acquirement of the knowledge of the Veda, performance of one's own duty, therefore conformity on the part of each man to the order to which he happens to belong. This is indeed the rule for one's own duty, other performances are like the mere branch of a stem. Through it one obtains the Highest above, otherwise one falls downward. Thus is one's own duty declared, which is to be found in the Vedas. No one belongs truly to an order (āśrama) who transgresses his own law."); cf. Rgveda III, 21, 2 (trans. H. Oldenberg, Vedic Hymns, ubi cit., p. 283). Cf. the very similar version of R.E. Hume (op. cit., p. 421). The whole passage insists upon performance of dharma but lauds ātma-jñāna (knowledge of the Soul) whereby mokṣa is obtained.

basis for a life of good actions¹⁶ in practically innumerable situations. There are (idealiter) clearly fixed "privileges, duties and obligations of a man, his standard of conduct as a member of the Āryan community, as a member of one of the castes, as a person in a particular stage of life"¹⁷, but (realiter) there are so many manifestations of different usages, customs, and special precepts that a further guidance is necessary, a task that the smṛtis have taken over.

16. This has been already taken into account by the Rgveda X, 85, 24 (vide the Rig Veda, trans. O'Flaherty, ubi cit., p. 269: "In the seat of the Law ["ṛtasya yonau"] in the world of good action, I place you unharmed with your husband."); cf. Taittirīyaka-Upanishad I, 11 (trans. F.M. Müller, ubi cit., part II, p. 52).

17. Kane, HD, ubi cit., p. 3. Except for the Vedas (samhitās) as mentioned above there are indeed 'positive' precepts of a juridical character to be met with in the Brāhmaṇas and Upanishads both of which are appended to the four Vedas.

§ 7 Śruti and the 'Promotion' of dharma

I. By the time of the first appearance of smṛti texts (about 550 B.C.) the topos of dharma was firmly established to the extent of its first three aspects in the imagination of the early Indian mind. Dharma "appears to be eternally ordained and embedded in the constitution of the world"¹. The three aspects of dharma came to the surface of śruti (as stated above) in form of (1) an extroverted presentation of natural phenomena, (2) a re-presented extroversion of natural and (explicit) human phenomena, and (3) human affairs in coagulated relations and activities. Yet, it had not acquired practical functionality in all spheres of daily life which now seemed to call for reliable patterns of expected behaviour, in order to ensure an all-embracing capability of human beings to live in accordance with the regular course of the world.

We remember that already the Upaniṣads mark a shift of emphasis from the 'cosmic' pattern of dharma to the (explicit) human; to some degree the sacrificial relevance for the purpose of holding the universe in dharma (in the sense of ṛta) was minimized relative to a direction towards the whole of human affairs; everybody, all groups and parts of the society were expected to contribute to the realization of dharma. Since general intentions cannot sufficiently serve the needs of a whole and diverse community, distinct and easily comprehensible precepts had to be given without leaving the ground of the hallowed, irreversible and by now fossilized (closed) Vedic heritage. The origin of dharma inside śruti thus finds its continuation in smṛti, a promo-

1. J.N.C. Ganguly, Philosophy of Dharma (Law), in: Indian Historical Quarterly, Calcutta, 2 (1926), pp. 575-586, 809-825, p. 580.

tion in the indicated direction rather than a development.² Furthermore, the pre-motional state of dharma in śruti leads to dharmaśāstra (the study and teaching of dharma) within the scope of our smṛti literature. This indicates once more that dharma was in full existence long before a corpus of literature was exclusively devoted to the promotion of dharma.

II. To throw sufficient light on the promotion of this complex topos of dharma we should like to recall some distinct features of the Vedic heritage as visible in śruti. 'Knowledge' as it has been 'heard' and transmitted from time immemorial comprises the four Ṛg-, Sāma-, Yajur- and Atharva-Veda, the Brāhmaṇas, Āraṇyakas and Upaniṣads. The Vedic sutra-literature does not belong to śruti but to smṛti.³ Hence, śruti forms the basis and primary source of knowledge on dharma; it spreads the first information on the state of the world right from the beginning of Indian imagination inaugurating the topos of dharma with all later

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2. On the premises of our ordinary understanding of development, namely a consecutive unfolding process from the negative to the positive state of existence, or from a latent to a fully visible or elaborate mature state, I prefer to speak of promotion which in my opinion fits the Indian tradition adequately.
 3. Vide H. Bechert/G. von Simson (Hg.), Einführung in die Indologie, (Darmstadt, 1979), pp. 50-55; R. Lingat, The Classical Law of India, ubi cit., pp. 7-14, concerning smṛti Lingat explains: "Smṛti ... has two senses: in the original, etymological sense it signifies remembered tradition or the knowledge one may derive from memory of the rules of dharma, in opposition to the śruti which is knowledge directly acquired through Revelation. In a second sense it signifies the whole of the literature constituted by the dharma-sūtras and dharma-śāstras, a literature regarded as having been inspired by the smṛti." (p. 13). Cf. also A.S. Altekar, Sources of Hindu Dharma, (Sholapur, 1952), pp. 11-12.

consequences for the inception and formation of the indigenous Indian (Hindu) jurisprudence.⁴

Only the Upaniṣads in the transitional period from śruti to smṛti refer to dharma as personal duty of an individual within the emerging and later framing constituents of varṇa and āśrama.⁵ Up to this period (800-500 B.C.) ritual activities by means of yajña (sacrifice) predominated and formed a consciousness of the sacrificial act itself that benefited the actor and the state of the world.⁶ And this in itself (encircled in action and result) left no room for an independent and all-powerful deity (or deities). "Gods were only the functionaries in the affairs of the world. They never governed the world and men in the world. Men governed themselves according to the objective, real

4. Cf. P.V. Kane, Vedic Basis of Hindu Law, in: Journal of the Bombay Branch of the Royal Asiatic Society, vol. 26, pp. 57-82, p. 57-8. Cf. also J.C. Heesterman, Veda and Dharma, in: W.D. O'Flaherty/J.D.M. Derrett (eds.), The Concept of Duty in South Asia, (New Delhi, 1978), pp. 80-95; he points out that though the Vedas are transcendence itself and thus divorced from human reality they "hold the key to ultimate legitimation". "Therefore, even if the Vedas are in no way related to the ways of human life and society, one is still forced to come to terms with them." (p. 92-3).

5. Vide infra, § 10 I, II.

6. J.M. Koller holds a different (disputed) view according to which not the yajña is the efficient cause whereby the devas give benefits. Cf. John M. Koller, Dharma: An expression of universal order, in: Philosophy East and West XXII, 1972, pp. 131-144 ("Though the yajña is directed to a god, it is the activity of the yajña, not the god, which effects the desired change. The power of ordering the functions of this world is found in yajña not in the gods." (p. 135).

law of the world and in this govérnment, gods were also given a part."⁷ What the Vedas emphasize is held to constitute satyam (true order, truth) in the world of men and gods alike.

There exists a correspondence between order among human beings as satyam and order in the relation of men to their religious (supernatural) activities as yajña,⁸ both of which have their grounds (respectively) in the Veda, the suprasensible basis of all conduct; "this leads to a fusion of religion and morals, which is reflected in the existence of only one word in Sanskrit, viz. Dharma for both"⁹. This may explain why dharma is always considered to be linked with the supernatural world and the 'Supreme Reality' which is imaginatively real in the Vedas (śruti) wherein on the supposition of karma and samsāra, all human activities are found to produce transcendent results (adr̥ṣṭa phala). Therefore, the individual seeks to participate through obedience to dharma in the Vedic transcendence opened on the way (mārga) of jñāna and karma, and this is to visualize dharma as the signpost to one's parama-śreyasa (ultimate good).

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7. C. Kunhan Raja, Law is not will of God, in: TRIVENI, 33, 3 sqq., pp. 3-7, p. 5. Cf. J.D.M. Derrett, Religion, Law and the State in India, (London, 1968), where he mentions (pp. 165-6) the wishful thinking of Indian scholars in their occasional reference to 'God' to whom law was assumed to be subject but "unconsciously entertained for the purpose of making unflattering comparisons with the legal systems of the West, which was the motive that sent this doctrine on its way."
8. Cf. G.-D. Sontheimer, Die Ethik im Hinduismus, in: C.H. Ratschow (Hg.), Ethik der Religionen, (Stuttgart, 1980), pp. 349-435, p. 406; A.A. Macdonell, Vedic Mythology, (Strassburg, 1897, repr. 1963), p. 11; K.V.R. Aiyangar, Some Aspects of the Hindu View of Life according to Dharmaśāstra, (Baroda, 1952), pp. 162-3.
9. K.V.R. Aiyangar, ibid., p. 62.

III. It is about ten centuries after the first R̥gvedic traces, when the commencing smṛti texts provide ample signposts to guide man to this state which is conducive to bliss (niḥśreyasa). And the 'teachings of dharmā' (dharmāśāstras) assert "that society ... exists not for its own sake (there is none) but in order that this state may be achieved by each inhabitant"¹⁰. One may add, that this state finally allows 'ultimate freedom' without endangering the pre-established order according to the early imaginative Vedic world-outlook.

The 'promotion' of dharmā¹¹ takes place or, at this distance, gives the impression of having taken place in an unbroken consistency on the basis of śruti-dharmā.¹² Yet, this same topos appears in new circumstances of which the smṛti texts are fully aware and which they clearly engender in their treatment of dharmā-orientated teachings. These new circumstances enable all human beings to participate

10. J.D.M. Derrett, History of Indian Law (Dharmaśāstra), in: B. Spuler (ed.), Handbuch der Orientalistik, II, Indien, Sektion Geschichte, ed. by J. Gonda, (Leiden, 1973), p. 18. Cf. also K.M. Sharan, Court Procedure in Ancient India, (New Delhi, 1978), p. 1 ("... ultimate objective is not merely general happiness but spiritual welfare.").

11. It may be worth noticing what J. Gonda, Het Begrip Dharma in Het Indische Denken, in: Tijdschrift voor Philosophie 20, 1958, pp. 213-268, has stated, namely (p. 267): "It is no correct method to suppose the term to have evolved semantically in the chronological order of the texts in which different aspects of the general idea attracted the attention of the authors."

12. On this basis "man is regarded as a manifestation and expression of a deeper reality, which is the measure of man, not vice versa ... (and) all reality is one in being and function". John M. Koller, ubi cit., p. 132.

actively in dharma, and this means at the same time to be protected and maintained in the course of one's life.

"Dharma is so called because it upholds all creatures. In fact all creatures are upheld by dharma. Therefore that which is capable of upholding (dhāraṇa), is certainly dharma."¹³

13. Mahābhārata, Śānti P. CIX, 10-12 (trans. P.C. Roy, vol. VI, p. 253).

§ 8 The Nature and Relevance of smṛti in 'Promoting' dharma

I. The smṛti texts give such information as enables us to enquire into the whole complex topos of dharma as in the course of 'promotion' between about 800 and 500/400 B.C., and still until about 200 A.D.¹ when "additional works were written to summarize dharma, including secular law, which aimed at an educated and adult public, and consequently went into some detail, though with a high degree of subtlety and compression. These were called dharmasāstra-s or smṛti-s: they purported to be the remembered wisdom of the race"². Furthermore smṛti (remembered wisdom) exposes an insight into the ingenuity of the ancient Indian (Hindu) mind spread over many centuries with only little loss in point of effect and admiration on the side of the orthodox Hindu population. As an effective teaching of dharma smṛti is only in these second to śruti.

Smṛti derives from smṛ (to remember). It indicates that its contents were remembered and thus orally handed down by Brahmin śāstrīs (scholars) over many a generation. Ancient sages were believed to have remembered such wisdom as they thought worthy of preservation; otherwise, it is

1. This date agrees with the latest dating of the composition of the Manu-smṛti or Mānava-dharma-śāstra; vide R. Lingat, op.cit., pp. 92-96 (95: "Indologists have been virtually forced into the position of adopting Bühler's opinion and agreeing to place the work between the second century B.C. and the second century A.D.").

In case of the Indian situation I shall confine this enquiry chronologically to this date, including the Manu-smṛti, although I am aware that later texts have to be occasionally recognized since all later 'jurisprudential' texts until 1800 A.D. at the latest can be treated as 'ancient'; vide J.D.M. Derrett, Religion, Law and the State in India, ubi cit., pp. 150-1.

2. J.D.M. Derrett, ibid., p. 153.

held, such wisdom might have been forgotten. The eminent Indian scholar P.V. Kane explains the fundamental difference between the Veda (śruti) and smṛti as follows: "There are fundamental differences between the Veda and the smṛtis. The Veda was deemed to be self-existent, eternal and of absolute authority, while smṛtis are pauruṣeya (works of human authors), have only a derived authority (as being presumed to be based on Vedic passages most of which are not now available), their number is very large, they often differ so much from each other ..."³

To the extent that the smṛtis are concerned with propagating and promoting the topos of dharma they are to be gathered as a product of Vedic dharma, a fact that does not allow us to qualify those texts as innovations developed on axioms which are derived from certain first rate dogmas. They owe, to be sure, the insights into their task to once existent Vedic 'statements' which are indirectly and notionally present in what has been remembered.

It is this link with śruti that imparts (consequential) authority and utmost practical relevance to smṛti. "The sages of our śāstra merely 'remembered' their law; it never

3. P.V. Kane, History of Dharmśāstra, ubi cit., vol. V, 2, sec. VII, ch. XXIX, p. 1272.

This 'interdependence' of śruti and smṛti is clearly visible in a statement of Medhātithi. "As Medhātithi says (on Manu-smṛti I, 1), 'Manu has said all that has been said in the Ṛgveda, the Yajurveda, the Sāmaveda and the mantra-s of the Atharva, as also by the Seven Great Sages.'" (quoted J.D.M. Derrett, ibid., p. 85). Cf. also, K.V.R. Aiyangar, op.cit., pp. 81-2 ("Every dictum of a smṛti has [scil. in orthodox theory] a Vedic source which can be discovered by sufficient knowledge and research." p. 81).

emerged from a set of facts."⁴ There was no tendency to deduce general principles from a multitude of groups of pragmatic precepts. One may add that they also never comprised anything like an organized body of co-ordinated doctrines or a decalogue.⁵ And this seems not surprising because smṛti composers appear to have been always alert

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4. J.D.M. Derrett, Dharmaśāstra and Juridical Literature, (Wiesbaden, 1973), p. 42; "set of facts" is (likely) to be understood in Derrett's context as true and controllable data of experience, an exclusive reliance on which appears to be alien to the art of composition of ancient smṛti texts, instead, it is much more likely (to go on with the same author) and this may interpret his above-quoted statement that "the variations between the prescriptions laid down are supposed to reflect [in their Vedic link; my insertion] the changed habits of tribes or peoples in different areas, more or less influenced by indigenous usages or the peculiar exigencies of the political or economic situation". (Religion, Law and the State in India, ubi cit., p. 152).
5. Cf. K.V.R. Aiyangar, op.cit., p. 160; this holds equally true of Indian (philosophical) darśana-s (outlooks, views; from drś, to look at, to view); although they are often referred to as "philosophical systems" (Aiyangar, ibid.), they cannot be qualified as such unless we speak of 'system' in a rather colloquial, non-technical and 'unphilosophical' sense.

of the practical side of social life,⁶ though Indians revel in classification and enumeration; but they were never urged nor felt the necessity to compress their 'material' or opinion into an abstract and 'final' compendium aimed at an utmost systematic perfection. On the other hand the smṛti composers, as G. Jha remarks⁷, did not lack a "certain progressive spirit and desire" for adapting the topos of dharma to the naturally changing conditions and situations of life.

II. The earliest smṛti specimens on dharma are so-called dharmasūtras; they belong to the class of kalpa-(ritual)sūtras, which form one part of the six Vedāṅgas (the auxiliary 'sciences'), compositions required for the purpose

6. Cf. U.N. Goshal, The Relation of the Dharma Concept to the Social and Political Order in Brahmanical Canonical Thought, in: Journal of the Bihar and Orissa Research Society, Patna, vol. XXXVIII, pt. 1, pp. 190-202; Goshal observes (p. 192) concerning the dharma idea in the early smṛtis that dharma "is conceived by these authors in the concrete form of the rules and principles [both expressions are to be grasped in an untechnical sense; insertion by myself] governing the lives of the social units"; consequentially Goshal speaks of "this concrete conception of the dharma" (vide p. 192, infra). Nothing else do our smṛti-s indicate, and a close inspection leaves us with the impression that flexibility instead of fixation ranked rather high although the social constituents of varṇa and āśrama may lead us in passing to a different impression. Cf. also Surama Dasgupta, Development of Moral Philosophy in India, (Bombay, 1961), p. 210 ("The smṛtis, which have woven out a complex network of social duties and values, have dealt with all the different levels of social life.").

7. Vide Ganganatha Jha, Hindu Law in its Sources, vol. I, (Allahabad, 1930), p. 2.

of interpreting the Vedas.⁸ The dharmasūtras are, so to say, manuals (or catalogues) comprising repertoires of statements, precepts, maxims, etc. on the topos of dharma. They pass according to a usual enumeration⁹ under the names of Gautama (the oldest extant), Āpastamba, Baudhāyana, Vasiṣṭha, and so on, including the comparatively late sūtra composition of Viṣṇu. They are composed in succinct aphorisms intended to be learnt by heart.

While the sūtras¹⁰ are attached to a Vedic school, the

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8. Vide Āpastamba II, 4, 8, 13, pp. 121, in: The Sacred Laws of the Āryas, pt. I: Āpastamba and Gautama, trans. by Georg Bühler, in: SBE, vol. II, (Oxford, 1879, repr. 1975); R. Lingat, op.cit., pp. 10-14, 18 ff; Bechert/v. Simson (Hg.), Einführung in die Indologie, ubi cit., pp. 54-5; S.C. Banerji, Dharma-Sūtras, a study in their origin and development, (Calcutta, 1962), pp. 1-6; N.C. Sen-Gupta, Evolution of Ancient Indian Law, (London, 1953), p. 14.
 9. Vide J.D.M. Derrett/T.K.K. Iyer, The Hindu Conception of Law, in: International Encyclopedia of Comparative Law, vol. II, ch. 1, V, (Paris-Tübingen, 1975), pp. 107-119, p. 115.
 10. Derrett explains (Dharmaśāstra ..., op.cit., p. 25): "The sūtras, the crisp prose aphorisms, then typified cryptic teaching, arranged so as to recall to the student, long after he had begun to earn as a scholar or ritual expert, what he had learnt in his teacher's school." An extremely remarkable point to mention is the fact of oral transmission for many generations (vide supra); to this Derrett observes (History of Indian Law, op.cit., pp. 20-21): "Jurists learnt the smṛtis by heart and were able to trace back many customary practices directly or indirectly to the words of the sages who, supposedly, heard the truth about duty from the Self-existent One." An also important point is raised by K.V.R. Aiyangar, op.cit., pp. 83, 85, which may throw some additional light on the long-standing Indian habit of memorization and transmission: "In ancient India, there was a prejudice against books, i.e. knowledge reduced to writing. It was held to breed indolence, a grave weakness in a teacher or student. ... It corresponded to a syllabus containing only topical headings that serve as guides to oral exposition and mental recapitulation by teacher and pupil." This memorization practice can be traced back to the Upaniṣads; vide P.V. Kane, History of Dharmaśāstra, ubi cit., vol. V, 2, sec. VII, ch. XXVIII, p. 1180. On style and language of the dharmasūtras, see also S.C. Banerji, Dharma-Sūtras, op.cit., pp. 3-4.

śāstras (or smṛtis) on dharma succeeding the sūtras are independent, and more detailed extensive compositions arranged in a more easily memorable verse form.¹¹ The most important dharmaśāstra (or smṛti composition on dharma) is that one attributed to and passing under the name of Manu, usually referred to as 'The Manu-smṛti' or, when addressed to an occidental public, 'The Laws of Manu' or 'The Code of Manu',¹² which unfortunately has the disadvantage that it may mislead, and thus lead an uninformed occidental observer to false conclusions. A consultation of J.D.M. Derrett's and T.K.K. Jyer's brief and intelligible passages under the heads of "The Role of the śāstra" and "The Nature of the śāstra" in their exposé "The Hindu conception of Law"¹³ can give helpful information in this matter; and the same is true of R. Lingat's chapter on "The Dharmaśāstras: The Manu-smṛti"¹⁴.

Apart from Manu-smṛti there is a great number of smṛti compositions on dharma, the best-known of which are the dharmaśāstras of Yājñavalkya and Nārada as well as the fragments of Kātyāyana and Bṛhaspati.¹⁵ The smṛti repertoire

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11. Vide R. Lingat, op.cit., pp. 73-77 (on the difference between dharmaśāstra and dharmaśūtra).
 12. In this way: G. Bühler, and R. Lingat (op.cit., p. 77). Concerning the Manu-smṛti I shall use and refer to G. Bühler's translation "The Laws of Manu", in: SBE, vol. XXV, ed. by F. Max Müller, (Oxford, 1886, repr. 1979).
 13. Published in: International Encyclopedia of Comparative Law, vol. II, 1, (Paris-Tübingen, 1975), pp. 107-119, 111-15.
 14. R. Lingat, op.cit., pp. 73-96.
 15. Vide P.V. Kane, History of Dharmaśāstra, ubi cit., vol. I, pp. XXIV ff (Synopsis of contents); Kane speaks of a total number of about 100 smṛtis (p. XXV) composed up to 800 A.D. about the period of the first appearances of commentators which are supposed to have existed by 500 A.D. and authors of digests (p. XXXIV); cf. also A.S. Altekar, op.cit., p. 20.

includes also (in fact though not in name) a composition attributed to Kauṭilya (alias Kauṭalya), namely his Arthaśāstra (teaching of 'secular' ways of life, a manual on the governmental art), which is produced in the sūtra form.¹⁶ In its intention to stabilize the 'secular' ways of life it supports the dharma orientation of the whole community in its different parts with different duties;¹⁷ altogether the Arthaśāstra is not unrelated to dharma, it covers ground covered to some extent in the dharmasāstra, but its preconceptions are entirely 'secular'. There are still the two famous epics, the Mahābhārata including the Bhagavadgītā, and the Rāmāyaṇa, to be mentioned; these two smṛtis are equally relied on as a source of dharma, the Rāmāyaṇa less frequently than the Mahābhārata.¹⁸

III. Although the subject-matters of the different teachings of dharma can be distinguished on the whole according as they deal with two different kinds of affairs, with those called dr̥ṣṭārtha or adr̥ṣṭārtha,¹⁹ their main question runs 'how to conform to such a way of life that can be accepted and qualified as being in accordance with

16. J.D.M. Derrett, Dharmasāstra ..., ubi cit., p. 25; P.V. Kane, ibid., p. XX-XXII.

17. Cf. F. Wilhelm, The Concept of Dharma in Artha and Kāma Literature, in: W.D. O'Flaherty/J.D.M. Derrett, eds., The Concept of Duty in South Asia, (New Delhi, 1978), pp. 66-79, pp. 70-1.

18. Vide P.V. Kane, ibid., p. XXVI (pp. 158-160); also J.D.M. Derrett, ibid., p. 46, where he observes that "the epics seem to borrow largely from the smṛtis [the dharmasūtras and dharmasāstras, my insertion], and are occasionally themselves cited by the commentators." (with further references, footnote 292).

19. Vide K.V.R. Aiyangar, op.cit., p. 78 (of course "There are again those which deal with both."); cf. M.M. Patkar, Treatment of Law in the Dharmasūtras, in: The Poona Orientalist, vol. XXVI, 1 (1961), pp. 55-62, pp. 61-2.

dharma'; and this question accounts for the 'practical' rather than for the 'theoretical' in the intentions and treatment of our topos of dharma.²⁰ Hence, even contradictory answers only furnish the problem-orientation of this question whose solution depends on a (whole) situation with variables which determine the problem and its subsequent solution. "There is nothing static in the smṛtis"²¹, except for the smṛtis' constant and indisputable reliance on two constituents existing in the four varṇas as well as the four āśramas; for these are to be taken as the constituting pillars whereupon social and individual life entirely rests.²² Moreover, they frame man's mārga (way) furnished with those many signposts of dharma directed towards the individual's niḥśreyasa and, after all, if they are his constant option, towards mokṣa. To follow dharma means first of all, according to śruti and smṛti, to live one's life within the limits of varṇa and āśrama; in the words of Manu-smṛti:

"For that man who obeys the law (dharma) prescribed in the revealed texts (Veda) and in the sacred tradition (smṛti), gains fame in this world and after death unsurpassable bliss."²³

20. Cf. J.D.M. Derrett, Religion, Law and the State in India, ubi cit., p. 153; N.C. Sen-Gupta, Evolution of Ancient Indian Law, (London, 1953), p. 1.

21. Shivaji Singh, Evolution of the Smṛti Law, (Varanasi, 1972), p. 237.

22. Cf. the same, ibid., p. 237; Singh speaks of 'constants' referring to the four varṇas and āśramas, and he adds (beyond the innumerable 'variables') a third 'constant', namely the four puruṣārthas, which are in my opinion not a constituting element comparable to the varṇa and āśrama 'scheme' (vide infra).

23. Manu-smṛti II, 9 (trans. G. Bühler, SBE, vol. XXV, p. 31 (op.cit.)); cf. also the closing remark, Manu-smṛti XII, 126 (ibid., p. 513).

IV. There was a class of experts called ācāryas, śāstrīs, or gurus, generally members of the Brahmin varṇa, who occupied themselves with the task of studying, teaching - the Brahmins' svadharma - and advocating dharma to all members of their community with respect to the different varṇas and āśramas. But they never regarded themselves as creators of dharma because there was nothing which had to be created, dharma existed and had only to be transmitted and promoted. Accordingly their first task required to study dharma, as it is stated in the Manu-smṛti:

"(To study) this (work) is the best means of securing welfare, it increases understanding, it procures fame and long life, it (leads to) supreme bliss."²⁴

Their second important task comprised the teaching and advocating of dharma - that which made up the proper promotion of dharma, including an educational process, the background against which a successful and lasting promotion must be seen. All this calls for an evaluation of smṛti-texts under the practical needs of a dharma-orientated community.²⁵ Therefore to speak in terms of practical needs, means never to take the smṛtis, especially the dharmasūtras and dharmaśāstras, for what they are not and cannot be: a treatise (and by no means a specimen of book-law) evolving a theory of dharma in order specifically to govern

24. Manu-smṛti I, 106 (ibid., p. 26).

25. Cf. J.D.M. Derrett, History of Indian Law (Dharmaśāstra), ubi cit., pp. 20-21; the same, Dharmaśāstra and Juridical Literature, ubi cit., pp. 9, 11.

practice. They are but the practical results of handling practical problems for a wider benefit, namely to miss no signpost (dharma) which, finally, leads to mokṣa.²⁶

26. "Characteristically", as Derrett writes (History of Indian Law (Dharmaśāstra), ubi cit., p. 19), "Indian 'righteousness' does not lay down an exclusively valid way, but 'both this and that are true': this does not mean, however, that no order of preference exists in the abstract. ... (namely, to continue with Derrett) "ultimate bliss, relief from the pain of rebirth in the world."

§ 9 Sources and Interpretation of dharmā

I. Once the question is raised "what kind of human behaviour can be accepted as having the quality of dharmā" one is referred to the sources of dharmā. Generally three sources are relevant, although the Manu-smṛti mentions four; they are, in the succession of their theoretical relevance, the Veda (śruti), smṛti, and ācāra (good custom), in addition ātma-tuṣṭi (self-satisfaction).¹ Ācāra needs some explanation which I shall give later,² śruti and smṛti are not unknown to us,³ and ātma-tuṣṭi is almost negligible

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1. Manu-smṛti II, 6: "The whole Veda is the (first) source of the sacred law [dharmā], next the tradition [smṛti] and the virtuous conduct of those who know the (Veda further), also the customs of holy men, and self-satisfaction." (trans. G. Bühler, SBE, vol. XXV, ubi cit., p. 30); cf. Manu-smṛti II, 12; Gautama I, 1-2; Āpastamba I, 1, 1, 1-3 (trans. G. Bühler, SBE, vol. II, ubi cit., p. 175, resp. p. 1; Vasiṣṭha I, 4; Baudhāyana I, 1, 1, 1/3/4 (trans. G. Bühler, SBE, vol. XIV, ubi cit., p. 1, resp. p. 143. Aiyangar, op.cit., p. 73, observes that Yājñavalkya adds a fifth source, namely the desire to act springing from a pious resolve.
 2. In short, Manu-smṛti (henceforth only Manu, quoted after G. Bühler, SBE, vol. XXV) II, 18: "The custom handed down in regular succession (since time immemorial) among the (four chief) castes (varṇa) and the mixed (races) of that country, is called the conduct of virtuous men [ācāra]." On the 'mixed castes' (the different subcastes emerging from different types of mixed marriages) and the elaborate theories to account for them and 'systematize' them see the recent publication by L. Rocher, Notes on Mixed Castes in Classical India, in: Adyar Library Bulletin XLIV-XLV, (1980-1), pp. 132-146.
 3. Cf. Manu II, 10 ("But by Śruti (revelation) is meant the Veda, and by Smṛti (tradition) the Institutes of the sacred law [dharmā]: those two must not be called into question in any matter, since from those two the sacred law [dharmā] shone forth.").

with regard to the authoritative mode of interpretation (Mīmāṃsā);⁴ however it need not have been negligible in practice, since śīla (good disposition, good conduct, etiquette) was itself a topic of instruction and provided some criteria, e.g. ānṛśamsya (humaneness), to assist a person experiencing doubt in a lacuna between traditional precepts (āgama). Since the answer sought from dharma is the outgrowth of a practical problem the solution of which takes man to his 'desired' end, it deserves first of all a practicable answer, a direction to act. To this purpose śruti is only indirectly applicable because, as already mentioned, it lacks suitable direct precepts (especially the Ṛgveda).⁵ Nevertheless śruti remains the ultimate and 'constructive' as well as 'instructive' basis with respect to all other sources. Correspondingly smṛti and ācāra may alter, not so śruti. Even invisible śruti overarches all 'later' sources of dharma. Hence, dharma remains always related to śruti. Compared to śruti all other 'systems', we should say 'non-Hindu' (e.g. Buddhist) 'systems', are founded on 'darkness'. This reads in the words of Manu:

"Those traditional texts outside the Vedas
and whatever evil doctrines there may be,
all they are without fruit after death -

4. Vide R. Lingat, op.cit., p. 7.

Appeal to one's own conscience or intuition can be made only by a person who is himself of unimpeachable morals, spirituality, and learning. Vide K.V.R. Aiyangar, op.cit., pp. 74-5.

5. Vide Āpastamba I, 4, 12, 10 (op.cit., p. 47): "... All precepts were (originally) taught in the Brāhmaṇas, (but) these texts have been lost ..." This indication, adding passage 11, comes into discussion when questions of textual interpretation are raised.

they are traditionally said to be founded in tamas [darkness]."⁶

II. Since smṛti is conceived of as having been transmitted in close correspondence and strict conformity with śruti one may rely on the dharmasāstras as that whole authoritative corpus that exists, so to say, as an extended version of eternal Vedic words;⁷ though composed by men, it shares in Vedic infallibility.⁸ Therefore, their precepts and statements on dharma are practically of foremost relevance. The same holds true of ācāra as the third source of dharma, for the smṛtis themselves refer to it,⁹ recognizing that dharma in contact with human life can never be exhausted in 'isolated' precepts or in whatsoever manifestations of practical experience. The śāstrīs had always to visualize the old in a new guise, or, in other words, new signposts (topoi) of dharma on the old basis to a never-changing destination.

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6. Manu XII, 95 (trans. J.D.M. Derrett, Bhārucci's Commentary on the Manusmṛti, 2 vols., (Wiesbaden, 1975), p. 430; see also (ibid.) in translation Bhārucci's commentary on this verse); vide also Bühler's trans. (SBE, op.cit., p. 505): "All those traditions (smṛti) and all those despicable systems of philosophy, which are not based on the Veda, produce no reward after death; for they are declared to be founded on Darkness." Cf. also Medhātithi's commentary in: G. Jha, Manu-Smṛti, (Calcutta, 1926), pp. 627-8; and Jaimini I, 3, 3 ("Because dharma depends upon the Veda and the non-Veda is therefore not acceptable."), quoted after Jaimini, The Mīmāṃsā Sūtras, trans. with an introduction by M.L. Sandal, (New York, 1979, repr.), p. 23, (The Sacred Books of the Hindus, vol. 28).
7. Vide P.V. Kane, History of Dharmasāstra, ubi cit., vol. V, 2, sec. VII, ch. XXVIII, p. 1182; cf. Koller, op.cit., p. 141.
8. Vide J.D.M. Derrett, Dharmasāstra and Juridical Literature, ubi cit., p. 18, with further references.
9. Vide Manu I, 107.

And ācāra is one more topos to account for it.

III. The smṛtis refer to ācāra as a source of dharma, and they do so in using several different expressions, namely, apart from ācāra, sadācāra or śiṣṭācāra, and also śīla and samaya signifying roughly 'conduct', or rather 'agreement, convention or usage'; while the latter two words, somewhat distant from ācāra, sadācāra or śiṣṭācāra, are frequently employed in the smṛtis to indicate a proper understanding of the third source of dharma.¹⁰ Ācāra ('ideal custom'), sadācāra ('custom of the good'), and śiṣṭācāra ('custom of the śiṣṭas', i.e. the 'disciplined') are for instance mentioned in Manu, Vasiṣṭha, Baudhāyana and Viṣṇu.¹¹ The praise of ācāra is especially exuberant in Vasiṣṭha who gives the following statement (VI, 1):

"(To live according to) the rule of conduct is doubtlessly the highest duty of all men. He whose soul is defiled by vile conduct perishes in this world and in the next."¹²

10. On ācāra or sadācāra see for instance the explanations of P.V. Kane, History of Dharmaśāstra, ubi cit., vol. III, ch. XXXII, pp. 825-855, also the subsequent chapter; R. Lingat, op.cit., pp. 14-17, 176 ff; J.D.M. Derrett, G.-D. Sontheimer, G. Smith, Beiträge zu Indischem Rechtsdenken, (Wiesbaden, 1979), pp. 21, 25 ff; J.D.M. Derrett, Religion, Law and the State in India, ubi cit., pp. 158 ff. It is my intention to give only the main characteristic features of ācāra, and not to go into details which are sometimes open to controversy.

11. Vide Manu IV, 155-158; Vasiṣṭha VI, 1; 6-8; 43; Baudhāyana I, 1, 1, 4-6; Viṣṇu LXXI, 90; (all ref. ubi cit.). Baudhāyana for instance gives (ibid. I, 1, 1, 6 (trans. G. Bühler)) the following description of śiṣṭas (śiṣṭas): "(Those are called) Śiṣṭas who, in accordance with the sacred law, have studied the Veda together with its appendages, know how to draw inferences from that, (and) are able to adduce proofs perceptible by the senses from the revealed texts." Vide also infra, my subseq. passage.

12. Trans. G. Bühler, SBE, vol. XIV, ubi cit., p. 34.

In contrast the Mahābhārata, Vanaparva, is more explicit and affords a sufficient understanding; the passage runs as follows:

"And virtuous conduct is indicated by acquisition of knowledge, pilgrimage to sacred places, truthfulness, forbearance, purity and straightforwardness. ... Those good men who know well the consequences of the fruition of their good and evil deeds, are commended by virtuous men."¹³

From all these indications and explanations we may gain the following viewpoints which are distinctive of ācāra as a source of dharma. Ācāra is given under the condition of a longstanding, at best an antique, practice which is widespread, generally accepted, unambiguous and not principally in opposition to śruti and smṛti wisdom, and being still acknowledged as śiṣṭācāra, the honoured practice of the 'virtuous' or 'good'. Thus Vasiṣṭha says:

"A śiṣṭa ... is one whose heart is free from (wordly) desires and (only) such acts of śiṣṭas are (to be held as) dharma for which (wordly or secular) cause (or motive) cannot be assigned."¹⁴

It is important to observe that only such conduct can have the qualification as śiṣṭācāra that is purely adr̥ṣṭārtha (of an invisible purpose).¹⁵

13. Mahābhārata, Vanaparva CCVI, trans. P.C. Roy, vol. VI, (Calcutta, n.d.), pp. 457-8.

14. Vasiṣṭha I, 6-7 (trans. P.V. Kane, History of Dharma-śāstra, ibid., pp. 825-6, with further references); cf. the trans. of G. Bühler, op.cit., p. 1.

15. Vide K.V.R. Aiyangar, op.cit., pp. 78-9; P.V. Kane, ibid., pp. 827, 843; G. Bühler, SBE, vol. XIV, ubi cit., p. 1, note 7.

Furthermore, śiṣṭas are only such persons who are very well versed in śruti and smṛti and who are living according to their wisdom; a śiṣṭa's goodness, as Aiyangar observes, "must have a background of intense belief in and [scil. in thesi] a mastery of the Veda"¹⁶. It follows that ācāra is different from our understanding of 'custom'.

Briefly summarized we might say: Ācāra comprises accepted and honoured action in an adr̥ṣṭa spirit based on a firm belief in śruti and smṛti, and entitled to be looked upon as a guide and pattern, thus to become, for want of a śruti or smṛti'dharma', an additional source of dharma. Even more *concisely*, as R. Lingat has put it: "Thus ācāra, the way of life, is the supreme source of merit when it conforms to precepts."¹⁷

IV. The last passage of this paragraph is devoted to some elucidating remarks on the interpretation of dharma in the context of the textual sources.¹⁸ Provided that the topos of dharma was not (and still is not) open to a satisfactory definition by its 'nature' (as we know, it was not), it follows that the task of interpretation had to be mastered by the ancient śāstrīs. From Āpastamba we learn:

"... Virtue [dharma] and Sin [adharmā] do not go about and say, 'Here we are'; nor do gods, Gandharvas [lascivious (mythical)]

16. K.V.R. Aiyangar, *ibid.*, p. 74. Or, as R. Lingat, *op. cit.*, p. 14, says; "Sadācāra is a religious life, exclusively orientated towards the acquisition of spiritual merit."

17. R. Lingat, *ibid.*, p. 198.

18. The important reference is again P.V. Kane, History of Dharmasāstra, *ubi cit.*, vol. V, 2, sec. VII, ch. XXVIII-XXX, pp. 1152-1351. Further references are given in R. Lingat, *op.cit.*, part two, ch. 1, esp. p. 150, n. 12.

beings], or Manes say (to men), 'This is virtue [dharmā], that is sin [adharmā]'"¹⁹.

Even Āpastamba's subsequent statement²⁰ cannot overcome the difficulties in determining questions of dharmā and adharmā. The aid of interpretation is always welcome with respect to the difficulties, to continue with Āpastamba, which arise when one intends "to learn the sacred law [dharmā] from (the letter of) the Vedas (only)"²¹, and which are to be met with in cases of unclear or doubtful indications to which Āpastamba²² refers.

Being unable to define dharmā the śāstrīs tried to determine dharmā as the respective situation called for. There are several possibilities. Lakṣmīdhara states in his great digest of the first half of the 12th century that "dharmā can be determined by [i.e. in respect of] its application in daily life, by consideration of the forms (svarūpa) it takes, by its effects (phala) both seen and unseen, and by the authority (pramāṇa) behind it and the occasion (nimitta) for its use or application"²³. However, the ancient school of Mīmāṃsā, dealing with and applying the exegetical method, give a definition of dharmā, defining it, however, only formally, namely, "the duty [dharmā] is an object [artha]

19. Āpastamba I, 7, 20, 6 (trans. G. Bühler, SBE, vol. II, ubi cit., p. 72); cf. the translation given in R. Lingat, op.cit., p. 197.

20. Ibid.I, 7, 20, 7 ("But that is virtue [dharmā], the practice of which wise men of the three twice-born castes praise; what they blame, is sin [adharmā].").

21. Ibid.II, 11, 29, 13 (p. 171).

22. Ibid.II, 11, 29, 14 (p. 171).

23. Ed. 1948, p. 5, quoted after K.V.R. Aiyangar, op.cit., p. 63.

distinguished by a command [codanā]"²⁴. In contrast, the school of the Vaiśeṣika also attempts at defining dharma, saying that dharma is that from which prosperity (abhyudaya) and beatitude (niḥ-śreyasa) result.²⁵

Both definitions, especially that of the Mīmāṃsā (to which I shall confine myself), originated in close contact with Vedic texts in order to deal with and to arrive at a correct handling of sacrificial acts. To this extent they engaged in investigations of the Veda aiming at a correct knowledge of dharma. We owe to the commentary of Kumārila (7th. cent. A.D.) an explanation concerning the relation of dharma, Veda, and Mīmāṃsā:

"When discussion about the correct knowledge of Dharma is being carried on, Veda being the means of such knowledge, mīmāṃsā will supply complete information about the subject of the procedure or method."²⁶

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24. The Mīmāṃsā Sūtras of Jaimini, I, I, 2, trans. with an introduction by Mohan Lal Sandal, (New York, 1979, repr.), Sacred Books of the Hindus, vol. 28. The collection of these sūtras are regarded as the oldest extant, they may have originated between the third centuries B.C. and A.D. For more information see R. Lingat, op.cit., p. 149.
25. Vide K.V.R. Aiyangar, ibid. Vaiśeṣika is one of the six darśanas, the orthodox philosophical schools of the Hindus.
26. Quoted after P.V. Kane, HD, vol. V, 2, sec. VII, ch. XXVIII, p. 1185. Cf. the rather critical and most recent article by N.S. Junankar, The Mīmāṃsā Concept of Dharma, in: Journal of Indian Philosophy, vol. 10, no. 1, 1982, pp. 51-60 ("The Mīmāṃsaka is concerned with the theory of meaning in so far as it enables him to instal the authority of the Veda on a pedestal where no foibles of human beings or their language can reach but which guarantees all the merits that human ingenuity can offer. (But) ... his arguments ... are not convincing." (p. 52)).

Mīmāṃsā interpretation rules have been applied to smṛti texts only after adaptation. On the other hand, not quite surprisingly, the smṛti texts served as an object of Mīmāṃsā investigation,²⁷ so that we can speak of a mutual impact on each other with benefit for both. It is the dominating intention of the śāstrīs to teach their subject, namely dharma, with constant regard to the Mīmāṃsā rules, once it is evident that a conflict of dharma dicta are out of the question.²⁸

The rules and maxims (of good sense) are chiefly to be understood as different types or tools to arrive at a decision (assuming the śāstrī is forced to decide in a doubtful matter on dharma) with practical consequences. Therefore, several rules, not as an end in itself, have been invented; their main divisions, which need not be given here, are listed in an easily comprehensible way within an encyclopedic article by J.D.M. Derrett and T.K.K. Jyer.²⁹ Apart from

27. Vide P.V. Kane, ibid., p. 1178.

28. In case of such a conflict the śāstrīs were liable to pay attention to the solution the smṛtis themselves offered; e.g. Gautama I, 4: "If authorities of equal force are conflicting (either may be followed at) pleasure." (trans. G. Bühler, SBE, vol. II, ubi cit., p. 175). Cf. Manu II, 14, with the same solution, but expressly confined to a conflict of śruti texts. E.g. if śruti and smṛti texts are conflicting śruti prevails, for it holds the basic authority; whereas smṛti prevails over ācāra. Vide J.D.M. Derrett et al., Beiträge zu Indischem Rechtsdenken, ubi cit., pp. 27-8. According to the principle of unity of doctrine (ekavākyatā), as K.V.R. Aiyangar, op.cit., p. 87, observes in explaining the different kinds of conflicting dharma dicta, there can be no real "'conflict of laws'" inside Dharmaśāstra. Conflict of opinions, of course, there will always be. Cf. also P.V. Kane, ibid., pp. 1265 ff.

29. The Hindu Conception of Law, ubi cit., p. 116 (no. 185), with a further reference. Vide also P.V. Kane, HD, vol. V, 2, sec. VII, ch. XXX, "On Mīmāṃsā principles and the rules of interpretation in relation to Dharmaśāstra".

other statements the Nyāyakośa mentions that dharma is to be ascertained from an injunction when one has a (subjective) purpose (or desire),³⁰ thus taking up the above quoted definition of dharma by Jaimini. Summing up, we may say that what is ordered is dharma and what is strictly forbidden is adhama, and that a precept with an invisible purpose (adr̥ṣṭārtha) is always superior to that with only a visible purpose (dr̥ṣṭārtha).³¹

We may close here, but not without a remark on the persons, or group of persons forming an assembly, who were held to be authorized to state formally what could be accepted as dharma. Generally Brahmins were authorized and of course responsible to observe and propound dharma, whether in cases that deserved their advice or conforming to their proper occupation to teach dharma to the other varṇas.³² Manu states:

"The Brahmin is said to be the creator, the punisher [i.e. discipliner], the teacher, the benefactor"³³.

But whoever, to be sure, might administer 'law', Brahmins alone propounded dharma.

30. M.B. Jhalakīkar, Nyāyakośa or Dictionary of Technical Terms of Indian Philosophy, (Poona, 1928, revised ed.), p. 387 (I owe the translation of this passage to the kindness of J.D.M. Derrett). Cf. also on the Mīmāṃsā's primary object of study, the injunction, R. Lingat, op.cit., pp. 153-156.

31. K.V.R. Aiyangar, ibid., gives the following example: "Rules which prescribe evening and morning prayers are Vedasiddha [established by the Veda] and adr̥ṣṭārtha. The political and other teachings of the kind in Darmaśāstra ... come under the heads of dr̥ṣṭārtha or loka-siddha [established by the people, or the public, or popularly, or in daily life]."

32. Vide Manu XII, 108-114; Baudhāyana I, 1, 1, 12-13; 16; I, 1, 1, 7-8 (concerning an assembly); Vasiṣṭha I, 16; III, 5; 20 (legal assembly); III, 7 (cf. Gautama V, 20).

33. Manu XI, 35 (trans. J.D.M. Derrett, Bhāruci's Commentary, ubi cit., vol. II, p. 353).

§ 10 Constituents of dharma

I. Varṇa¹ and āśrama², once being externally and internally established, form (at any rate from the smṛti period onwards) the existential constituents of dharma in the course of the world. Originated in śruti and promoted in smṛti⁴ under the condition of fostering dharma⁵ within man's karmamārga, varṇa and āśrama strengthened in their own capacities the continuity of dharma and weakened all contrapossibilities with only few exceptions⁶.

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1. Vide Dict. of Hinduism, ubi cit., p. 323; I give here a short note: its primary meaning is most general 'external appearance', usually translated with colour or complexion, and often referred to in the sense of 'caste' (from Latin 'castus' meaning pure) which is ultimately legitimized in Manu-smṛti I, 31, although its first indication may be traced back to the Ṛgveda X, 90, 11-12, the famous puruṣa-sūkta (Hymn of Man, vide The Rig Veda (O'Flaherty, ubi cit.)).
 2. Denoting the 'four stages of life' where man exerts himself. Vide Dict. of Hinduism, ibid., p. 22. It is still doubtful whether pre-Manu dharmaśāstrīs hinted at anything like a system or systematic treatment of āśrama(s) [the four stages of life]; vide also infra, footnote 10.
 3. Vide Ṛgveda X, 90 (op.cit.) where the origin of all living beings, especially the four 'components' of mankind are given according to their different functions.
 4. Manu-smṛti I, 31 (supra cit.). Vide B. Kuppaswami, Dharma and Society, (Madras, 1977), pp. 76-79 on "Divine Origin of Varṇa Vyavastha".
 5. Since the puruṣa-sūkta is of a relatively late date, we can presume that the topos of dharma was already present, at least in its foregoing ṛta imagination, and varṇa became an additional, most effective constituent for the maintenance of order (dharma).
 6. E.g. the rise of Buddhism (5th, or conceivably 4th cent. B.C.) in its strong opposition against the varṇa scheme and the Brahmins' spiritual leadership on the basis of Veda.

The following very few remarks and explanations are mainly designated to prepare a sufficient understanding (if possible) of what shall be treated subsequently in § 11, to which some central importance is attached. Of course, there would be much to say about varṇa and āśrama in detail, especially about varṇa and jāti, however, restrictions and confinement are inevitable considering the purpose of this enquiry in comparative jurisprudence. It can only set out the essential features in order to render possible a comparison between dharma, li, and nomos, such as is intended and outlined above. This must entail many shortcomings which nevertheless may lead to a clear design though with little strokes.⁷

II. All smṛti sources of dharma agree and take for granted in accordance with Manu-smṛti I, 31 that

"but, for the sake of the prosperity of the worlds, he caused the Brāhmaṇa, the Kshatriya, the Vaiśya, and the Śūdra to proceed from his mouth, his arms, his thighs, and his feet"⁸.

Accordingly man belongs to one of these varṇas (classes, 'castes'); to the Brahmin varṇa with its priest and teacher function and obligation, to the kṣatriya varṇa with its function and obligation to protect and to rule, to the vaiśya varṇa obliged to the function of a tradesman or farmer, or to the śūdra varṇa with its sole function to serve the three other classes.⁹ Furthermore, man has to spend his

7. Thus I shall be unable to enter into details or into the controversies on this subject which issued innumerable debates for almost three millennia; on jāti see Dict. of Hinduism, ubi cit., p. 128.

8. Trans. G. Bühler, op.cit., pp. 13-14 (SBE, vol. XXV).

9. For more distinctions vide Baudhāyana I, 10, 18, 2-6.

life (at least theoretically) successively in the four āśramas. Gautama (III, 2) declares:

"(The four orders [āśramas] are, that of) the student, (that of) the householder, (that of) the ascetic (bhikshu), (and that of) the hermit in the woods (vaikhānasa)."¹⁰

Both, varṇa and āśrama, are unanimously regarded as irreversible elementary cornerstones of the interdependent individual and communal life; they are, as we should take them, the basic existential constituents of dharma under the provision of karma and samsāra.¹¹ Imposed on man's destiny in 'space and time' varṇa and āśrama contribute to order and stability at large; they preform the dharma course of the world. General security, unity of society, and foreseeable as well as reliable regularity could be guaranteed regardless of the many differences between human beings in their respective situations and dispositions.¹² Accordingly the smṛtis (dharmaśāstra, and the two epics) go into detail

10. Trans. G. Bühler, op.cit., p. 192 (SBE, vol. II); ibid. explaining with Haradatta that "in all other Sāstras (the order [āśrama] of) hermits is the third, and (the order of) ascetics the fourth" - except for Āpastamba (II, 9, 21, 1) who exactly agrees with Gautama. Cf. the explanation given by A.L. Herman, An Introduction (op.cit.), pp. 86-9; he renders: Brahmacarya, the Student Stage; Gṛhastha, the Householder Stage; Vānaprastha, the Forest-Hermit Stage; Sannyāsa, the Ascetic Wanderer Stage. Vide also Manu I, 88-91. It is still uncertain whether Gautama really intended the āśramas to be resorted to successively.

11. Dharmaśāstra takes the propositions concerning karma and samsāra for granted; vide J.D.M. Derrett, History of Indian Law, ubi cit., p. 36. For samsāra vide Manu I, 50 (op.cit.).

12. Cf. M.M. Patkar, Nārada, Bṛhaspati, and Kātyāyana, (New Delhi, 1978), p. 5; Romila Thapar, State formation in early India, in: Int. Soc. Sci. J., vol. XXXII, 4, (1980), pp. 655-669, p. 660.

stating and prescribing the many duties (dharmas) of everybody within the limitations of varṇa and āśrama, and attaching sanctions of a social and/or a spiritual effect in order to ensure what the Mahābhārata so clearly states:

"That which is capable of upholding (dhāraṇa), is certainly dharma."¹³

III. Some additional explanations on the constituents of dharma may be made before passing on. The fourfold varṇa division into which man enters by birth is of dharma-pradhāna (dharma 'auctoritas') in contrast to jāti (birth) which is of artha-pradhāna (material or purposive 'auctoritas')¹⁴. Hence varṇa membership serves a spiritual end; among the varṇas only the Brahmin, the Kṣatriya, and the Vaiśya share the capability of being twice-born with their respective duties (svadharmas, vide § 11); the Brahmin varṇa is the most important, 'glorified' in Manu II, 87 with the words:

"But, undoubtedly, a Brāhmaṇa reaches the highest goal by muttering prayers only; ..."¹⁵

Varṇa membership springs from a supernatural privilege owing to one's previous karma, a belief which has to govern also one's present life, in order to escape saṃsāra ('bondage of life, death and rebirth') once for all and reach mokṣa (final release). Serving a spiritual end spiritual duties are in the highest esteem; but everyone is respected discharging his appointed varṇa duties wherefrom honour and esteem are gained, and not from sole membership of the

13. Mahābhārata, Śānti P., CIX, 10-12 (P.C. Roy, ubi cit.).

14. Pradhāna denotes 'principal, important, having as one's authority'; cf. Monier-Williams, Dict., ubi cit., p. 680. Vide also K.V.R. Aiyangar, op.cit., p. 123.

15. Trans. G. Bühler, op.cit., p. 46 (SBE, vol. XXV).

varṇa.¹⁶ However, varṇa preserves a stable, unalterable spiritual superstructure encompassing the hundreds of jātis (subcastes) which arose varṇa-independently and do vanish thus; jāti (after the 'joint family') provides social security under the varṇa 'roof' (resort) serving (as already mentioned) dharma-pradhāna in contrast to artha-pradhāna.

Similarly, āśrama functions in man's individual life, namely to prepare man most efficiently to make the best of his present situation in fulfilling his respective duties which are awaiting their reward. This division into four stages of life, sounding highly theoretically,¹⁷ is nonetheless, though often incomplete or brought to an end irregularly, of good practical consequences. It is founded on the educational stage leading over to the householder's,

16. Vide K.V.R. Aiyangar, op.cit., p. 107; somewhere else he draws attention to the idea of 'superior' and 'inferior', an idea which in his opinion "does not arise in the valuation of interdependent organs" (ibid., p. 106); on page 123 he speaks of "the organic interdependence of varṇas as parts of a living social organism". With a different outlook B. Kuppuswami (op.cit.) points at the negative side of the varṇa and jāti scheme which resulted that "Hindu society is, as it were, irreversibly fragmented" (p. 92) and thus closed to ideas of equality and social mobility. On the interesting points on the "Impact of Ethno-Geographic Factors" concerning varṇas and jātis see also Shivaji Singh, op.cit., pp. 164-176. A.L. Basham, op.cit., pp. 147-151, holds an unbiased view avoiding dichotomous value-judgements when he presents his explanations, especially on varṇa and jāti. The same is true of R. Lingat, op.cit., pp. 29-45.

17. Vide Āpastamba II, 9, 21, 2 (op.cit., p. 153 (SBE, vol. II)): "If he lives in all of these four according to the rules ... [of dharma], without allowing himself to be disturbed (by anything), he will obtain salvation." Cf. Manu II, 88; Vasiṣṭha VII, 3, op.cit., p. 40, (SBE, vol. XIV). Cf. also Mahābhārata, Sānti P. CCLXXXVIII, op.cit., pp. 365-369. On the origin, development, and etymology of the idea/word of āśrama see P.V. Kane, HD, ubi cit., vol. II, p. 1, ch. VIII, pp. 416-426.

the most important in the long run.¹⁸ Everybody according to his varṇa and jāti dharma has the chance for self-exertion through different modes of activities and prescribed requirements in each stage. Thus, āśrama too evolves into a stabilizing constituent of dharma. We may be already aware of it, after having glanced over the tables of contents in our numerous smṛti texts; they pay extraordinary attention to these four āśramas with their respective ways of life including the prescribed saṃskāras (initial, preparatory rites, purificatory ceremonies, sacraments).¹⁹

The passing of man's life in four stages, idealiter rounded up with a quarter of a century for each stage, is also held to be governed by three debts which man has to discharge as sacred duties;²⁰ the obligation to sages to whom man owes śruti and smṛti, called ṛṣi-ṛṇa, to be discharged during the student's stage by studying the Vedas; the obligation to the ancestors, called pitr-ṛṇa, to be discharged as a householder by marrying and having children, in order to continue the family line; and lastly the debt towards gods (and the whole creation), called deva-ṛṇa, to be discharged during the two final stages of a hermit (vāna-prastha) and an ascetic (saṃnyāsin) by performing sacrifices or sacred acts, expressed in the words of Manu:

"When he [the saṃnyāsin] has paid the three debts, let him apply his mind to (the attainment of) final liberation; he who seeks

18. "As all rivers, both great and small, find a resting-place in the ocean, even so men of all orders [āśramas] find protection with householders." Manu VI, 90; trans. G. Bühler, op.cit., p. 215.

19. E.g. Manu-smṛti, chapters II-VI (roughly two-fifths of the whole text). A.L. Basham, op.cit., p. 159, mentions that there are some forty saṃskāras from man's conception to his death.

20. Vide Vasiṣṭha XI, 48, ubi cit., p. 56, addressing a Brahmin.

it without having paid (his debts) sinks downwards."²¹

IV. Before closing this paragraph I should make two more remarks, a special and a general. I have mentioned already that the entry from one stage to the next depends on the previous performance of obligatory samskāras (supra), in order to enter 'in an improved, at best, perfect state of being' the next stage which brings man closer to his final aim.²² This 'sacred procedure' may be understood as the passing of a signpost (dharma) on man's karma-mārga relating worldly affairs with a supernatural goal. It is summarized in Manu:

"With holy rites, prescribed by the Veda, must the ceremony on conception and on other sacraments be performed for twice-born men, which sanctify the body and purify (from sin) in this (life) and after death."²³

Quite naturally the first stage creates and develops the educational foundation without which the tradition of the common Vedic heritage would be endangered, risking oblivion and at worst loss. Hence the strong emphasis of our smṛtis laid upon education, namely in being taught (by Brahmins,

21. Manu VI, 35; see also the two following verses stressing the offer to direct one's mind to the aim of mokṣa, now when he shall live even without dharma, only devoted to attain mokṣa (final release from the bondage of samsāra), vide Manu VI, 49, ubi cit., p. 207. Cf. R. Lingat, op. cit., p. 51; K.V.R. Aiyangar, op.cit., p. 129.

22. Aiyangar, op.cit., p. 129, observes that samskāras are "fundamental in a conception of the Hindu way of life".

23. Manu II, 26, trans. G. Bühler, op.cit., p. 33.

the transmitters of Vedic knowledge and wisdom) and studying this common heritage.²⁴ Provided a successful enterprise, the necessary elements of human sensitivity and intellectual capabilities (or vice versa) have been stimulated and fostered, in order to visualize the dharma relevance for one's own and the community's benefit, yet to be sought and practised as one's own light or heavy burden, svadharma.

24. Vide Gautama VI, 21-23; and the whole chapter II; Āpastamba I, 1, 1, 14/16; I, 1, 1, 18 (indirect stress of producing Vedic learning, "the father and the mother produce the body only", trans. G. Bühler, op.cit., p. 3); I, 2, 5, 7/9-11; Baudhāyana I, 2, 3, 1; Manu II, 112; (opera cit.). Vide also K.V.R. Aiyangar, op.cit., pp. 137, 142-4, 147-8.

§ 11 Svadharmā, sādharmaṇa-dharma, and puruṣārtha

I. Svadharmā is a specific and distinct topos in relation to varṇa and āśrama. Dharma of varṇa and āśrama is one's svadharmā or varṇāśramadharmā. It comes into focus as the proper promotion of dharma in the early smṛti period. It is especially distinguished from sādharmaṇa-dharma (common dharma or residual dharma). All together there are various special or relative dharmas (duties) complementing each other, even including sādharmaṇa-dharma which is not 'absolute' and not opposed to svadharmā although the latter has indisputable priority. Moreover, dharma is present as puruṣārtha (aim or good of man) usually being linked with artha, kāma, and mokṣa.

Apart from varṇāśramadharmā, which is interchangeable with svadharmā, being the emphasized expression with reference to everyone's own and peculiar dharma relative to one's varṇa and present stage of life (āśrama), there are, as mentioned, usually four more (special) dharmas: varṇa-, āśrama-, guṇadharmā (dharma of quality or function) and naimittikadharmā (dharma of occasion).

The following exposition centres on svadharmā as the principal topos characteristically applied to individual duties within the existing constituents of dharma. Two more sections then follow dealing with sādharmaṇa-dharma and puruṣārtha respectively. Of course, this is not the whole picture of the promotion of dharma in the early smṛti period, but it is the essential part of it.

II. What is dharma according to the smṛtis' teaching? The answer is relatively easy. J.D.M. Derrett pointed it out: "Nominate the man, state his age, caste, and status,

and one can be told what his dharma is."¹ It is his sva-dharma, explicitly supported in the words of Manu:

"Rather one's own dharma [svadharmā] badly done than that of another well performed."²

And the Arthaśāstra states:

"(The observance of) one's own special duty [svadharmā] leads to heaven and to endless bliss."³

To expound in detail these special or relative dharmas (duties) must be seen as a proper function of all smṛtis which have taken over the task of promoting dharma on the basis of śruti. Hence, the Gautama-sūtra remarks close to the end:

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1. J.D.M. Derrett, Social and Political Thought and Institutions, in: A.L. Basham, ed., A Cultural History of India, (Oxford, 1975), pp. 124-140, p. 127; cf. also, the same, History of Indian Law, ubi cit., p. 21. Or one might ask after kartavyatā, "what ought to be done?" And one would get the answer: "Dharma requires to be done that which is enjoined, and requires that we abstain from what is forbidden", according to dharmāśāstra. (the same, The Hindu Conception of Law, ubi cit., p. 110.
 2. Manu-smṛti X, 97 (trans. J.D.M. Derrett, Bhārucci's Commentary on the Manusmṛti, vol. II, (Wiesbaden, 1975), p. 328; cf. trans. by G. Bühler, op.cit., p. 423 (SBE, vol, XXV). Vide also the almost equal wording of the Bhagavadgītā III, 35; XVIII, 47 (A New Translation by K. W. Bolle, (Berkeley, 1979)).
 3. Arthaśāstra I, 3, 14 (trans. R.P. Kangle, The Kauṭilīya Arthaśāstra, Parts I-III (Text, Translation, Study), (Bombay, 1969, 1972, 1975), part II, p. 8.

"The law [dharmā] of castes and of orders
[of varṇas and āśramas] has been declared."⁴

The corresponding passage in the Manu-smṛti runs:

"O sinless one, the whole dharmā has been
stated for the four castes by you."⁵

Bhārucci's comment on this passage is instructive, it may elucidate our understanding of svadharmā which obviously amounts to the 'heart of the matter' in determining man's duty with constant regard to his place and time in the universe; thus Bhārucci expounds Manu-smṛti XII, 1 as follows:

"One may object that by the word "of the four castes" the dharmā of the āśramas (stages of life) has been excluded. There is no exclusion, because, as the class [varṇa] cannot perish or be separated from the individuals, the dharmas of āśramas are none other than the dharmas of the castes."⁶

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4. Gautama XIX, 1 (trans. G. Bühler, op.cit., p. 274 (SBE, vol. II); cf. Manu II, 5, (SBE, vol. XXV, p. 29: "He who persists in discharging these (prescribed duties) in the right manner ['as they are prescribed in the Vedas and without expecting rewards'], reaches the deathless state and even in this (life) obtains (the fulfilment of) all the desires that he may have conceived." (trans. G. Bühler, op.cit.)); Āpastamba II, 1, 2, 2, (SBE, vol. II, p. 102: "Men of all castes, if they fulfil their (assigned) duties, enjoy (in heaven) the highest, imperishable bliss." (trans. G. Bühler, op.cit.)).
 5. Manu XII, 1 (trans. J.D.M. Derrett, Bhārucci's Commentary on the Manusmṛti, ubi cit., p. 414); cf. trans. by G. Bühler, op.cit., p. 483 (SBE, vol. XXV).
 6. Bhārucci XII, 1 (trans. J.D.M. Derrett, ibid.).

Thus man's varṇa is his irrevocable identity, any act against which must destroy man and the overarching order (i.e. dharma in the transmitted meaning of śruti, esp. of Rgvedic origin).⁷

Varṇa-dharma is always implicitly āśrama-dharma, for man naturally finds himself in one of the four āśramas. For reasons of distinction and classification āśrama-dharmas are expressly and separately listed. However, varṇāśrama-dharma determines one's svadharma on which the celebrated Bhagavadgītā gives four explicit instances.⁸ This very work, part of the widely known Mahābhārata, culminates on emphasizing the importance of performing one's own duty (svadharma) if one does not want to miss the desired end of mokṣa. To this end the performance of svadharma (including also a person's sex and position in the social scale) must also be seen in the interests of social stability for the present and, still more, for many generations to come; therefore a breach of svadharma, whose śruti origin makes it sacrosanct, is first of all a sin with appropriate consequences.⁹ That it is also a social offence is not surprising because svadharma has to serve the preordained order that is identical with śruti-dharma sustaining the universe once and

7. K.V.R. Aiyangar observes that "varṇa-dharma is social planning, in which the spiritual, educational, military, administrative and economic functions are attached permanently to certain hereditary groups, ensuring the transmission of professional ideals and standards and efficiency" (op.cit., p. 68).

8. Vide Bhagavadgītā II, 31 ("Considering also the duty of your own class"); II, 33; III, 35; XVIII, 47 (the first two lines of the last two verses are identical), trans. after K.W. Bolle, op.cit., p. 27. Svadharma is an emphasis of what is really man's varṇāśrama; cf. Rajendra Prasad, The Theory of Puruṣārthas: Revaluation and Reconstruction, in: J. of Indian Philosophy 9 (1981), pp. 49-76, pp. 57-59.

9. Cf. K.V.R. Aiyangar, op.cit., pp. 68-9.

for ever.

Probably with regard to dharmasāstra, so to say giving a survey, the Arthasāstra (vide supra)¹⁰ lists in the beginning, just after the 'enumeration of sections and books' and the 'enumeration of the sciences', and before 'establishing (the necessity of) economics, and the science of politics' the special duties (dharmas) of the four varṇas and the four āśramas, including sādhāraṇa-dharma (the duties common to all varṇas and āśramas); it concludes this chapter with the remarkable words, summarizing the one idea and purpose of all teachings on dharma:

"For, people, among whom the bounds of the Aryan rule of life are fixed, among whom the varṇas and the stages of life [āśramas] are securely established and who are guarded by the three Vedas, prosper, and do not perish."¹¹

Considering the two different preconceptions and intentions of teachings in arthasāstra and dharmasāstra we might apply the distinction between pravṛtti-dharma and nivṛtti-dharma, the one set of dharmas which directs man to ordinary life,

10. The Arthasāstra, as stated above, is (despite precepts relating to religious institutions and performances) a work of entirely secular preconception and purpose; for a quick survey see there the essential duties (dharmas) as they are enumerated (trans. by R.P. Kangle, op.cit.).

11. Arthasāstra I, 3, 17 (trans. R.P. Kangle, ibid., p. 9). The other idea and purpose of dharmasāstra are (as already mentioned) to lead man to mokṣa. J.D.M. Derrett explained this twofold intention of 'smṛti dharma' (concerning the two sorts of religious injunctions) as regarding social facts (covered only to some extent by dharmasāstra, but entirely by arthasāstra) and 'trans-social' facts (I should like to say) involving the individual "who seeks mokṣa, nivṛtti, the cessation of striving and suffering and experience altogether" (Religion, Law and the State in India, ubi cit., p. 69).

to fit into the existing order of his life-world, and the other set of dharmas which relates him to the (final) release from this world.¹²

Coming back to dharmaśāstra, we should be clear that the individual's dharma was constantly attempted to be predicated and ready for application in any situation. There was an unceasing search to find the right way of living, to give sufficient and practical advice so that everyone could be sure about his svadharma upon which so much of one's 'destiny' depended. Not only the Mahābhārata with the Bhagavadgītā but also the Rāmāyaṇa, the other great epic, abounds with instances, such as follows:

"Thus happiness accrues to one who discharges his duty; through performance of one's duty, the whole world is conquered, duty constituting its very marrow."¹³

It is not difficult to observe that obviously the theory of svadharma, assuming a corresponding practice, could easily be used to repel efforts directed and launched to upset the social and spiritual equilibrium. Correspondingly varṇa and āśrama, the foremost constituents of dharma, were widely held to counterbalance 'anti-dharmic' disturbances and thus to secure the balance of the social whole.¹⁴

The permanent call for svadharma enacts the stabilizing factor within those constituents. And all further

12. Cf. J.D.M. Derrett, ibid., p. 70; K.V.R. Aiyangar, op. cit., p. 66.

13. Rāmāyaṇa III, 9 (trans. Hari Prasad Shastri, 3 vols., (London, 1952, 1957, 1959), p. 20.

14. Cf. the critical remarks concerning varṇa-dharma by B. Kuppuswami, op.cit., p. 52.

divisions of dharmā¹⁵ provided by dharmāśāstra, as there are additionally guṇa-dharma and naimittika-dharma, serve the same intention. There is a clearly defined contrast to be observed between such duties which are truly obligatory (nitya¹⁶) and such as are optional (of pleasure), called kāmya (directed to specific kāma (pleasure)), in between are the naimittika-dharmas (duties), acts which should be done on specific occasions or for specific purposes; the implication of dharmāśāstra is that it defines dharmā and adharmā for a given situation referring to nitya, naimittika or kāmya.¹⁷

We may remember the relationship between dharmā and karma (supra, § 6), namely that karma without dharmā would be void, and dharmā without karma ineffective; the same holds true especially with respect to the smṛtis' conception and teaching of svadharmā. The shift of emphasis from the period of the Upaniṣads to the dharmāśāstra's task of teaching the dharmas of all varṇas and āśramas considering the 'force' of karma is quite obvious in all existing composi-

15. Vide supra, § 11; the different kinds of special or relative dharmā are usually given in five distinctions, cf. K.V.R. Aiyangar, op.cit., pp. 66-7; Bhaviṣya-purāna cited by Lakṣmīdhara, Kṛtya-kalpa-taru, brāhmacārikāṇḍa, p. 7, quoted after J.D.M. Derrett et al., Beiträge . . ., ubi cit., p. 12; cf. also J.D.M. Derrett, The Concept of Duty . . ., ubi cit., p. 30, who lists six kinds including sādhāraṇa-dharma, thus agreeing with the Nyāyakośa, op.cit., p. 387. I shall explain sādhāraṇa-dharma separately for reasons given above. Anyway, there will be only a different method of explanation on this issue, for the treatment of the subject-matter as well as its interpretation remains the same irrespectively of the enumeration.

16. Nitya confers the meanings of ordinary, usual; in our context esp. of invariable, fixed, obligatory, necessary; vide M. Monier-Williams, A Sanskrit-English Dictionary (1899), ubi cit., p. 547.

17. Most of the matters leading to Anglo-Hindu law come under nitya.

tions. J.D.M. Derrett points out: "The way to achieve good karma and to avoid evil must be taught by teachers. These have to be trained. The śāstra assimilated two roads to achieving merit, avoiding the clash between the two paths of karma (action, sacrificial endeavour) and yoga (devotion, asceticism) which reason could hardly avoid."¹⁸

On the individual's part to achieve good karma competence (adhikāra) is prerequisite, in other words, one's svadharmā is essentially required. For instance, to teach the Veda is the svadharmā of the Brahmin householder, he alone has the (preordained) competence, so that from his karma (act) a good result is to be expected which attaches itself to the act and the performer. We should remember that "every act of Dharma is believed to create an invisible effect termed apūrva or adr̥ṣṭa" and that, resting solely on Vedic authority, "the existence of this influence cannot be proved"¹⁹. However, to practice one's svadharmā but merely in expectancy of a good result is not wanted. Man, says Āpastamba,

18. J.D.M. Derrett, History of Indian Law, ubi cit., p. 19/20. Cf. P.V. Kane, HD, op.cit., vol. V, part 2, pp. 1530-1612. Evidently, the successful promotion of dharma rests on the doctrine of karma which itself is of śruti origin and thus a part of the foundation of smṛti, esp. of dharmāśāstra. This may be illustrated with Gautama, the (supposed) eldest smṛti specimen on dharma: "(Men of) the (several) castes and orders [varṇas and āśramas] who always live according to their duty enjoy after death the rewards of their works, and by virtue of a remnant of their (merit) they are born again in excellent countries, castes, and families, (endowed) with beauty, long life, learning in the Vedas, (virtuous) conduct, wealth, happiness, and wisdom." (XI, 29). "Those who act in a contrary manner perish, being born again in various (evil conditions)." (XI, 30). "The advice of the spiritual teacher and the punishment (inflicted by the king) guard them." (XI, 31). Trans. G. Bühler, Op.cit., p. 238 (SBE, vol. II).

19. K.V.R. Aiyangar, op.cit., p. 64.

"shall not fulfil his sacred duties [i.e. svadharma] merely in order to acquire these worldly objects (as fame, gain, and honour). For when they ought to bring rewards (duties thus fulfilled) become fruitless."²⁰

Not only kāmyakarma (actions aimed at securing pleasant results) is relatively fruitless (niṣ-phala) but also good acts done indifferently without the necessary belief in their proper value are ineffective for one's final release from samsāra (the circle of birth, death, and rebirth).²¹ Moreover, the Bhagavadgītā reminds man to be aware of all his activities as being only an offer to Brahman.

"Whatever you do, or eat, or sacrifice, or offer, whatever you do in self-restraint, do as an offering to me. Thus you will be freed from the prison of deeds and their results, good and evil. Wholly trained in renunciation, released, you will come to me."²²

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20. Āpastamba I, 7, 20, 1-2 (trans. G. Bühler, op.cit., SBE, vol. II, p. 71). Vide also Manu II, 2-3 (SBE, vol. XXV, p. 29); Bhagavadgītā IV, 14; V, 12 ("The disciplined man gives up the results of his acts and attains perfect peace. The undisciplined man acts out of desire; he is attached to the results; his acts imprison him." Trans. K.W. Bolle, op.cit., p. 65).
21. We have seen (supra, § 6) that there exists in late śruti imagination an intrinsic relationship with dharma, karma and samsāra that now completely surfaces in the topos of svadharma (varṇāśramadharmā) in view of mokṣa.
22. Bhagavadgītā IX, 27-28 (trans. K.W. Bolle, op.cit., pp. 109-111); cf. also ibid., XVIII, 5-6 (p. 195). By the way, we may take notice of an instructive annotation by K.V.R. Aiyangar, op.cit., p. 91, namely that the "extreme Vedantins permit the performance of enjoined karma like Agnihotra (daily fire-rite) as commanded by śruti. Other Vedantins take every enjoined act as designed as an offering to Brahman, to be done with the consciousness that it is a form of adoration of the Supreme Being. In this sense Dharma is synonymous with worship. It links ethics with religion and philosophy, and fuses Dharmaśāstra with Vedānta." Theory and practice of renunciation, or transfer of merit, important within Buddhism, cannot be discussed here.

It may be superfluous to point out that care for one's own specific dharma does not amount to a kind of cherished egocentrism or the like, nor should it be mistaken for an artificial demarcation between individual and community. For man's duties (except for the last stage, the ascetic's āśrama) are related and permanently directed towards his 'life-world', as there are his teacher, his parents, children, wife et cetera. The emphasis of svadharma inculcates the individual's responsibility for the whole. Provided that one's svadharma is being done (idealiter) perfectly, one has complied with community's expectations, and simultaneously discharged one's duties towards mokṣa which is not counted among kāmya-karmas.²³ All this is held to accrue to the perfect whole, comprising man and his community stabilized in dharma, here to be regarded as the overarching order.

To ensure this whole-scale state of dharma the smṛtis (dharmaśāstras) were concerned about precepts, also for times and situations of distress (āpad) when the regular (prescribed) performance of svadharma would be difficult or even impossible. Under such circumstances, called āpad-dharma²⁴, exceptions from varṇāśrama-dharma (svadharma) are permitted. Manu says:

"So the dharmas in time of distress have been set out for the four castes: those who perform them properly reach the highest state."²⁵

23. Pleasant acts which are drṣṭārtha and distinct from ni-tya- and naimittika-karma (vide supra, this §), whereas the practice of dharma for its own sake, called niṣkāmyakarma, leads to mokṣa.

24. Āpad, here: to get into trouble, fall into misfortune; vide Monier-Williams, Dict., ubi cit., p. 142.

25. Manu-smṛti X, 130, trans. J.D.M. Derrett, Bhārucci's Commentary ..., ubi cit., p. 339; Manu has devoted a whole section (X) to āpad-dharma, introduced with the words (IX, 336, last verse of this section): "Now learn in due order what it [the fine profession of dharma] is during distress." (ibid., p. 289). Vide also Bhārucci's comment on the quoted Manu verse (X, 130), ibid., p. 339. Cf. in SBE, vol. XXV, pp. 401-430, G. Bühler's trans., op.cit.

The effect of those explicitly prescribed restrictions, e.g. to offer sacrifices for all members of all varṇas or to make one's living according to that of the next inferior varṇa,²⁶ can be considered as regular (being provided as such) and natural adjustment, bringing theory and practice into accord.²⁷

There is little doubt that svadharma, as has been explained, dominates in dharmaśāstra, even if it be admitted that the society was (broadly speaking) 'collective'. In contrast only marginal attention is devoted to those topoi to which occidental observers usually refer as cardinal virtues for community life. Those 'virtues' pass under the expressions of śīla and sādhāraṇa-dharma²⁸ and figure variously in smṛti texts. They are the common duties (sādhāraṇa-dharmas) irrespective of varṇa and āśrama. In Gautama we find the following passage:

"Now (follow) the eight good qualities of the soul, (viz.) compassion on all creatures, forbearance, freedom from anger, purity, quietism, auspiciousness, freedom from avarice, and freedom from covetousness."²⁹

26. Vide Gautama VII, 4-5; cf. Vasiṣṭha III, 24-25 (both ubi cit., SBE, vols. II, XIV).

27. We may also visualize āpad-dharma rules as the necessary legitimation of inevitable occurrences and practices. Cf. A.L. Basham, op.cit., p. 140.

28. G.-D. Sontheimer, The Joint Hindu Family, (New Delhi, 1977), explains "sādhāraṇa used as an adjective finds application if something is 'common' or 'commonly applicable' to the whole of the society, i.e. ... the four varṇas, but may also be used if something is 'common' or 'peculiar' to a closed group like a caste, guild, family, gotra, etc." (p. 35).

29. Gautama VIII, 22-23, trans. G. Bühler, op.cit., p. 217 f (SBE, vol. II).

Manu enumerates only five common dharmas, as they are

"the sum of dharma in the four castes [var-
ṇas]", namely, "abstention from injury,
truth, absence of anger, purity, restraint
of the senses"³⁰.

III. It is maintained that sādhāraṇa-dharma conforms to a "comprehensive code of ethics"³¹ as K.V.R. Aiyangar has observed; yet this characteristic may not lead us to the assumption that the smṛtis contained anything like an ethical theory or a theory of universal morality. It goes without saying that no part of Hindu dharma relates to 'man' as man including mlecchas (non-Hindus). Moreover, neither there is a detailed analysis of any of the common duties nor an attempt at exhaustive or systematic treatment of sādhāraṇa-dharma as an isolated subject. Principal questions on their fundamental truth, on validity or standardization did not arise.³²

Smṛti composers felt an obligation to teach the respective dharma for every member of the community, and only to this extent sādhāraṇa-dharma could play its role in

30. Manu X, 63, trans. J.D.M. Derrett, Bhārucci's commentary ..., ubi cit., vol. II, p. 316 (orig. vol. I, p. 216); ibid. Bhārucci's remarkable comment: "... this dharma of the individual consisting in abstention from injury, and so on, is to be seen as applying even to those who spring from others than the four castes." Cf. the early dharmaśāstras of Āpastamba I, 8, 23, 6 (p. 78) and Vasiṣṭha IV, 4 (p. 26), both ubi cit., SBE, vols. II, XIV; cf. also Arthaśāstra I, 3, 13 (p. 8), ubi cit.; Nyāyakośa, ubi cit., p. 387. K.V.R. Aiyangar observes that the smṛtis give catalogues of general virtues which amount when arranged to over thirty terms (ubi cit., p. 67).

31. K.V.R. Aiyangar, op.cit., p. 67. Cf. S.K. Maitra, The Ethics of the Hindus, (Calcutta, 1963), p. 23.

32. Cf. P.V. Kane, HD, ubi cit., vol. II, ch. I, p. 11.

guiding man in his behaviour for the benefit of the whole community and yet, as part of the whole, for his own well-being in this world and hereafter. Accordingly the cardinal virtues (dharmas) of ahiṃsā (abstention from injury) and satyam (truth) shine forth most prominently in serving this purpose;³³ they are, no doubt, "basic to the very existence

33. The evaluation of ahiṃsā as well as the general distinction between sādhāraṇa-dharma and svadharmā belongs mainly to the smṛti period; while originating as doctrine with the Upaniṣads (the Vedic age knew little practice of ahiṃsā compared to Aśoka, the emperor of the third century B.C., who propagated and practised it widely according to his desire for dharmā-vijaya (conquest by means of dharma)), ahiṃsā entered not only into the dharmāśāstras and the epics but in the first place into the teachings of the unorthodox Jains and Buddhists where it was held in great esteem and practice, and thus presumably influencing the later smṛtis in their emphasis on ahiṃsā. Vide e.g. Manu IV, 148; 170; VI, 39-40; 52; 68-9; 75; in this book Manu is concerned with the dharmas of the āśrama of the saṃnyāsin, and for him especially, who has turned his mind toward mokṣa but still being kept on his karmamārga and not merely pursuing his jñānamārga, ahiṃsā is a very practical precept of great significance not easily to be followed: "With a view to the preservation of living beings he should always, by day or by night, even during bodily sickness, walk scanning the ground." (VI, 68; trans. Derrett, Bhārucci's Commentary ..., ubi cit., p. 19). K.V.R. Aiyangar, op.cit., p. 160, explains that "among the five yamas [rules of restraint] ahiṃsā comes first, because in social relations it is easiest to cause pain (in the extended sense)" and that "truth (satyam) comes only after a-hiṃsā". Arising from passages which mention satyam in the first place, such as e.g. Mahābhārata, Sānti P. CLXII, saying that truth is the highest duty, we may have some doubts (as indicated for the pre-Buddhist period) whether there is in fact a clear priority of ahiṃsā over satyam, including also for the dharmāśāstra period with its emphasis on satyam in many places (e.g. Manu II, 179; IV, 138-9; 170, 175-6; Viṣṇu LXX, 73-4) certainly bearing in mind that satyam is of Vedic origin where it played a prominent part with important consequences for the later legal procedures. Virtually this question of priority is secondary and only of theoretical interest, since both dharmas (duties) are to be practised with equal attention when the respective situation calls for it. Note the permitted deviations from satyam when limb, livelihood and life are in jeopardy discussed by Derrett, Privileged Lies, in: Adyar Library Bulletin XLIV-XLV, (1980-1), pp. 285-292, 290-1, and compare Buddhist refusal of concessions - "In no case is he [the Buddhist] allowed to tell a lie." (Tachibana, The Ethics of Buddhism, (London, 1926, 1975), p. 250 (243-256)).

and survival of human society"³⁴, and their advocacy for all āśramas bespeaks "the eternal [sanātana] verities about conduct"³⁵. However, in a conflict of svadharmā with sādhāraṇa-dharma, especially exemplified in the conversation between Arjuna and Kṛṣṇa in the celebrated Bhagavadgītā (concerning the kṣatriya's duty to kill if the situation calls for it, thus touching upon the problem of ahiṃsā), svadharmā has been given an indisputable preference,³⁶ probably with good reason, namely in order to ensure the pre-ordained balance of the universe according to the Vedic imagination of dharma (here the irreversible order of human affairs in coagulated relations and activities).

IV. It is readily allowed that the promotion of dharma can also come under consideration with relation to what is commonly called puruṣārtha either within the trivarga or, including mokṣa, within the caturvarga scheme. Although puruṣārtha (literally 'purpose(s) of man (individual)') "is not a technical term but a word of common usage in Sanskrit"³⁷ it appears to be scarcely used in the dharmaśāstra of Manu. We find it in the section concerning the duties (dharmas) of the ruler (rāja):

34. Rajendra Prasad, The Theory of Puruṣārthas: Revaluation and Reconstruction, in: J. of Indian Phil. 9 (1981), pp. 49-76, p. 58.

35. J.D.M. Derrett/T.K.K. Jyer, The Hindu Conception of Law, ubi cit., p. 113.

36. Though binding on every one, irrespective of varṇāśrama, sādhāraṇa-dharma is (situationally) overruled by svadharmā. And principally, as mentioned in the Bhagavadgītā, in the case of the kṣatriya's duty to fight; vide e.g. Manu VII, 87-98 (ubi cit.). Cf. W.D. O'Flaherty, The Clash between Relative and Absolute Duty ..., ubi cit., p. 97.

37. Rajendra Prasad, ibid., p. 50.

"He should know these four-fold means of attaining the ends of man [puruṣārthas]." ³⁸

It conveys the meaning, most generally, of 'any object of human pursuit' ³⁹, thus, the end of man or the aim of human existence. And there are conventionally altogether four aims, namely, dharmā, artha, kāma, and mokṣa. ⁴⁰ The controversy existing to some degree whether puruṣārtha represents the trivarga or caturvarga scheme, i.e. the three- or four-fold (including mokṣa) set of human aims, is here negligible; it adds nothing to our further understanding of dharmā.

With reference to the Manusmṛti we can observe that the trivarga as well as the caturvarga scheme is mentioned according to the context. ⁴¹ Manu speaks for instance of the combination of the three puruṣārthas, of dharmā, kāma, and

38. Manu VII, 100 (trans. J.D.M. Derrett, Bhārucci's Commentary ..., ubi cit., vol. II, p. 63, (cf. SBE, vol. XXV, p. 232)).

39. Vide Monier-Williams, Dict., ubi cit., p. 637.

40. By now all of them may be well known except for kāma which means 'pleasure' and is especially dealt with in the literature devoted to it, namely the Kāmasūtra where we find the following explanation (I, 2, 11): "Kāma is the enjoyment of appropriate objects by the five senses ..., assisted by the mind (manas) together with the soul (ātman)". (quoted after Unto Tähtinen, Indian Philosophy of Value, (Turku, 1968), p. 51)).

We may additionally note that Karl H. Potter, Presupposition ..., ubi cit., p. 9, contends that the trivarga, artha, kāma, dharmā, "are best considered as attitudes and that this conception does justice to Indian ideas", whereas M. Hiriyanna, The Quest after Perfection, (Mysore, 1952), pp. 22, 103, refers to puruṣārtha as a human value consciously pursued, an object of desire.

41. Vide e.g. Manu II, 224; VII, 26; (concerning trivarga) and as already mentioned VII, 100 (on caturvarga); it seems that the trivarga set of puruṣārthas predominates because of the 'extraordinary' aim of mokṣa (vide infra). Cf. Arthaśāstra (ed. Kangle, op.cit.) 1, 7, 3.

artha (wealth), with respect to, the king's wisdom and learning,⁴² and somewhere else he emphasizes that the "chief good consists of the aggregate of (those) three"⁴³. The Mahābhārata makes no exception in stating that the course of the world rests upon dharma, artha, and kāma.⁴⁴

Albeit unceasing in concentration on the promotion of dharma the śāstra does not ignore, still less reject, occupations which are inspired by visible objects (dr̥ṣṭārtha). Moreover, the dharmasāstras leave no doubt that artha and kāma are necessary for man's existence without which no pursuit of dharma could effectively take place; and this want would have the further consequence of a hopeless 'struggle' for mokṣa. Even a collapse of the all decisive constituents of varṇa and āśrama could easily happen and endanger the otherwise balanced order of the world. Thus, neither artha nor kāma are deemed as unworthy, although they are not properly taught within the scope of dharmasāstra itself. A special literature, the Arthasāstra and the Kamasāstra, respectively, deals with those subjects.⁴⁵

Concerning the smṛti tradition we are thus facing a composite picture with different accentuations and no reservation. For instance in the case of Arthasāstra we find the following determination:

42. Manu VII, 26 (SBE, vol. XXV, p. 220); vide also Bhāru-
ci's comment at J.D.M. Derrett, op.cit., p. 39.

43. Manu II, 224 (trans. G. Bühler, op.cit. SBE, vol.
XXV, pp. 70-1).

44. Mahābhārata, Śānti P. CLXI; cf. also ibid., CXXIII,
4-5, and VIII, 13-20.

45. Unto Tähtinen, Indian Philosophy of Value, (Turku, 1968),
observes that "there has been continuous and extensive
writing on the subject [dharma] right down to the pre-
sent, which is not the case with Arthasāstra and Kāma-
śāstra". Modern treatises on both of these subjects
are Western in character not representing indigenous
tradition. (ibid., p. 27). The Śukranīti is not really an
exception (vide L. Gopal, The Śukranīti - A Nineteenth-
Century Text, in: BSOAS XXV (1962), pp. 524-556).

"Material well-being [artha] alone is supreme', says Kauṭilya. For, spiritual good [dharma] and sensual pleasures [kāmas] depend on material well-being [artha]."46

In contrast the dharmaśāstras are clear about the priority of dharma precepts over those of artha or kāma quality. There is a statement in Nārada concerning the question of priority:

"When the rules of sacred law [dharma] and the dictates of prudence [i.e. artha] are at variance, he [the king] must discard the dictates of prudence and follow the rules of sacred law [dharma]."47

The darmaśāstra's determination solely rests on scriptural sanction (i.e. on the authority of śruti). However, dharma only overrules artha and kāma in case of a conflict, which can easily arise where (in a special situation) a dharma precept is in opposition to artha or kāma precepts. Hence also the question of utility (and even problems of an utilitarian ethic from an occidental viewpoint) has been distinctly settled by the darmaśāstra on the basis of the adr̥ṣṭārtha foundation of dharma which makes for man's karma-mārga towards mokṣa. But this destination takes for granted that man genuinely opts for the mokṣa goal and has properly fulfilled his trivarga duties, especially during the āśrama of the householder, before he turns his mind to mokṣa which eventually implies freedom from karma and thus re-

46. The Kauṭilīya Arthaśāstra 1, 7, 6-7 (trans. R.P. Kangle, op.cit., p. 14; "it appears that Kauṭilya was the first to assign a high place to artha as against dharma and kāma).

47. Nārada, Introd. I, 39 (trans. J. Jolly, The Minor Law Books, Vol. XXXIII, p. 15); vide the same statement in Yājñavalkya II, 21. Cf. R. Lingat, op.cit., p. 157.

lease from saṃsāra and the attainment (without residue) of all conceivable puruṣārthas. Thus Manu says in the section on the fourth āśrama concerning the duties of the saṃnyāsin, implying that the devotion to the trivarga puruṣārthas has not been neglected:

"A twice-born man who seeks final liberation [i.e. mokṣa], without having studied the Vedas, without having begotten sons, and without having offered sacrifices, sinks downwards."⁴⁸

V. All modes of existence, as long as they are preserved in dharma (i.e. here the preordained course of the world, established in order), are held to lead to mokṣa, the "summum bonum", to speak with Kane, which consists "in non-return (anāvṛttiḥ) to the world of pleasures and sorrows"⁴⁹. The emphasis is doubtlessly placed on dharma, on the performance of svadharma as well as sādhāraṇa-dharma and the abstention from adharma, as the essential requisite for the "attainment of puruṣārtha, mokṣa"⁵⁰. Then the withdrawal from the world of karma might happen without damage

48. Manu VI, 37 (trans. G. Bühler, op.cit., SBE, vol. XXV, p. 205). This statement is very clear about the duties to be fulfilled in the previous three āśramas which all are open to the pursuit of artha and kāma. Vide also Manu X, 115, saying that "seven sources of wealth are consistent with dharma (trans. J.D.M. Derrett, Bhārucci's Commentary ..., ubi cit., p. 332). Even the vānaprastha (hermit) in the third āśrama may enjoy kāma which is not forbidden by dharma (Āpastamba II, 8, 20, 22 (ubi cit., p. 152)). This attitude can be traced back to a Ṛgvedic indication (RV I, 89, 8), where the enjoyment of life granted by the gods finds unambiguous expression.

49. P.V. Kane, HD, ubi cit., vol. II, pt. 1, ch. VIII, p. 422.

50. V.A.R. Sastri, Dharma ..., ubi cit., p. 35.

to the established order (dharma)⁵¹.

No room is left for 'hubriś', neither for a man still seeking supreme happiness (niḥśreyasa) nor for a man being on his way (mārga) in the world or remaining in the circle of death and life (samsāra), but rather for contentment and discipline⁵², be it in the sphere of dharma or on the direct path of attaining mokṣa.

51. J.A.B. van Buitenen, Dharma and Mokṣa, in: Phil. East and West, vol. VII, 1957, pp. 33-40, observes (p. 37) that "mokṣa ... is the abandonment of the established order, not in favor of anarchy, but in favor of a self-realization which is precluded in the realm of dharma." Cf. D.H.H. Ingalls, Dharma and Mokṣa, in: ibid., pp. 41-48; there is some (here negligible) difference between van Buitenen and Ingalls on this subject, which the latter explains on p. 48. Cf. also A.B. Creel, Dharma in Hindu Ethics, (Calcutta, 1977), pp. 48-52; and Ludo and Rosane Rocher, Mokṣa. Le concept hindou de la délivrance, in: Religions de Salut, (Brussels, 1963), pp. 169-202. With respect to this ultimate puruṣārtha it appears that the dharmasāstra's advice to strive for it through constant practice of dharma (including kāma and artha, so to say as permitted performances of a dharmic way of life) is only one accepted possibility within the many divergent, but tolerated ways and means visualized from the all-embracing religious and philosophic point of view which is most characteristic of the (so-called) Hindu tradition. Cf. S. Radhakrishnan, Indian Philosophy, 2 vols., (London, 1940), vol. I, pp. 22-48, vol. II, pp. 26-7.

52. This is distinctly exposed by Manu (IV, 12): "He who desires happiness must strive after a perfectly contented disposition and control himself; for happiness has contentment for its root, the root of unhappiness is the contrary (disposition)." (trans. G. Bühler, op.cit., SBE, vol. XXV, p. 130). The whole picture becomes visible with the addition of Manu's saying (XII, 89): "Acts which secure (the fulfilment of) wishes in this world or in the next are called pravṛitta (such as cause a continuation of mundane existence); but acts performed without any desire (for a reward), preceded by (the acquisition) of (true) knowledge, are declared to be nivṛitta (such as cause the cessation of mundane existence)." (trans. G. Bühler, ibid., p. 503).

To close this paragraph, I should like to quote from the Mahābhārata a statement which once more elucidates and sums up, in only a few lines, what one could explain more exhaustively than I have tried:

"When one has understood the declarations of the Śruti that lead to correct inferences (about Brahma) and has practised those auspicious virtues which the same and other scriptures inculcate, one may lie down at ease, setting at nought the fears of decrepitude and death."⁵³

53. Mahābhārata, Śānti P. CCXIX, ubi cit., p. 131.

§ 12 Rājadharmā

I. Already the early smṛtis envisaged that the promotion of dharma depended to a great extent on the efficacy of certain provisions addressed to a rāja (ruler, king) in order to exercise an all-pervading influence on his behaviour. Neither did the smṛtis rely on an ideal promotion of dharma nor did they pretend 'abstract' or superior wisdom and sufficiency, yet on the contrary, they attempted to be as realistic and practical as possible with regard to their task. Especially the dharmaśāstrīs were deeply concerned about the ways and means of acquiring the desired state of affairs: dharma as an overarching order attaching to all spheres of life. Thus it is obvious that the sāstrīs faced a task that called for permanent endeavours to present the most suitable expedients to attain it with lasting results. In order to prevent confusion wherever it might arise or to restore it the ruler of a given community had to be admonished not merely to see to his svadharmā within varṇāśramadharmā but to the dharma of his community. For, according to the prevalent śāstrīs' conviction dharma could only flourish if sufficient provision was made and available for a rāja¹ as the most important community institution. The Mahābhārata accordingly states:

"Unless there existed some authority that regulated the people and their doings there would have been chaos and no security."²

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1. Here to be grasped as ruler, king, sovereign, prince or chief of a given community. Vide Dict. of Hinduism, ubi cit., p. 243; P.V. Kane, HD, ubi cit., vol. III, ch. III, pp. 63-4, 70.
 2. Mahābhārata, Vana P. XXXV, 21 (trans. P.V. Kane, HD, vol. I, pt. 1, ch. XIV, p. 151).

I shall content myself, in this paragraph, with such explanation as will further our understanding of the topos of dharmā. Leaving aside the ruler's svadharmā³ I should like to throw some light on the peculiar dharmā of the ruler (rājadharmā) which he owes to his position itself. In order to secure the dharmas of his community it was taken for granted that a ruler was obliged to fulfil such actions as could satisfy his subjects' desire for well-being, this being congruous to his own desire. Naturally the whole community takes interest (idealiter) in upholding dharmā for both general and individual benefit.⁴

II. Man's well-being was held to consist in the unhampered pursuit of (not less than) the three aims of man (trivarga puruṣārtha) which could only persist under the necessary protection of a securely dharmā-orientated ruler. Thus, the opening chapter on rājadharmā reads in the words of Manu as follows:

"I shall expound the dharmas of the king, how the king should conduct himself, how he originated and how his highest attainment comes about." - "By a Kṣatriya who has received the Vedic saṃskāra [the sacrament of initiation]⁵ according to the rule all this

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3. This svadharmā (for general information on svadharmā, vide above, § 11) springing from varṇa and āśrama may be modified to some degree on the ruler's part in relation to his subjects though in theory it is not different (generally) from the kṣatriya's svadharmā.
 4. Vide K.V.R. Aiyangar, *op.cit.*, p. 176. Similarly P.V. Kane, *HD*, ubi cit., vol. III, ch. III, p. 97, states: "Observance of dharmā was the great social and political ideal from very ancient times for all including the king."
 5. I leave aside the question of his coronation with its cosmic (magical) aspects.

must be protected justly." - "For when the world was kingless and scattered entirely through fear the Lord created the king in order to protect all this."⁶

I should add that it is a given assumption that the rāja was created; namely there was a time (just as, historically, such peoples survived) when no individual ruler was known.

Like the gods' dharma (devatā-dharma) rājadharmā requires strict conformity to dharma (according to śruti and smṛti) implying the protection of dharma without which the regular and preordained course of the world would definitely collapse and disclose the worst possible and most abhorrent of states: mātsya-nyāya (i.e. anarchy)⁷; however,

6. Manu VII, 1-3 (trans. J.D.M. Derrett, Bhāruci's Commentary ..., ubi cit., vol. II, pp. 33-4); cf. SBE, ubi cit., vol. XXV, p. 216. In his commentary Bhāruci explains that the "highest attainment" (in Derrett's translation, ibid.) "of the king is the abundant acquisition of prosperity founded on the triad, dharma, artha, and pleasure" - "all this" means "varṇas (castes or classes) and the stages of life [āśramas]" - "protection", Bhāruci continues, "is not merely a seen matter [dr̥ṣṭārtha]". With a view to the continuous promotion of dharma J.D.M. Derrett observes in his "Religion, Law and the State in India" (ubi cit., p. 28): "This is what the classical jurisprudence says the king must do: he must secure the performance of their dharma-s by all classes of people ..., and must set a good example by his own regularity and sincerity." This latter calls for a strong-minded king having good examples before himself, because, as the Mahābhārata, Śānti P. CXLII, says, "a weak-minded king can never display wisdom (in the discharge of his duties) in consequence of his not having drawn any wisdom from examples before him" (trans. P.C. Roy, ibid., vol. VI, p. 341).

7. Vide Mahābhārata, Śānti P. LXVII (ubi cit., p. 155) with the following illustration: "They who live in countries where anarchy prevails cannot enjoy their wealth and wives." For mātsya-nyāya vide § 12 IV.

while the gods cannot let dharmā down,⁸ the ruler can betray it, so that constant indications on rājadharma are necessary and thus inevitably met within our smṛti compositions in a great number. Almost unanimously they admonish the ruler, to use the crisp formulation of Viṣṇu:

"To protect his people" (III, 2), "And to keep the four castes [varṇas] and the four orders [āśramas] in the practice of their several duties [i.e. their respective (collective) svadharmas]" (III, 3).⁹

The effect of providing protection on the ruler's part and being protected on the subject's part is a welcome reciprocity which is distinctly pointed out in Kautilya's Arthaśāstra, namely, that

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8. K.V.R. Aiyangar, op.cit., p. 177 observes: "In Indian belief even the great gods are only functionaries with duties [dharmas], which they cannot fail to discharge. They are governed by a devatā-dharma." Neither the kings nor the gods "can act on whims, but must conform to Dharma" (ibid.). According to mīmāṃsā gods are only the means of fulfilling man's desires prosecuted by correctly performed sacrifices. Vide supra, § 7.
9. Trans. by J. Jolly, The Institutes of Vishnu, SBE, vol. VII, pp. 13-4, with a long list of crossreferences on dharmasāstra works, so that there remain merely a few additions, such as e.g. to Vasiṣṭha XIX, 1 and 7, (op.cit., p. 96), and to Baudhāyana I, 10, 18, 1 (op.cit., p. 199) saying (with additional information): "Let the king protect (his) subjects, receiving as his pay [sic] a sixth part (of their incomes, or spiritual merit)." In a footnote J. Jolly (ibid.) explains that "learned Brāhmaṇas do not pay taxes, but the king obtains a sixth part of the spiritual merit which they acquire". Vide also Mahābhārata, Sānti P. XCI (ubi cit., vol. VI, p. 212), and Rāmāyaṇa, ubi cit., bk. I, ch. 25, pp. 56-7 (stressing that even deeds that appear ruthless, are permitted to those appointed to protect their subjects" (trans. Hari Prasad Shastri)), cf. bk. III, ch. 9, p. 20.

"in the happiness of the subjects lies the happiness of the king and in what is beneficial to the subjects is his own benefit"¹⁰.

That the emphasis in connection with protection is put on material well-being (vide the following Arthaśāstra statement, ibid.) completely fits a work of an entirely secular character, and this is by no means surprising; however, what is worth mentioning once more, is that it does impart to us, in stressing activity as "the root of material well-being" (ibid.)¹¹, the basic significance of karmamārga (vide above, § 6) which is not - contrary to what is still commonly believed by Western philosophers - inferior to jñānamārga¹². Accordingly the Arthaśāstra draws heavily on that conviction when it refers to the negative effects of the want of activity; this passage reads in full:

"In the absence of activity [anuthāne: 'in absence of positive striving'], there is certain destruction of what is obtained and of what is not yet received. By activity

10. Arthaśāstra, 1, 19, 34; trans. R.P. Kangle, op.cit., p. 47.

11. In the Mahābhārata, Śānti P. CXV (ubi cit., pp. 271-2) we find a more prolix observation, in short, as follows, that "a king ... engaged in protecting his subjects ... should be conversant in all matters connected with virtue and wealth" (trans. P.C. Roy, ibid.).

12. Of course the Upaniṣads and the Bhagavadgītā give the impression that jñāna is superior.

reward is obtained, and one also secures abundance of riches."¹³

III. Protection does not come about 'eo ipso', it requires due attention to internal and external affairs. Appropriate activities are to be executed as rājadharma¹⁴ by means of daṇḍa (literally: stick, punishment), in a wider sense to be comprehended (and so used in our sources) as imposing 'acknowledged' secular disadvantage on somebody in situations resulting from 'contra-dharmic' activities.

Daṇḍa is necessary and, at least in theory, inescapable, even for the ruler himself. Thus, says Manu:

"For his sake the Lord at first created Punishment [daṇḍa], protector of all creatures, dharma, born of himself, having the

13. Arthaśāstra, 1, 19, 36 (ibid., p. 48). We may gather from this passage that "activity" conforms (quite generally) to man's destiny on his karmamārga, not just touching upon the ruler's duty (rājadharma) to protect his subjects through appropriate activities (e.g. by means of daṇḍa) but expressly including it with all aspects as regards the relation of dharma and karma (vide supra, esp. § 6); thus "activity" leads within karmamārga to sukha (happiness, pleasure; vide as quoted, ibid. 1, 19, 34), which is threatened with "destruction" by inactivity, and continues to niḥśreyasa (highest (spiritual) good), unless prevented by inactivity, obtaining just that as "reward" and here additionally 'royal' riches.

14. We may not forget the king's duty to secure the performance of penance and to supervise readmission to caste.

form of the brilliance of Brahma."¹⁵

Protection by means of daṇḍa, however, includes the ruler's care for man's secular and religious prosperity, demanding the expiation of a sin and the punishment of an unwanted or forbidden behaviour, since an adharmic behaviour having the quality of a 'crime' simultaneously pertains to a sin and a punishable 'crime'.¹⁶ Hence to escape the ruler's daṇḍa may be not difficult, and is often successfully achieved, "but not that of the eternal law of karma"¹⁷.

15. Manu VII, 14 (trans. J.D.M. Derrett, Bhārucci's Commentary, ubi cit., p. 36); the great importance of daṇḍa could not be more strongly emphasized. Bhārucci's comment (ibid.) reads: "This has been said: "Without punishment [daṇḍa] there is no passionate quality, therefore, if punishment is to be eschewed no king will wish to protect his people (?)." (vide footnote, ibid.).

Vide Manu VII, 28 (ibid., p. 40: "... it strikes even the king who swerves from dharmā, together with his relatives."). K.V.R. Aiyangar, Rājadharmā, (Adyar, 1941), on Manu VII, 28.

It is revealing to observe that Brahmins, who taught a limitation on physical punishment of themselves, really admire daṇḍa and therefore not less vyavahāra (vide § 13) which is also given in a particular relation to daṇḍa. Vide J.D.M. Derrett, Vyavahāra: Light on a Vanished Controversy from an Unpublished Fragment, in: the same, E C M H L, vol. I, ubi cit., pp. 80-85, pp. 81, 84.

16. Cf. Hans Losch, Rājadharmā. Einsetzung und Aufgabenkreis des Königs im Lichte des Purāna's, (Bonn, 1959), stating (p. 116): "Jedenfalls ist im Begriff des Daṇḍa die Staatsgewalt versinnbildlicht, die sich in den verschiedenen Bezirken staatlichen Lebens als Gerichts- und Verwaltungshoheit manifestiert, während sie außerhalb der Staatsgrenzen im zwischenstaatlichen Verkehr ihren Ausdruck in kriegerischen Auseinandersetzungen findet." Vide K.V.R. Aiyangar, op.cit., p. 94; ibid. explaining that "the extraordinary severity shown in dealing with pratiloma unions ['unnatural' unions with a husband of a lower varṇa] reflects the intensity of the belief in the maintenance of both the social and the cosmic order by the prevention of saṃkara [inter-varṇa unions]"; daṇḍa implies (in its dharmic foundation) deterrence and correction as well as expiation, repentance and penance (prāyaścitta). Aiyangar opines on good grounds (ibid., p. 109) that "punishment is looked at not as retaliation".

17. Aiyangar, ibid., p. 109.

To perform rājadharma as regards internal protection the ruler, whose effective authority is "entirely secular"¹⁸, depends for his success on inflicting daṇḍa correctly while telling the truth, acting after due investigation, being wise and learned in the trivarga puruṣārthas, dharma, kāma, and artha.¹⁹ This then results, to continue with Manu, in prosperity

"with respect to the three aims; he who is voluptuous, partial, or mean will be struck down by Punishment [daṇḍa] itself"²⁰.

And the community of his subjects does also prosper in

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18. R. Lingat, op.cit., p. 215; I should add with Lingat (ibid.) in the interest of a proper understanding that "the king appears to owe his authority neither to the divine will, nor to his birth, nor to any social compact, but solely to the force at his disposal" (with a reference to a somewhat isolated deviating proposition of Nārada XVIII, 25, which "simply restates the law of karma").
19. Vide Manu VII, 26 (ubi cit., SBE, vol. XXV, p. 220, and Derrett, Bhārucci's Commentary ..., ubi cit., vol. I, p. 53, vol. II, p. 39 (trans.); Manu's statement has a good dharma-sūtra backing in Gautama XI, 2-6 (ubi cit., SBE, vol. II, pp. 234-5).
20. Manu VII, 27 (ibid.). The worst aspect of a ruler is his tendency to vyasanas (vices, weakness); vide Manu VII, 45-53 with Bhārucci's commentary (ubi cit., pp. 44-49) and compare Arthaśāstra (ubi cit.) 8,3,1-66; cf. J.D.M. Derrett, A Newly-discovered Contact between Arthaśāstra and Dharmaśāstra: the Role of Bhārucci, in: the same, E C M H L, vol. I, pp. 120-130, pp. 127-9.

dharma, i.e. in their (subjects') svadharmas²¹ conforming to the maintenance of the preordained universal dharma.

The ruler's concern about external affairs which also confronts smṛti composers in dealing with rājadharmā may be treated as an extension or subdivision of protection, applying the force of daṇḍa to "thieves" from within and to danger (in a very wide sense) from without. The authority for such conduct could be traced, for instance, in Manu's statement (which may amount to a definite precept) that

"the world is conquered by Punishment, a pure man is hard to find; through fear of Punishment the entire universe submits to being enjoyed".²²

Conquering the whole world (i.e. within a ruler's reach) purports to keeping the world in order, so that rājadharmā shares the responsibility for sustaining universal dharma.²³

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21. This reads in the words of the Arthaśāstra at the end of chapter four, 1, 4, 16, succinctly summarizing the secular aspect of rājadharmā: "The people, of the four varṇas and in the four stages of life [āśramas], protected by the king with the Rod [daṇḍa], (and) deeply attached to occupations prescribed as their special duties [svadharmas], keep to their respective paths." (trans. R.P. Kangle, op.cit., pt. II, p. 10). Cf. an explanation by Sen-Gupta, op.cit., p. 38. P.V. Kane, HD, ubi cit., vol. III, ch. III, p. 96, remarks what I should not miss to quote in full: "The importance of dharma as an all-embracing institution was impressed upon the king by our writers so frequently that it must have had its psychological effect on every king. The idea that daṇḍa personified as Deity might strike down the bad king himself [with references] would tend to keep even a whimsical king within bounds."
22. Manu VII, 22 (trans. J.D.M. Derrett, Bhārucci's Com. ..., ubi cit., vol. II, p. 38, orig. vol. I, p. 52).
23. Cf. hereto G. Bühler's translation of Manu VII, 22 (SBE, vol. XXV, p. 219) and Bhārucci's comment (trans. Derrett, ibid.).

A justification for conquest is thus provided.²⁴ The relation of rājadharma (viz, the king uses force (daṇḍa) to conquer foreign countries) to universal dharma which must be maintained (therefore protection of what is already obtained) surfaces in a further statement of Manu, expressly stressing the ruler's duty to protect this whole, 'enlarged world':

"Thus the lord of the earth, having properly attended to all business, may seek to acquire countries that have not been acquired and protect those which he has acquired."²⁵

We should add, continuing with Manu,

"... kings who are concerned exclusively with the protection of their subjects go to heaven"²⁶;

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24. Vide J.D.M. Derrett, The Maintenance of Peace in the Hindu World: Practice and Theory, in: Recueils de la Société Jean Bodin, XIV (1962), pp. 143-177, 144-5, 166-69.
25. Manu IX, 251 (trans. Derrett, ibid., p. 273). Cf. Manu VII, 87-9; Viṣṇu III, 42; 47-48 (saying, neither to "abolish (or disregard) the laws of that country", nor to "extirpate the royal race", but to "invest there a prince of the royal race of that country with the royal dignity" (trans. J. Jolly, ubi cit., SBE, vol. VII, p. 18)); cf. Manu VII, 201-203. According to dharmaśāstra as well as to the Arthaśāstra condemnation of annexations after conquest is based on loyalty to dharma and not to any human person; vide K.V.R. Aiyangar, op.cit., p. 179.
26. Manu IX, 253 (trans. Derrett, ibid., p. 274); cf. Manu VII, 144. For more and explicit details vide "The Kauṭīliya Arthaśāstra" (ubi cit.), esp. books 7-14 concerning the conduct of external affairs.

and still they may also 'enjoy' their subjects,²⁷ who give willing obedience to the precepts of dharma, presented as well as represented by Brahmins; and they obey the commands of the king who himself is seen to perform his rājadharma. Thus, says Gautama:

"The king is master of all, with the exception of Brāhmaṇas" and "... these two, uphold the moral order in the world."²⁸

IV. In passing we should not miss some observations on the ruler's handling the task of administering 'justice' within his community, a capacity that partakes of his rājadharma. What follows anticipates to some degree the issue of 'dharma and litigation' (vyavahāra), subsequently in § 13.

Commencing with the treatment of litigation or lawsuits Manu reads:

"Desirous of trying lawsuits he, the king, should enter the court in a modest [!] manner, accompanied by Brahmins and by council-

27. From an instructive article by J.D.M. Derrett, Bhū-Bharaṇa, Bhū-Pālana, Bhū-Bhojana: An Indian Conundrum, in: the same, E C M H L, vol. I: Dharmaśāstra and Related Ideas, (Leiden, 1976), pp. 33-49, we learn the three-fold occupations of ancient Indian kings (including the curious concept of the Kings' enjoying their subjects) in terms of their English equivalents as maintenance, protection, and enjoyment of the Earth (pp. 35, 36, 37), which may be interpreted (if one can go so far) as conforming to the trivarga puruṣārthas (dharma, artha, kāma) with respect to the kings' svādharma.

28. Gautama XI, 1 and VIII, 1 (trans. G. Bühler, op.cit., SBE, vol. II, pp. 234, 214 (vide footnote, ibid.); cf. Āpastamba II, 5, 11, 5-6 (ibid., p. 125); Vasiṣṭha I, 40-41 (ubi cit., SBE, vol. XIV, p. 8).

lors experienced in policy."²⁹

It is rājadharma to try and to decide cases, and in doing so to listen to the advice of "well-instructed Brāhmaṇas" (Viṣṇu III, 72) and, as just quoted, to their advice in policy. Thus we learn that it is not the Brahmin himself who is principally entrusted with vyavahāra though he should be appointed for it "whenever the king himself shall not carry on the trial of suits"³⁰.

The Brahmin's svadharmā is, as I have pointed out, to teach and to protect dharma, only in the second place to help to administer it in vyavahāra. The royal administration of vyavahāra³¹ equals the Brahmins' performance of sacrifices, with the same effect, the maintenance of dharma, and with an equal reward.³² However, to be sure, it is not rājadharma to create or establish dharma, and therefore in principle there is no royal legislation; but it is the king's duty to enforce dharma whenever the situation calls for it; and also, if necessary, to discover and to implement it.³³ A rāja-śāsana (royal decree, expression of the

29. Manu VIII, 1 (trans. J.D.M. Derrett, Bhāruci's Com. ..., ubi cit., p. 90); cf. Gautama XI, 19; Vasiṣṭha XVI, 2; (both ubi cit.). Manu's insistence on "councillors experienced in policy" refers once more to the king's task which "is essentially political" (R. Lingat, op.cit., p. 221). Cf. Yājñavalkya II, 1 ff. in: M.N. Dutt, The Dharma Śāstras, (Calcutta, 1906-8, repr. New Delhi, 1978), vol. I, pp. 61-68.

30. Manu VIII, 9 (trans. Derrett, ibid., p. 93); cf. Viṣṇu III, 73.

31. Wilhelm Rau, Staat und Gesellschaft im alten Indien, nach Brāhmaṇa-Texten dargestellt, (Wiesbaden, 1957), p. 95, observes that the ruler as representing 'legal' authority is mentioned as early as in the Śatapatha Brāhmaṇa 5, 3, 3, 9.

32. Vide M.M. Patkar, Nārada ..., ubi cit., p. 8.

33. Cf. A.L. Basham, op.cit., p. 87; K.V.R. Aiyangar, op.cit., p. 178; R. Lingat, op.cit., p. 231.

ruler's will) could be an appropriate expedient to effectuate this duty (rājadharmā).³⁴

V. As regards the dominant feature of rājadharmā we have seen that smṛti compositions despite their functional differences foster protection by means of daṇḍa in order to stabilize community life, both under a secular as well as a religious aspect. Rulership included unbiased attention to religious aspects, since for obvious reasons the performance of 'royal' duties was inseparable from religious affairs partaking in man's destiny towards niḥśreyasa and mokṣa. Thus we find the statement of Manu:

"The king who protects all creatures in accordance with dharma and strikes those who are worthy of death, sacrifices day by day with sacrifices having thousands of hundreds as the fees."³⁵

No doubt rājadharmā which was taught by brahmin teachers centred, to speak in topoi of puruṣārthas, on dharma. Hence, by all means the ruler had to be on guard to prevent such disturbances from without and from within that might endanger dharma and tend to the state of anarchy (arājakaṃ: 'kinglessness') and chaos (mātsya-nyāya), and this meant in particular, as J.D.M. Derrett has observed, that the ruler under the special presupposition of rājadharmā (in contrast

34. R. Lingat, ibid., observes that "the commentators and digest-writers know by the name rāja-śāsana only individual measures or occasional orders (with ref.). These precepts had no other foundation or sanction than the will of the king, nor other object than to secure the government of the realm".

35. Manu VIII, 306 (trans. J.D.M. Derrett, Bhārucci's Commentary, ubi cit., p. 182). Vide also Manu VIII, 305, 308, 311 (ibid.). Cf. John W. Spellman, Political Theory of Ancient India, (Oxford, 1964), p. 223. U. Tähtinen, Non-violent Theories (vide infra, bibliog.), pp. 42, 55, explains how protection of the people by force did not diminish, but rather enhanced the ruler's compliance with the duty of ahimsā.

to rājanīti) had to care for the maintenance of "the delicate balance of competing, jealous groups, castes, (and) regions within his kingdom"³⁶.

The special presuppositions of rājadharmā made no way and certainly did not give rise to, a concept of law, neither to a Rule of Law nor to fundamental rights, as Derrett in his article (mentioned above) has distinctly pointed out, a fact which is of considerable importance for a proper understanding of dharma.³⁷

This being said, I should emphasize once more that in order to comply with rājadharmā the individual ruler occupied and deserved his pivotal communal position for the sake of dharma. This position was not unlimited, for concerning the "administration of justice the king was to be checked by the judge and sabhyas [assemblies of elders], who were fearlessly to render advice to the [scil. possibly] erring king"³⁸. All this includes under the rule of dharma (i.e. the preeminence of dharma) that the ruler could not himself make dharma; nor could he make law in default of a concept of law! Dharma had to be discovered or ascertained according to dharmaśāstra; in given situations the ruler

36. J.D.M. Derrett, Rājadharmā, in: Journal of Asian Studies, XXXV, 4, (1975-6), pp. 597-609, p. 606; cf. the same, Social and Political Thought and Institutions, in: A. L. Basham (ed.), A Cultural History of India, (Oxford, 1975), pp. 124-140, pp. 125, 140 "The ideals of the Indian peoples presupposed insecurity, from which political power rescued them. Against this background one sought one's soul's comfort by practising personal and social virtues; apart from this background, virtues were hardly to be aspired to." Ibid., p. 140.

37. The same, ibid., with a useful brief explanation of rājanīti as "the way a king should comport himself to be successful" in contrast to rājadharmā as "the way a king should comport himself in order to be righteous", i.e. in a dharmic sense.

38. P.V. Kane, HD, ubi cit., vol. III, ch. III, p. 97.

could propound directions (rājaśāsanas) which were capable of being held (by śāstrīs) to be valid under the proposition that they were not opposed to dharma.³⁹ Finally it may be worth noting that neither rājas nor brāhmaṇas were the masters of dharma , but both indeed its servants; thus "the superiority of dharma was a matter of the Hindu world view"⁴⁰.

39. Cf. K.V.R. Aiyangar, op.cit., pp. 176, 178; R.P. Kangle, The Kauṭilīya Arthaśāstra, pt. III, A Study, (Bombay, 1965), pp. 223-4; N.C. Sen-Gupta, op.cit., p. 39; J.D. M. Derrett, Rulers and Ruled in India, in: the same, E C M H L, vol. I, ubi cit., pp. 50-79, p. 71. In the Arthaśāstra (3,1,38) we find the following somewhat paradoxical but revealing statement which may summarize an essential viewpoint of the ruler's role (at least in theory): "When all laws [dharmas] are perishing, the king here is the promulgator [promoter, effectuator] of laws [dharmas], by virtue of his guarding the right conduct [ācāra] of the world consisting of the four varṇas and four āśramas." (trans. R.P. Kangle, op.cit., pt. II, p. 194; vide also his explanation, ibid.).

40. J.D.M. Derrett, Rājadharmā, ubi cit., p. 607; cf. the same, Rulers ..., ibid., p. 59.

§ 13 Dharma and vyavahāra

I. The purpose of this paragraph is to focus briefly on the role of dharma when a dispute has to be settled before an authorized tribunal, or, to use Manu's words (VIII, 1) when lawsuits were about to be investigated. It is then that vyavahāra calls for dharma, which in having been fully stated (Manu I, 107) does not exclude or neglect to handle vyavahāra. This now has to be explained, since the modern jurist will by no means presuppose, with respect to our context, that (to speak in his terms) righteousness and law necessarily overlap, still less that the latter can be comprehended by the former.

Vyavahāra, following P.V. Kane's observations, "is so called because of its removing various doubts"¹. Apart from this definition it has acquired several meanings which are stated by Kane;² for our purpose we can follow and work with the extremely crisp meaning given by Bhārucci in his comment on Manu VIII, 1:

"vyavaharaṇam vyavahāraḥ."³

This conforms to Kane's just mentioned, very ancient explanation in the sense of vyavahāra as "law-suit or dispute in a court and legal procedure"⁴.

Generally dharma appears within vyavahāra as that which must be protected in order to preserve the protection of

1. P.V. Kane, HD, ubi cit., vol. III, ch. XI, pp. 246-7.

2. Ibid., pp. 245-6. It appears to have been a technical term far anterior to the attempts, etymological and otherwise, to explain it.

3. J.D.M. Derrett (ed.), Bhārucci's Commentary ..., ubi cit., vol. I, p. 85, translated in vol. II, p. 91: "A 'lawsuit' is a litigation"

4. P.V. Kane, ibid., p. 246.

dharma; this reads in the words of Manu:

"Dharma indeed, if damaged, damages; dharm
ma when protected protects; hence dharm
ma should not be damaged lest damaged dharm
ma destroys us."⁵

According to Gautama, the earliest dharmaśāstra, the ruler's administration of dharm
ma (vide § 12) should be regulated by śruti, smṛti, the aṅgas and the purāṇa (mythology).⁶

Both statements given in their respective contexts recall the paramount significance of dharm
ma; even within vyavahāra dharm
ma retains its close connection with śruti (the Vedas) and smṛti, without which a promotion of dharm
ma would lose its basis; moreover, the progressive deterioration of the present time-cycle that (to follow Bṛhaspati I, 1) already necessitated the administration of 'judicial' proceedings would be exacerbated. Therefore, to prevent or to remove disorder that troubles the involved parties with dr̥ṣṭa and adr̥ṣṭa (seen or unseen) effects, carefully organised and successfully practised vyavahāra is needed, especially impartiality in order to yield the same reward "as solemn Vedic sacrifices do"⁷. However, we may be aware that dharmaśāstra compositions came into existence to care especially for man's education according to standards of dharm
ma, thus only incorporating (still in the case of Manu) a comparatively small portion on vyavahāra, and only to the extent

5. Manu VIII, 15 (trans. J.D.M. Derrett, Bhārucci's Com. ..., ibid., p. 95); cf. G. Bühler's translation in SBE, vol. XXV, p. 255, where "dharm
ma" is rendered by "justice", thus easily perverting the original understanding into the direction of the occidental conception of justice.

6. Gautama XI, 19 (trans. G. Bühler, op.cit., SBE, vol. II, p. 237.

7. Yājñavalkya I, 359-60, quoted after P.V. Kane, ibid., p. 242; it is in this way, as Kane (ibid.) continues that "administration of justice was held to be a very sacred duty". Vide supra, § 12 IV.

necessary to solve inevitable disputes for the sake of dharma as the indispensable condition of the maintenance of the world as well as man's signpost towards mokṣa.

II. Having thus considered most briefly and generally the role of dharma within vyavahāra some attention to the special position of dharma therein may be due. Regarding this issue a bundle of problems requires adequate consideration; there are e.g. the relation between dharma and vyavahāra rules, the relevance and consistency of vyavahārapadas (the subject matters of a possible litigation), the relation of dharma and caritra (custom, usage), and that of dharma and rāja-śāsana (already touched upon in § 12 on rājadharmā), and last but not least the interdependence of dharma and satya (truth), and of dharma and 'law'. Some of those problems are of great antiquity, others occur with the steady promotion of dharma in all spheres of life, an impressive picture of which may be obtained from the Mahābhārata.⁸ Fortunately, there are some valuable investigations which handle those problems to a good extent including instructive details, so that I can easily refer to these works here⁹ and concentrate in this passage on the 'four

8. Cf. T. Chakravarti, Dharma in the Mahābhārata, in: Bulletin of the Rama Krishna Mission Institute of Culture, Calcutta, IV, 11 (1953), pp. 269-70; A. Chandra, The doctrine of dharma in the Mahābhārata, in: [1963] I S.C.J. (Journal sect.), pp. 11-16.

9. The most recent investigation is: J.D.M. Derrett, G.-D. Sontheimer, G. Smith, Beiträge zu Indischem Rechtsdenken, hg. v. Theodor Viehweg u. Reinhard May, (Wiesbaden, 1979), esp. parts II and III on "Gewohnheitsrecht/Sitte und Recht in der traditionellen indischen Jurisprudenz" (pp. 17-58) and "Gerichtsverfahren und Richter im traditionellen indischen Recht" (pp. 59-85); vide also M.M. Patkar, Nārada, Bṛhaspati, and Kātyāyana, a comparative study in judicial procedure, (New Delhi, 1978); J.D.M. Derrett, The Concept of Law according to Medhātithi, a pre-Islamic Jurist, in: the same, E C M H L, vol. I, (Leiden, 1976), pp. 174-197; R. Lingat, op. cit., part II: "From Dharma to Law", esp. pp. 176-256; and, of course, P.V. Kane, HD, ubi cit., vol. III, ch. XI on "Vyavahāra (Law and Administration of Justice)", pp. 242-316.

feet decision-basis' of vyavahāra, and therein on the relevance of caritra - both to further our understanding of dhārma.

Vyavahāra can be of two kinds, namely concerning 'artha' (wealth in a wide sense) and 'himsā' (injury) or, to follow our well-known distinction, of a civil or criminal kind, respectively divided according to Manu (VIII, 3-7) into fourteen kinds of disputes on 'artha' and four on 'himsā'. These are the usually enumerated eighteen vayvahārapadas which were held to be a convenient arrangement, not embracing all possible disputes, and hardly aimed at representing any regularity or, as Kane observes, "scientific principle of classification"¹⁰. Surveying the actual contexts of the Manu- and Yājñavalkya-smṛtis we find it more than likely that the so-called eighteen vayvahārapadas are intended primarily as models rather than manuals of practice; indications rather than codes. Dharma, however, is well served by this.

A decision concerning those vyavahārapadas must be reached on the 'four feet decision-basis' according to an ancient text of unknown age and origin, to be met with (for instance) in Nārada-smṛti and Kauṭilīya Arthaśāstra, saying that a decision is to be based on dhārma, vyavahāra, caritra, or rāja-śāsana, the later of which always supersedes the earlier one.¹¹ From Nārada and the Arthaśāstra we are

10. P.V. Kane, HD, ibid., pp. 258; vide also ibid., pp. 248-9, 258; Bhāruci's comment on Manu VIII, 8 reads that, most plausibly, "an absolutely complete enumeration cannot be made because their subdivisions are limitless" (trans. J.D.M. Derrett, Bhāruci's Com. ..., ubi cit., vol. II, p. 93).

11. Vide Nārada, Introd. 10 (ubi cit., SBE, vol. XXXIII, p. 7); Kauṭilīya Arthaśāstra 3, 1, 39 (R.P. Kangle, op.cit., part II, p. 195 with further information; cf. Brhaspati II, 18 (ubi cit., SBE, vol. XXXIII, p. 285)). For an instructive discussion vide J.D.M. Derrett et al., Beiträge ..., ubi cit., pp. 42-7; cf. P.V. Kane, ibid., pp. 259-60.

given to understand in their respective subsequent statements that dharmā is based on satya (truth), vyavahāra on witnesses, caritra on general usages or common acceptance among members of a community, and rāja-śāsana is based on the authority of a ruler's individual order.

There is some old dispute concerning the intricate question of how to understand and to apply (according to different post-Manu smṛti compositions) the 'four feet decision-basis' in a vyavahāra (lawsuit) as I have preferred to denote this maxim which admits of being grasped as a source for a decision (better than source of law¹²) or a means whereby a decision-basis may be proved, and this especially with respect to caritra (in short to be rendered with custom or usage). Leaving aside details that are eas-

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12. This preference is induced by the phenomenon that neither a word "law" (Skt. naya) is used in the early dharmaśāstras nor a concept of law (in an occidental sense) being observed, instead there is a body of more or less complex rules or precepts (such as having the quality of dharmā, vyavahāra, caritra or rāja-śāsana) to be met with whereupon a court decision can be based and accordingly enforced under public acknowledgement of the authority in charge of settling disputes. Vide J.D.M. Derrett, The Concept of Law ..., ubi cit., pp. 174-5, where he asks for attention concerning the danger of using the word "law", "... since ... naya may not occur in Medhātithi [a famous commentator of the Manu-smṛti] at all, and since the words which certainly occur do not correspond to any commonly accepted word for "law" in modern languages, ..." (p. 174).

As to the maxim mentioned, some additional explanation may be wanted. In the present context a precept having the quality of vyavahāra (and thus overruling dharmā) means a precept concerning transaction or dealing (vide P.V. Kane, HD, vol. III, p. 245), in other words (Arthaśāstra 3, 1, 1, with Kangle's annotation, ubi cit., p. 190): "vyavahāra is primarily a transaction between two or more parties, which may form the basis of a suit in a court of law." And as such vyavahāra shares by incorporation and references the authority of dharmaśāstra, because "a decision should not be given by merely relying on the text of the śāstra" (Brhaspati, quoted after Kane, ibid., p. 259). Cf. also R.C. Hazra, Dharma - Its Early Meaning and Scope, Part II, in: Our Heritage (Calcutta), vol. VIII, 1960, pp. 7-34, pp. 32-3.

ily obtainable from Derrett¹³ I should take this instructive maxim as a proper precept to be applied in court in order to arrive at a decision being acceptable to those concerned, and simultaneously satisfying the needs of dharmasāstra as well as the interests of a wider public seeing their customs (caritras) readily applied when the situation calls for it.¹⁴

III. This being mentioned, I should like to further this enquiry with a few remarks on the relevance of caritra in its relation to dharma, thus touching upon a delicate but significant problem in attempting to understand the ancient topos of dharma. Any theory of dharma as distinct from a legal theory deserves utmost clarity in the mutual relations of dharma, custom, and "law". This especially would be indispensable for a comparative theory of ancient jurisprudence surpassing occidental conceptions as well as such preconceptions as derive from an occidental jurist's outlook.

Once more, in vyavahāra (a lawsuit) caritra (custom, usage) supersedes dharma; dharma means here the sāstra's dharma as being taught and composed by sāstrīs, which is, however, not the whole dharma in consideration of its origin in śruti,¹⁵ although it is an essential and accordingly

13. Vide "Beiträge zu Indischem Rechtsdenken", ubi cit., pp. 45-7; and "Religion, Law and the State in India", ubi cit., pp. 154-6.

14. The old dispute whether the four 'feet' are means of proof or sources of law is perhaps misconceived. Professor Nobuyuki Watase (private communication) derived recently from this ancient maxim (in an article published in Japanese) a solution according to which two of the 'feet' are means of proof and two are means whereby the decision is to be arrived at. It appears that his view and mine have much in common.

15. This is quite obvious from dharmasāstra itself; vide e.g. Gautama XI, 25-7; Manu XII, 108-13.

highly promoted aspect. Quite apart from the above mentioned maxim this is firmly established, and already fixed in Manu with ample dharmasūtra authority. It is said in Gautama that

"the laws [i.e. the usages in accordance with dharma] of countries, castes, and families, which are not opposed to the (sacred) records [i.e. śruti], (have) also authority"¹⁶;

and Manu reads, much more elaborated, and to be grasped in its context with regard to our maxim:

"... he [the ruler] shall decide ... according to reasons derived both from the location of the litigants and from the śāstra."¹⁷

Implicitly caritra takes a share in dharma; it is an accepted expression of dharma in its entirety which is held to be present even if invisible. For his own welfare man's actions had to be governed by his dharma (svadharmā) and that of his near-range community, the practices of which created caritra in order to maintain lasting order (in the sense of dharma) for the benefit of this whole community that exists as an 'entity' of his own, supporting the individual aiming at niḥśreyasa and mokṣa. Even adharmā practices (as being opposed to the śāstra's dharma) might find acceptance as dharma under specific conditions because, following a statement in the Mahābhārata, dharma and adharmā arise as such due to time and place.¹⁸ Such is the influence

16. Gautama XI, 20 (trans. G. Bühler, op.cit., SBE, vol. II, p. 237).

17. Manu VIII, 3 (trans. J.D.M. Derrett, Bhārucci's Com. ..., ubi cit., p. 92); cf. Manu VII, 203; VIII, 41 and 46; Āpastamba II, 6, 15, 1; Vasiṣṭha I, 17; XIX, 7.

18. Vide Mahābhārata, Śānti P. LXXVIII, ubi cit., p. 182.

of caritra;¹⁹ and of course vyavahāra as propounded in dharmaśāstra had to recognize its near-range aspect of dharma. However, as regards the dharmaśāstra's conception of itself, it is limited to non-opposition to the śāstra's dharma, which is quite obvious in the just-quoted statements by Gautama and Manu. It should not be surprising at all that the śāstra, to the unceasing efforts of which the promotion of dharma could take place and spread its influence lasting over so many centuries, endeavoured to be the only authority to say what is dharma and what adharma.²⁰

IV. Caritra as a decision-basis within vyavahāra participated in those aspects expounded by dharmaśāstra, and moreover it could guarantee more specifically with respect to the situation and the dispute concerned that dharma, as overarching order and the factor of tradition and stability, did not collapse or become itself a subject of aversion and rejection.

19. Vide J.D.M. Derrett et al., Beiträge ..., ubi cit., pp. 18, 23-4, 38-9.

20. J.D.M. Derrett, ibid., p. 36, observes in his instructive explanations considering especially the difference between ācāra (as a source of dharma) and caritra: "Ācāra bildete eine ergänzende Quelle des dharma [after śruti and smṛti], wenn die schriftlichen Quellen schwierig, ... Bei Streitfällen [in a vyavahāra], besonders bei solchen säkularer Natur, mögen Regeln (dharmāni, Neutrum) Quellen des Rechts [according to the above explained maxim] (nicht von dharma) sein, wenn sie sich als echte lokale oder gruppenbestimmte Sitten ausweisen. Diese beiden Wege, die sich auf die Sitten beziehen, dürfen nicht verwechselt werden. Das wertvolle Werk von P.V. Kane [History of Dharmaśāstra] leidet darunter, daß es dies nicht zur Kenntnis nimmt." Cf. also, the same, Dharmaśāstra ..., op. cit., p. 11; and, the same, Religion, Law and the State in India, ubi cit., pp. 158-170, chapters on "Ācāra and the Śāstra" (pp. 158-61), "Custom versus the Śāstra" (pp. 161-64), respectively dealing with the intricate problems of "Custom and Law in Ancient India" (p. 148, the headline of chapter 6).

Concrete social order surfaced in caritra and that had to be brought into a good balance with dharma, not too difficult a task considering that the early smṛtis (dharmasūtras) conceived dharma already in concrete precepts governing human affairs in their communal units, especially in (vide § 8) coagulated relations and activities. However, admitting the impossibility²¹ of providing useful generalizations and abstractions of the many different caritras in vyavahāra (customs and usages in especially long-range business affairs and transactions), a matter of fact concern, the dharmasāstrīs never attempted to present a systematic treatise, on the basis of their specific outlook, on 'law' (or methodically treated 'legal' precepts in a completed presentation). Instead they aimed at a practical arrangement of prominent and widely accepted 'legal' topoi that could enable decisions to be fitted into (or possibly matched against) their prevalent conception of dharma.

To obviate some possible uncertainties on the essential components of caritra I should explain that caritra is fit to be assumed and treated as regular conduct within a community as soon as it has acquired the status of a long-standing, still prevailing practice, founded on the common acceptance of those concerned who, according to definition, already possess a good reputation irrespective of the custom in question.²² Under this proposition caritra can become 'in casu' the appropriate basis for a court decision, and thus can overrule dharma, without however the slightest tendency to replace it generally in the long run of human existence from generation to generation.

21. This is implicit in Manu VIII, 3; 41 and 46.

22. Cf. J.D.M. Derrett et al., Beiträge ..., *ibid.*, p. 21-3.

PART TWO

LI AND NOMOS

§ 14 Origin, Extension, and Consolidation of *li*

I.O. The origin of *li* 禮¹ can be traced as early as the beginning of the Western Chou dynasty (1122 B.C.). The originating phase² comes into consideration within a period of roughly 350 years until the end of the Western Chou dynasty in 771 B.C. The chronologically first movement³ of the topos of *li*, which I shall terminate with the supposed date of Confucius' birth (551 B.C.), overlaps with the 72 years of his life-time, inasmuch that the available sources include the "Spring and Autumn" period (770-464 B.C.) during the rule of the Eastern Chou dynasty (770-256 B.C.). Therefore, the sources of the so-called first movement of extension of the topos of *li* are probably not free from later interpolations under the influence of Confucius' teachings.

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1. The romanization of Chinese characters which is used here and in § 16 is the Wade-Giles system since it is still the one commonly used in English writing dealing with China and Chinese. Reference to Chinese characters is given separately at the end of the enquiry by using small Roman letters as indicators. *li* without indication is always the above given character.
 2. It is not more than about 350 years from before the beginning of the Chou dynasty that history in China can be reliably assumed and dated; this gives us also the presumed date of the (traceable) beginning use of the Chinese script, however, during these 350 years of the Pre-Chou period, when the Shang dynasty ruled over parts of China, there are no indications of *li* as having been written down and preserved. Vide H.G. Creel, The Origins of Statecraft. Vol. One: The Western Chou Empire, (Chicago - London, 1970), p. 336. On problems of the Chinese historicity including the script, vide Joseph Needham, Science and Civilisation in China (in short SCC). Vol. 1: Introductory Orientations, (Cambridge, 1954), pp. 98, 86 f, 32; Fung Yu-lan (transl. by Derk Bodde), A History of Chinese Philosophy, Vol. I, (Princeton, 1952, 1973), p. 7; Wolfram Eberhard, Geschichte Chinas, (Stuttgart, 1971), p. 16.
 3. In making use of the word 'movement' I attempt to describe appropriately the Chinese 'phenomenon' of a distinctive series of mental impulses creating, extending, and consolidating the indigenous expression *li*.

One may take into account that a desirable clear-cut periodic classification is impossible. Problems of this kind are due to the general difficulty of chronology and authenticity of Chinese sources.⁴ Though there are inevitable chronological incongruities, in particular as to the early phases of Chinese history, they do not affect our understanding of *li* as it surfaces in the sources covering a period of nearly one millennium.

The early documents for this enquiry consist in the Shu Ching (Book of History, or better, of Historical Documents), the Shih Ching (Book of Songs or Poetry), and the Tso Chuan (supposedly a commentary on the "Spring and Autumn Annals").⁵

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4. "Problems of chronology hamper the study of almost every aspect of ancient China." H.G. Creel, *op.cit.*, p. 487. The above given dates follow Creel's chronology (*ibid.*, pp. XIV, 47). On problems of authenticity, authorship and biographical material, vide Raymond Dawson, *Confucius*, (Oxford, 1981), pp. 3-8.
 5. On the *Shu Ching* ("Document Classic") as the oldest source of *li*, and generally the oldest historical documentary work in China, vide Creel, *op.cit.*, pp. 447-463; A.F.P. Hulswé, *China im Altertum*, in: Golo Mann u. Alfred Heuß (Hg.), *Weltgeschichte, Zweiter Band*, (Frankfurt a.M./Berlin, 1962, Gütersloh, 1979), pp. 477-571, 483; Bodo Wiethoff, *Grundzüge der älteren chinesischen Geschichte*, (Darmstadt, 1971), p. 22; C.P. Fitzgerald, *China. A short cultural history* (1935), (London, 1950), in German, (München, 1967, 1977), pp. 60, 89.

A valuable and easily attainable survey on translated original sources gives Fung Yu-lan, *op.cit.*, pp. 410-416. As to the sources concerning the origin of *li*, and on *li* in the Confucian Analects, and in the Mencius I shall use and refer to James Legge, *The Chinese Classics* (in the original with a translation, critical and exegetical notes, etc.), 5 vols., (Hong Kong, repr. 1970), in short: Legge, CC. Other sources are given below. Vide the discussion on the sources in Creel, *op.cit.*, pp. 444-486.

According to my intention of giving a brief treatment of the origin, extension and consolidation of *li*, for comparative purposes, I shall only use and refer to the most significant (and easily available) sources for authentic information on *li*. Thus I exclude, for instance, the Chou Li (Ritual of Chou) and the I Li (Book of Etiquette and Ceremonial), here also for reasons given by Creel, *ibid.*, pp. 478-80, 485-6.

Subsequent to its origination, the topos of li can be traced in two movements, one of extension (before Confucius), and a second of consolidation being inaugurated with Confucius' teachings. According to the significant sources, the consolidation movement takes place in three phases: the first comprises the most influential teachings of Confucius as found in the Lun Yü (Analects), the second, the works under the names of his renowned successors and opponents during the Warring States period (463-222 B.C.), and the third the Li Chi (Book of Li) being compiled and edited during the early years of the Former Han dynasty (206 B.C. - 8 A.D.). Both movements represent a long process of continuity until li appears as a strongly Confucian consolidated and complex topos which has pervasively moulded the Chinese culture up to the present day. My characteristic of two movements, of extension and consolidation, seeks, at the very outset of this enquiry, an appropriate descriptive framework which strives to escape from a narrow and unfit presentation of 'things' Chinese by avoiding, if at all possible, the use of an Occidental framework and terminology that would mislead our comparative endeavours.⁶

6. This includes, of course, further descriptive caution, inasmuch as the Chinese world-view differs substantially from our own which we convey inevitably in employing the English language and terminology. These bear no relation to the very different Chinese language of our original sources but have a close relation to the influential heritage of the Greek and Latin languages with remarkable effects on our thinking, speaking, and writing. Vide Reinhard May, Frieden und die Aufgabe des Rechts, (Wiesbaden, 1979), pp. 17-23, 94-106, esp. 108-112, 151-64. In his Science and Civilisation of China, vol. 2, (Cambridge, 1956, repr. 1975), Joseph Needham states in section 18 on "Human Law and the Laws of Nature": "Granet was correct in his conclusion that the Chinese world-outlook was running along quite different lines, and that the Chinese notion of Order positively excluded the notion of Law." (p. 572). And he concludes (p. 574): "The time has come for a rigorous effort to follow Chinese modes of thought."

The strong and lasting Chinese attitude of thinking and acting in the context of li inspired a very rich literature dealing with the manifold aspects of li, visible throughout the whole corpus of the classical sources. Due to the limited scope of this paragraph I shall only primarily and briefly deal with source works and not indulge in references to other works except for a few important contributions⁷ in Western languages in order to aid further and more detailed investigations for comparative purposes.

7. Vide for instance N.E. Fehl, Li. Rites and Propriety in Literature and Life, (Hong Kong, 1971), pp. 81 ff, 213-22; further informative and basic works, including translations of sources, are (general): Wm. Theodore de Bary (ed.), Sources of Chinese Tradition, vol. I, (New York - London, 1960), esp. pp. 1-149; Wing-tsit Chan, A Source Book in Chinese Philosophy, (Princeton, 1963, 4¹⁹⁷³), esp. pp. 3-270; E.R. Hughes, Chinese Philosophy in Classical Times, (London, 1942, repr. 1971), esp. pp. 1-286; Fung Yu-lan, op.cit., esp. pp. 22-378; Alfred Forke, Geschichte der alten chinesischen Philosophie, (Hamburg, 2¹⁹⁶⁴), esp. pp. 5-482 with references in Chinese; Marcel Granet, La civilisation chinoise, (Paris, 1929, 1968), esp. pp. 19-160, 175-207, 339-451; the same, La pensée chinoise, (Paris, 1934, 1968), esp. pp. 33-76, 249-480.

Special works are: Jean Escarra, Le Droit Chinois, (Pékin et Paris, 1936), esp. pp. 3-84 (La conception chinoise du droit); Derk Bodde, Basic Concepts of Chinese Law: The Genesis and Evolution of Legal Thought in Traditional China, in: Proceedings of the American Philosophical Society, Philadelphia, vol. 107, 1963, pp. 375-398; Derk Bodde/Clarence Morris, Law in Imperial China, (Cambridge, Mass., 1967), esp. pp. 3-51 (partly identical with Bodde's Basic Concepts (above)); Karl Büniger, Die Rechtsidee in der chinesischen Geschichte, in: Saeculum 1952, pp. 192-217; Tsien Tche-hao, Le droit chinois, (Paris, 1982), esp. pp. 5-15; Yosiyuki Noda, The Far Eastern Conception of Law, in: International Encyclopedia of Comparative Law, vol. II, 1, (Paris - Tübingen, 1975), pp. 120-36; H.G. Creel, Legal Institutions and Procedures During the Chou Dynasty, in: J.A. Cohen et al. (eds.), Essays on China's Legal Tradition, (Princeton, 1980), pp. 26-55; Oskar Weggel, Chinesische Rechtsgeschichte, (Leiden - Köln, 1980), esp. pp. 3-27, 277-280 (Quellen und Literatur zum chinesischen Recht); Reinhard May, op.cit., esp. pp. 107-235 (zum "Diallakischen Charakter chinesischen Rechtsverständnisses").

The following two dictionaries will be used: F.S. Couvreur, Dictionnaire classique de la langue chinoise, (Paris 1890, 2¹⁹¹¹, repr. 1966/67), short: Couvreur, Dict.; Herbert A. Giles, Chinese - English Dictionary, (London, 1912, repr. 1967), short: Giles, Dict.

I.1. In the Shu Ching, there are four instances of li which belong to the genuine documents of the Western Chou period.⁸ Two of the earliest phrases read:

"Let the king at first employ the ceremonies [li] of Yin, and sacrifice in the new city, doing everything in an orderly way, but without display."

"Order has been initiated throughout the four quarters of the empire; but the ceremonies [li] to be honoured (by general observances) have not yet been settled, and I [the king] cannot look on your [the duke's] merit as completed."⁹

The translation of both phrases is offered with an explanatory comment saying that (in the first instance) the li of the present Chou dynasty cannot be employed for various reasons, so that in the meantime the "ceremonies" [li] of the previous Yin (also known as the Shang dynasty) should be practised, and (in the second instance) that the "ceremonies" in general are to be distinguished from those of the preceding dynasties.¹⁰

In translating li with 'ceremony' in the first instances to be met with, we are introduced to a rather general understanding which requires an additional explanation with regard to the graphic etymology of the character and its wider context. The character is composed of two parts. The right

8. Vide H.G. Creel, The Origins of Statecraft in China, ubi cit., p. 336.

9. Shu Ching, transl. Legge, CC III, pt. V, bk. XIII, 5, p. 438; pt. V, bk. XIII, 19, p. 445; the other two li are to be met with in pt. V, bk. XIII, 15, p. 443; pt. V, bk. XIV, 8, p. 478.

10. Ibid., pp. 438-9, 445.

hand part li^(a) discloses, especially in its ancient form, a vessel used in sacrificing,¹¹ more specifically, a ritual vessel containing two pieces of jade.¹² The left hand part shih^(b) shows the radical of the composite character (the combination of both parts is later than the bone or bronze inscriptions)¹³; the meaning of the shih^(b) part is given with "sign, signify, show, inform, deity, divinity, religious"¹⁴; an etymologically more detailed explanation says that it is a derivative of the three horizontal strokes, meaning, in its straightened form as a part of shih^(b), "influx coming from heaven, auspicious or inauspicious signs, by which the will of heaven is known to mankind"¹⁵.

The whole character retains the original denotation, signifying ritual actions as offering valuable sacrifices. With reference to the ancient dictionary, the Shuo Wen Chieh Tzu of Hsü Shen, completed in 121 AD, Wei-ming Tu observes that li "specifically points to the step or act whereby spiritual beings are properly served and human happiness obtained"¹⁶. Initially, the expression li denotes, most

11. Vide L. Wieger, Chinese Characters, (transl. from the French ed. 1915, New York, 1965), no. 744, p. 547; Giles, Dict., no. 6947, p. 873.

12. J. Needham, SCC II, table 11, no. 77, p. 230.

13. Ibid. Cf. N.E. FehI, op.cit., pp. 4-5.

14. Ibid.

15. Wieger, op.cit., Lesson 3D, p. 29.

16. Wei-ming Tu, Li as process of humanization, in: PEW XXII (1972), pp. 187-201, p. 190; cf. The Sacred Books of China, transl. by J. Legge, The Li Ki, pp. 9-10 (SBE, vol. XXVII, Oxford, 1885, repr. New Delhi 1976); J. Es-carra, op.cit., p. 16, says: "li a le sens primitif de sacrifices offerts aux esprits pour obtenir la prospérité." In a slightly different accentuation A. Waley, The Analects of Confucius, (London 1938, 1971), p. 64, refers to the original meaning of li as 'arranging ritual vessels'.

generally, a human activity in connection with the intention and practice of sacrificing, namely, as mentioned, for some specified purpose, very often in connection with ancestor worship directed to show deep concern and due respect for one's departed, thus keeping up the important continuity of many generations.

As to the above quoted phrases from the Shu Ching, the application of li has been slightly extended, so that the expression li marks the meaning (as probably in similar contexts) 'ceremonious' or 'religious ritual'. While Legge (supra) has chosen the translation "ceremony", Couvreur translated in French "rite, cérémonie religieuse, rendre un culte"¹⁷.

The original li actions grew (as I might suppose) in importance to the extent that their proper performances could bring about the desired positive effects in the visible as well as in the invisible world. Therefore, it seemed quite natural to equate more generally ceremonies or festive proceedings (religious activities, festive celebrations, rituals) of some social relevance with li and to ascribe magical power to those performances.¹⁸

17. Couvreur, Dict., p. 652.

18. Cf. Donald J. Munro, The Concept of Man in Early China, (Stanford, 1969), p. 35; H.G. Creel, The Origins of Statecraft in China, ubi cit., p. 335; Karl Büniger, Die Rechtsidee in der chinesischen Geschichte, in: Saeculum III, 1952, pp. 192-217, p. 201; the same, Religiöse Bindungen im chinesischen Recht, in: K. Büniger/H. Trimborn (Hg.), Religiöse Bindungen in frühen und in orientalischen Rechten, (Wiesbaden, 1952), pp. 58-69, p. 63; the same, Entstehen und Wandel des Rechts in China, in: Entstehung und Wandel rechtlicher Traditionen, hg. v. W. Fikentscher et al., (Freiburg/München, 1980), pp. 439-472, p. 449-50. Marcel Granet, La civilisation chinoise, ubi cit., gives a valuable impression of the early Chinese ways of life from a sociological point of view, esp. his descriptions of "La vie aux champs", "Les coutumes paysannes", "Lieux-saints et cités", "Pouvoirs diffus et autorité individuelle", et "Dieux et chefs masculins", pp. 161-217.

In the Shih Ching (The Book of Poetry, between 1122-600 B.C.) li occurs primarily with this connotation ten times in six poems;¹⁹ in two poems the application of li is once more extended. The first of it²⁰ presents li as being used in the sense of 'rules of proper and correct behaviour'. In the second poem li occurs twice in the third and last stanza consisting of four lines with four characters per line. It reads:

Look at the rat! It has its teeth.
And a man! But without li?
A man, and yet without li
Why does he not quickly die?²¹

Li means in this context 'correct and proper behaviour', man's behaviour that would fit a special situation, for instance a sacrifice in a devotional manner at the right time. Thus, li has acquired the meaning of 'propriety'.²² Despite enormous difficulties of translating li into a language of the non-Chinese language family we can assume without much hesitation that li in whatsoever sense is essential to man himself and his direct or indirect relation to others. Here, already, li surfaces as man's way of life, whether in appropriate activities, such as ceremonies and the original sacri-

19. Vide Legge, CC IV, pp. 85, 323, 371-2, 397, 586, 603; cf. H.G. Creel, op.cit., pp. 336-7 (he speaks of ten times in seven poems, and N.E. Fehl, op.cit., p. 81, speaks of nine times in six poems, whereas I have counted ten in six).

20. Vide Legge, CC IV, pt. II, bk. IV, IX, 5, line 8, p. 323. Cf. the discussion of an adequate translation and understanding by H.G. Creel, op.cit., pp. 336-7 with reference to Karlgren and Waley; I do not follow Karlgren's and Legge's translation of li by 'law'.

21. Vide Legge, CC IV, pt. I, bk. IV, VIII, 3, p. 85 (in the original Chinese version); my translation follows Legge's comment (ibid.) but slightly deviates from his wording in lines 2 and 3; cf. H.G. Creel, op.cit., p. 337, where he gives Karlgren's translation of the whole poem (li is rendered with 'decorum').

22. Vide Legge, ibid.

ficial acts, or in the manner of man's cherished behaviour. H.G. Creel points out that in the Western Chou period li hardly refers to a special code of conduct peculiar to aristocrats and that "in sharpest contrast to the situation in Spring and Autumn times there is no single case in which li is unmistakably used as the name of an aristocratic code"²³.

I.2. To further the understanding of the original topos of li four highly significant framework topoi should be mentioned, t'ien^(c), t'ien-ming^(d), te^(e), and hsiao^(f). T'ien^(c) (heaven) represents the image of the totality of cosmic events beyond man's direct control.²⁴ But according to the early Chinese belief in a reality of imagination, there is an interrelation between man's way of life and heavenly actions and reactions.

Problems of a harmonious interrelation between t'ien^(c) and man centre man's interest in his own contribution.²⁵ To accord with the t'ien-ming^(d) (the appointment of heaven) ought to be the king's utmost concern in order to ensure harmony between heaven and earth by means of an unceasing cultivation of te^(e) (virtue, human excellence)^{25a}. Thus it is said in the Shu Ching (Book of Historical Documents):

23. H.G. Creel, op.cit., pp. 337-8. Horace H.Y. Too, The Origin and Formation of the Traditional Chinese Synthetic Jurisprudence, in: Chinese Culture IX, 1962, pp. 73-107, p. 85.

24. Cf. T'ang Chün-i, The T'ien Ming in Pre-Ch'in China, in: PEW XI (1962), pp. 195-218, p. 203; Otto Franke, Chinesisches Recht, in: Handwörterbuch der Rechtswissenschaft, I (Berlin, 1926), pp. 867-871, p. 867; Fung Yu-lan, op.cit., p. 31 (distinguishing five different meanings of t'ien).

25. Cf. A.F.P. Hulswé, China im Altertum, ubi cit., pp. 497-507.

25a. An even more adequate translation (interpretation), also in this early phase of Chinese history and language, might be, because of the non-existing pair of vice and virtue as opposed to each other, 'moral impetus, excellent in character'; vide infra, III.3.(3). Cf. A. Waley, The Analects of Confucius, (London, 1938, 1971), p. 33.

"Heaven [*t'ien*] was not with him because he did not seek to illustrate his virtue [*te*]." ²⁶

And a famous poem in the Shih Ching (Book of Poetry) says, elucidating those interrelations:

"The appointment of Heaven [*t'ien-ming*] is not constant (i.e. 'not once for all'). ... Ever think of your ancestor, cultivating your virtue [*te*], always striving to accord with the will (of Heaven) [(*t'ien*)*ming*], so shall you be seeking for much happiness. ... The great appointment [*ming*] is not easily [preserved]. ... Do not cause your own extinction." ²⁷

Despite an observable but uncharacteristic belief in spirits, and in some kind of a supreme deity in very early phases of history, ²⁸ man considered himself little exposed to

26. Shu Ching, transl. Legge, CC III, pt. V, bk. XIV, 11, p. 457. T'ang Chün-i, op.cit., p. 201, clearly emphasizes that "the Heavenly mandate comes after man's cultivation of virtue [*te*^(e)], and the future of men is thus not determined by God. Moreover, after a man receives the Heavenly mandate, there is still something (i.e. cultivation of virtue) for him to do which can be done only by himself". This is plainly voiced in the following quotation from the Book of Poetry (vide infra, text). Concerning the early topos of *te*^(e) vide also A. Waley, The Way and its Power, (Boston/New York 1934, cit. after the Mandala ed., London, 1977), pp. 21, 31-2; D.J. Munro, op.cit., pp. 191-3.

27. Shih Ching, transl. Legge, CC IV, pt. III, bk. I, 1, 5-7, pp. 430-1.

28. Cf. Homer H. Dubs, Theism and Naturalism in Ancient Chinese Philosophy, in: PEW IX (1959/60), pp. 163-172, p. 166; Werner Speiser, China. Geist und Gesellschaft, (Baden-Baden, 1959, 1974), p. 62; H.G. Creel, op.cit., pp. 493-506 (The Origin of the Deity T'ien); J. Needham, SCC II, ubi cit., pp. 580-1.

the supernatural.²⁹ Instead he firmly believed in the close interdependence of nature and his behaviour. Therefore, it is up to him to regulate his conduct in the realms of his own control, such as in the family, the nucleus of human interdependences, in order to create an all-embracing harmony between nature and man. Apart from li, hsiao^(f) (filial piety) is a dominant family virtue, without which disharmony would prevail throughout the family, and thus profoundly affect the balance between the human and non-human events.³⁰

I.3. Devoid of a conception of transcendence and with little tendency to an occupation with the supernatural, the topos of t'ien-ming^(d) (or any other, e.g. shang ti^(g) [ruler above]) never took on the form of a divine celestial creator, nor, vice versa, could such topoi create an inclination to extend the effective 'reality of conception'³¹ into the spheres of the supernatural, from which viable effects were to be expected in the realms of human life and events. T'ien-ming^(d) implied the idea of heaven as issuing 'directives' or commands of various kinds (and we could find many examples)³², but it did not give way to the 'superstructure' of an all-powerful personal lawgiver on whom exclusively depended man's destiny with necessity.³³

29. Cf. Derk Bodde, Dominant Ideas in the Formation of Chinese Culture, in: the same, Essays on Chinese Civilization, (Princeton, 1981), pp. 132-8, pp. 132-3; T'ang Chün-i, Cosmologies in Ancient Chinese Philosophy, in: Chinese Studies in Philosophy, V (1973), pp. 4-47, p. 11.

30. Vide Shu Ching, Legge, CC III, pt. V, bk. IX, 16, pp. 392-3. Cf. infra, III.3.(2), footnote 93, and the brief discussion at II.3.(3).

31. Vide Reinhard May, Frieden und die Aufgabe des Rechts, ubi cit., pp. 22, 104-111.

32. Vide J. Needham, SCC II, pp. 547-8.

33. Cf. T'ang Chün-i, op.cit., pp. 11-12; J. Needham, ibid., p. 581, where he gives the exposition that "there was no conviction that rational personal beings would be able to spell out in their lesser earthly languages the divine code of laws which he had decreed aforetime".

In direct contact with all kinds of natural phenomena which maintained a strong feeling for mutual dependence, constant influence was thought to be exerted upon human behaviour in order not to upset the balance between heaven and earth. In this sense man had to respond to heaven with a compliant mode of existence on earth; li was held to be such a response, thus, a factor, which, at best, could regulate human affairs everywhere t'ien hsia^(h), under heaven (i.e. on the earth or in the world). And it is from this concern,³⁴ namely that the order of human society must correspond to the order of nature, that the topos of li gained fundamental value and thus was gradually transferred to new fields of application. This took place in a first movement, namely, as we shall see, in a movement of extension of the topos of li before the teachings of Confucius made their decisive contribution, which inaugurated a second movement, one of consolidation.

II.1. With the consecutive 'Spring and Autumn' period during the reign of the Eastern Chou kings, an increasing significance of the topos of li, gradually intruding into almost all spheres of man's existence, is easily to be gathered from numerous references, in particular from the later documents of the Shu Ching and the Tso Chuan (a commentary on the very brief year-by-year chronicle history of the state of Lu, the Ch'un Ch'iu (Spring and Autumn Annals), from 722-481 B.C., compiled c. 300 B.C. on the basis of earlier records)³⁵.

34. Cf. Louis von Kohl, Die Bedeutung der Riten im alten China, in: Ostasiatische Rundschau 13 (1932), pp. 59-61, 81-84, pp. 82-3; Cheng Chung-ying, Chinese Philosophy: a characterization, in: Invitation to Chinese Philosophy, ed. by A. Naess/A. Hannay, (Oslo, 1972), pp. 141-165, pp. 144-6, 162-3.

35. Vide Fung Yu-lan, op.cit., p. 415; H.G. Creel, Legal Institutions ..., ubi cit., p. 47.

The conceptions of t'ien^(c) as well as t'ien^(c) and ti⁽ⁱ⁾ (heaven and earth) still determine man's desire to conform to the pattern of nature by means of an adequate conduct of life which was deemed to be available most adequately in a li expressing behaviour. As man owes his existence to t'ien^(c) and ti⁽ⁱ⁾³⁶, the three ways of t'ien^(c), ti⁽ⁱ⁾, and man³⁷ have to be brought into a balanced correspondence through the practices of li, so that the natural harmony between t'ien^(c) and ti⁽ⁱ⁾ will not be spoiled. The Tso Chuan gives an explicit account of it:

"Ceremonies [li] (are founded in) the regular procedure of Heaven, the right phenomena of earth, and the actions of men. Heaven and earth have their regular ways, and men take these for their pattern, imitating the brilliant bodies of Heaven, and according with the natural diversities of the earth. ... The rules of ceremony [li] were therefore framed to support (that nature)."³⁸

As it is advisable for everybody to comply with the accepted rules of li, so the ruler in particular takes the foremost responsibility in governing his people according to the demands of li, because it was li

"what the ancient kings received from [in the sense of 'have been made to pay attention to'] Heaven and Earth for the government of their people, and therefore they ranked it in the highest place"³⁹.

36. Vide Shu Ching, transl. Legge, CC III, pt. V, bk. I, I, 3, pp. 283-4 (with comment).

37. I Ching ("The Book of Changes"), transl. Z.D. Sung, appendix II, ch. X, p. 333.

38. Tso Chuan, transl. Legge, CC V, bk. X, year XXV, pp. 704/708.

39. Ibid., bk. X, year XXVI, pp. 715/719.

This means that t'ien^(c) and ti⁽ⁱ⁾, comprehended as interrelated factors of natural phenomena, cause man to respond by creating out of his own experience and imagination, modes of an appropriate conduct, lasting models of refined behaviour, to settle his own affairs; by acting towards one another on the principle of reciprocity, the relations of men are balanced to accord with the goal of an overarching balance between nature and man. Such conduct conforms to the pattern of te^(e) and shapes the standards of li.⁴⁰

"It is by propriety [li] that righteousness [i^(k)]⁴¹ is carried out; it is by good faith [hsin⁽¹⁾ (sincerity)] that propriety [li] is maintained."⁴²

Thus, we find li in close relation to the most prominent guidelines according to which man's affairs should be conducted.

II.2. Considering the interdependence of heaven, ruler, and people,⁴³ it is the ruler, called the Son of Heaven,⁴⁴

40. Vide ibid., bk. V, year XXVIII, pp. 204/209; bk. I, year XI, pp. 31/33.

41. Instead of translating 'i' with 'righteousness', namely, 'that which is right to do' (vide Giles, Dict., no. 5454), I prefer to render 'i' with 'that which is appropriate to do', or 'a suitable and proper way of behaving towards one another'.

42. Tso Chuan, ubi cit., bk. V, year XXVIII, pp. 206/213.

43. Shu Ching, ubi cit., pt. IV, bk. VIII, II, 3, p. 255.

44. "Emperors indeed were not themselves considered to be divine, despite the title Son of Heaven. This was merely a manner of speaking, natural enough to the family-conscious Chinese, to convey how the ruler acted as intermediary between Heaven and the people, serving as son to the former and parent to the latter, neither relationship being meant literally." R. Dawson, The Chinese Experience, (London, 1978), p. 11.

on whom rests the task of perfecting government with *li*,⁴⁵ and who is addressed:

"Exert yourself, O king, to make your great virtue [*te*^(e)] illustrious, and set up the pattern of the Mean before the people. Order your affairs by righteousness [*i*^(k)]; order your heart by propriety [*li*]: - so shall you transmit a grand example to posterity."⁴⁶

Given such prominence to the position of the ruler and his actions, which are required to be "in reverent accordance with the ways of Heaven [*t'ien tao*^(m)]"⁴⁷, failure in due attention to *li* on the part of the ruler leads to imbalance and confusion.⁴⁸ But if *li* takes over and governs states and families⁴⁹ (clans, people) order is secured and provision made for the good of one's future heirs.⁵⁰

II.3. A lasting impact on the self-creative movement of making *li* into a distinctive way of life must be ascribed to the ordering of society in *wu lun*⁽ⁿ⁾ (five relationships). According to the Chinese 'reality of conception' their origin may be seen in the context of *t'ien*^(c) (heaven) as a complex of natural phenomena working as a source of

45. Tso Chuan, ubi cit., bk. VIII, year XII, pp. 377/378.

46. Shu Ching, ubi cit., pt. IV, bk. II, IV, 8, p. 182.

47. Ibid., pt. IV, bk. VIII, II, 2, p. 254.

48. Ibid., pt. IV, bk. VIII, II, 11, pp. 257-8.

49. Family means the joint or extended family.

50. Vide Tso Chuan, ubi cit., bk. I, year XI, pp. 31/33.

inspiration.⁵¹ In the Shu Ching, we find the following significant passage concerning the varieties of *li* linked with the five constituent sections (*wu tien*^(o)) or relationships (*wu lun*⁽ⁿ⁾) of society considered as a whole organism:

"From Heaven [*t'ien*^(c)] are the (social) arrangements with their several duties [*tien*^(o)] (i.e. with their five sections and their respective duties); to us it is given to enforce those five duties [*tien*^(o)], and then we have the five courses of generous conduct! From Heaven are the (social) distinctions with their several ceremonies [*li*]; from us proceed the observances of those five ceremonies [*li*], and then do they appear in regular practice! When (sovereign and ministers) show a common reverence and respect for these, do they not harmonize the moral nature (of the people)?"⁵²

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51. Thus, there are the five elements (or activities between heaven and earth, that which moves about without ever ceasing), namely, water, fire, wood, metal, earth; vide *Shu Ching*, ubi cit., pt. V, bk. IV (The Great Plan), pp. 320 ff, 325. Cf. R. Dawson, *The Chinese Experience*, ubi cit., p. 90. On the relation of natural phenomena and social organization Jean Escarra, *op.cit.*, points out considering M. Granet's expositions: "On conçoit qu'un groupe humain, ayant acquis, par des observations répétées, une certaine connaissance des phénomènes naturels, établit ensuite à l'imitation de ceux-ci, des règles d'organisation sociale." (p. 8).
52. *Shu Ching*, ubi cit., pt. II, bk. III, III, 6, pp. 73-4. On *lun*⁽ⁿ⁾ and *tien*^(o) see the entries in Giles, *Dict.*, nos. 7464, 11177, and Legge, *CC III* (*Shu Ching*), pp. 580, 654 (index), on *tien*^(o) in the sense of *lun*⁽ⁿ⁾ as in the *wu lun* which appears in Confucius' *Analects* and in Mencius, etc. cf. F.S. Couvreur, *Dictionnaire classique ...*, ubi cit., p. 72; A. Forke, *Geschichte der alten chinesischen Philosophie*, ubi cit., pp. 18, 42.

This passage is not at all easy to render adequately into English. However, we are able to grasp the central issue, in particular if we take some other passages into consideration.⁵³ Thus, it is obvious that there are the five tien^(o) or lun⁽ⁿ⁾, namely the distinguished relationships between father and son, ruler and subject, husband and wife, elder and younger (brother), and between friends. Taken together, they shape the whole society in a natural and characteristic manner so as to secure a plain and reliable order under the proposition that they are interlocking with their respective circle of duties and their corresponding performances which demand due attention to li expressing an expected correct and proper behaviour. In fulfilling one's duty li is the manner of how to do it, and so "the outward expression of inward feeling"⁵⁴ or, perhaps more likely, the inner constraint to act or react expectedly, in accordance with usage.

The observance and performance of li becomes the fruit of the respective five (moral) lessons, the wu chiao^(p)⁵⁵ or the five instructions of how to behave. This in turn created, quite naturally, the manifold particular li, the polite and decent ways of conduct (usages) due to the relationship and the situation therein. The Shu Ching refers, so to say representatively, to the three and five li. The three li are "all the observances in the worship of the spirits of heaven, the spirits of earth, and the spirits of men"⁵⁶. And the five li mentioned in the Shu Ching are

53. For instance, Shu Ching, ubi cit., pp. 31, 58, 316, 580.

54. Quoted after Giles, Dict., no. 6949, p. 873.

55. Vide Shu Ching, ubi cit., pt. V, bk. III, 10, p. 316; see also Legge's comment, ibid., p. 31.

56. Shu Ching, ibid., pt. II, bk. I, V, 23 with Legge's comment, p. 47.

those appropriate to worship, to calamity and mourning, to State guests, to war, and to festivities such as marriages and other occasions of joy.⁵⁷

II.4. Offences in disregard of one's duty called for appropriate treatment in order to restore the lost equilibrium of nature, the harmonious interaction between the human and non-human spheres. The wu hsing^(r) (the five punishments) are regarded as such treatment; they are to be considered in correspondence to the wu chiao^(p) (the five educational lessons of conduct (duty)) within the five relationships and their implicit order to conform to the respective rules of li.⁵⁸ It was admitted that the severe and formidable five punishments, and to a lesser degree the five banishments, were primarily intended to prevent offences that caused, as has been believed, the dreaded disturbances of natural harmony. Accordingly, the maxim prevailed that compassion and virtue should rule in punishments,⁵⁹ and likewise that "through punishment there may come to be no punishments, but the people accord with the (path of the) Mean [i.e. the harmonious middle path]"⁶⁰. In paying attention to this maxim, we find it repeated in the context of an important instruction concerning a perfect and wise gov-

57. Ibid., pt. II, bk. I, III, 8, pp. 35-7 with Legge's explanation and reference to a different viewpoint on the contents of the wu li (p. 37). Vide also, J. Escarra, op.cit., p. 10, pointing out once more the supreme importance of t'ien^(c) in relation to everything t'ien hsia^(h) (under heaven).

58. Vide Shu Ching, ubi cit., pt. II, bk. I, V, 19-20, pp. 44-5; cf. ibid., pp. 38, 74, 542. Among the offences for which punishment is provided failure in familial duty ranks high. Creel, The Origins of Statecraft, ubi cit., p. 168.

59. Vide Shu Ching, ubi cit., pt. II, bk. I, III, 11, p. 39, and (on te^(e), of pre-'Spring and Autumn' origin) pt. V, bk. IX, 21, p. 396.

60. Shu Ching, ubi cit., pt. II, bk. II, II, 11, p. 59.

ernment that can do without reliance on fixed regulations. The central part of this passage reads:

"Do not rely on your power to exercise oppression; do not rely on the laws [$f_a^{(q)}$] to practise extortion. Be gentle, but with strictness of rule [$chih^{(s)}$, in the sense of restraint]. Promote harmony by the display of an easy forbearance."⁶¹

The topos of $f_a^{(q)}$, which we shall come to see in contrast to li , signifies in its present form of writing (retaining the meaning of the differently composed original graph) 'a rule or fixed regulation (of punishment), a model as well as pattern and means'.⁶² Both conceptions represented by $hsing^{(r)}$ and $f_a^{(q)}$ are correlated in that $f_a^{(q)}$ denotes the strict procedure or method (which came to be fixed in writing) pertinent to the enforcement of punishment, especially concerning the wu $hsing^{(r)}$ (the five punishments) which were in use long before $f_a^{(q)}$ became known as referring to written penal law.⁶³ Significantly, the origin of $hsing^{(r)}$ and $f_a^{(q)}$ was attributed to foreign, non-Chinese influence, and may additionally explain the strong antipathy, primarily concerning $f_a^{(q)}$, the promulgation of which met with deep concern, and likewise the application of it had to be, nonetheless, amazingly considerate, and always carefully premeditated. This can be instructively demonstrated by

61. Ibid., pt. V, bk. XXI, 7, p. 541.

62. Cf. Escarra, op.cit., p. 16; L. Wieger, op.cit., p. 288; F.S. Couvreur, Dictionnaire classique, ubi cit., p. 508; D. Bodde, Basic Concepts of Chinese Law, ubi cit., remarks that " f_a is the usual generic term for positive or written law as an abstraction ... The word was already in common use before its appearance in legal contexts" (p. 379).

63. Vide D. Bodde, ibid., pp. 379-80.

reference to Lü Hsing section ("The Prince of Leu upon punishments"⁶⁴) in the Shu Ching; it concerns an announcement about the handling of punishments, probably the oldest notice of such a compilation in China though its exact date still remains a question of conjecture.⁶⁵ Once more we find a manifestation of te^(e) (moral impetus, excellent in character), repeatedly emphasized,⁶⁶ and, moreover, a condemnation of inappropriate application of the wu hsing, which is attributed to an uncultivated practice, in fact to that of the non-Chinese Miao people, who "made the five punishments engines of oppression, calling them the laws [fa^(q)]"⁶⁷.

Furthermore, there is a second example demonstrating the negative effects of a code of punishments in contrast to the traditional, long-established way of life, namely the practice of li in a spirit of benevolence and harmony. The Tso Chuan which, as mentioned above, was compiled from earlier records during the third century B.C., mentions the Hsing Shu (Books of Punishments), probably the first inscriptions (536/5 B.C.) to be treated as a ruler's code of defined penal regulations of totally secular origin and without any reference to the supernatural sphere. Though the text itself is not available, we are reliably informed by the Tso Chuan that the Hsing Shu⁶⁸ met with a strong oppo-

64. Shu Ching, ubi cit., pt. V, bk. XXVII, 1-22, pp. 588-611, with Legge's translation of the book-title.

65. Vide the discussion of the problem (also in view of the general question of the earliest "bodies of [written] law") by H.G. Creel, The Origins of Statecraft..., ubi cit., pp. 161-66 (with further references).

66. Shu Ching, *ibid.*, pp. 593, 595-6, 609, 611.

67. Ibid., p. 591.

68. In Legge, CC V, ubi cit., pp. 607-611 (Duke Chao, 6th year). Cf. The discussion by J. Needham, SCC II, pp. 521-2; D. Bodde, Basic Concepts ..., ubi cit., pp. 381-2; O. Weggel, Chinesische Rechtsgeschichte, ubi cit., pp. 3-4.

sition culminating in the saying: "When a State is about to perish, there will be many new enactments [*chih*^(s)] in it."⁶⁹ One of several good reasons to reject a government on the basis of written and defined regulations (generally referred to as *fa*^(q)⁷⁰, especially in later centuries) is that they make people reject *li* and appeal to *fa*, thus increasing their contentious spirit and provoking danger to the maintenance of natural harmony which by all means had to be prevented for the sake of man's existence under heaven (*t'ien hsia*^(h)). Therefore, as Joseph Needham pointed out, "from the beginning the supple and personal relations of *li* were felt to be preferable to the rigidity of *fa*^(q)"⁷¹.

II.5. We have considered now the first, socially important movement of extension of the topos of *li*. Therein, *li* was found to evolve (broadly speaking) from a special to a general way of life.⁷² This process took place (including the originating phase) over a period of about 600 years. However, I am unable to give a definition of *li*. It appears that by the 6th century B.C. *li* was only available as a complex topos, the comprehension of which entirely depended on the contexts that reflected the situation in which *li* played its peculiar part. In fact, the actual topos of *li* cannot be exhausted in any (abstract) definition. Inasmuch as *li* occurs variously in the early literature, it is amenable

69. *Ibid.*, pp. 607/610 (transl. Legge).

70. So especially the *Fa Ching* by Li K'uei (only the headings of its contents are available) which, as one can assume, served as model for all later so-called codes of regulations ('law'). Vide J. Needham, *ibid.*, pp. 523-4. Vide also Timoteus Pokora, *The Canon of Laws [Fa Ching] by Li K'uei - A Double Falsification?*, in: *Archiv Orientální* 27 (1959), pp. 96-121, who expresses doubts whether it can be used "as a base for the far-reaching conclusions concerning the origin of the Chinese codes" (p. 117).

71. J. Needham, *ibid.*, p. 522.

72. Cf. H.G. Creel, *The Origins of Statecraft ...*, ubi cit. p. 197; N.E. FehI, *op.cit.*, pp. 216-7, 220-1.

only to a rather general characteristic such as a socially created and accepted way of life, which obviously comprises a wide range of possible and accepted modes of human activities, being in the course of time represented as distinct habits or usages, in particular within the five relationships.

In contrast to the above mentioned regulations called fa^(q), li was not codified and remained unwritten during most of the Chou dynasty,⁷³ being orally preserved and transmitted by means of example and education. Thus, li was modelled from within and not imposed from above, devoid of any individual author, whether human or divine.⁷⁴ Li owes its invention to man's endeavour to fit into the natural harmony of things; to give active support to it, appropriate conduct is sought with due attention to the practice of i^(k) and te^(e).

While the early phase saw little disposition to the supernatural sphere, disclosing li as an attentive and appropriate expression in form of sacrificial ceremonies, the following phase exhibited a movement of li into the natural human spheres of life, where li was regarded as a suitable action or reaction in correspondence with the visible and invisible natural forces. Li behaviour became an essential part in human relations with almost no propensity to the supernatural; it was socially legitimated and under constant survey by the whole community in its wu lun⁽ⁿ⁾ organization with an accent on hierarchical modifications.⁷⁵

73. Vide D. Bodde, Basic Concepts ..., ubi cit., p. 383.

74. Cf. E.J.M. Kroker, Positives Recht und Naturrecht in China, in: Kroker/Veiter (eds.), Rechtspositivismus ..., (Wien/Stuttgart, 1976), pp. 130-157, pp. 138-9; D. Bodde, ibid., p. 378 (even in the case of fa^(q) no divine origin was ever suggested).

75. Cf. K. Büniger, Die normativen Ordnungen in China und ihr Verhältnis untereinander (1951), in: Ostasienwissenschaftliche Beiträge, (Wiesbaden, 1971), pp. 169-180, p. 170; D. Bodde, ibid., p. 383.

As to the operation of li, we may assume that the practice of it was internally enforced, working upon man's consciousness in form of an inner-constraint or compulsion to comply with its rules and models, so as to demonstrate one's personal ability to support universal harmony as well as to contribute to the cultivation of society and oneself. Everybody had to have, and to do, his duty, namely conforming to the way of conduct in accordance with li, or he was likely to bring about disorder in his relationships and personal misfortune. In the case of a ruler, this is amply illustrated with a passage from the Shu Ching:

"By my desires I was setting at nought all rules (of conduct), and by my self-indulgence I was violating all rules of propriety [li]: - the result must have been speedy ruin to my person. Calamities sent by Heaven may be avoided, but from calamities brought on by one's-self there is no escape."⁷⁶

Whereas this pre-Confucian passage, drawing attention to the consequences of violating the rules of li, in the sense of appropriate demeanour to others, already indicates a shift of emphasis to man's way of life (here with respect to the ruler's part in relation to his subjects and the due consequences of his failure), which we shall see at the centre of Confucius' teaching, the main emphasis nonetheless remains in the perspective of t'ien dao^(t), the way of heaven, or, in other words, in the "world of nature", where man can "find in all things an underlying harmony and unity, rather than struggle and chaos".⁷⁷ However, it is the task

76. Shu Ching, ubi cit., pt. IV, bk. V, II, 3, p. 207.

77. D. Bodde, Dominant Ideas in the Formation of Chinese Culture, ubi cit., pp. 133, 135; cf. the same, Harmony and Conflict in Chinese Philosophy, in: A.F. Wright, (ed.), Studies in Chinese Thought, (Chicago - London, 1953, 1967), pp. 19-80, p. 46.

of man to make his way to accord with it by means of constant regard for li, since "there is establishment for the observers of propriety [li], and overthrow for the blinded and wantonly indifferent"⁷⁸.

III.1. In what follows, I shall describe in a rather cursory manner the second movement of li. On the basis of the proceeding one, this movement can be conceived as the central and final one that took place in three phases, all of which contributed to the consolidation of the topos of li over a period of two thousand years. There is the initial phase of Confucius' teaching transmitted in the so-called Analects (Lun Yü)⁷⁹, and the subsequent ~~one~~ of his famous successors and opponents, which roughly coincides with the Warring States' period (463-222 B.C.)⁸⁰, and finally the third phase, beginning with the Former Han dynasty (206 B.C. - 8 A.D.),⁸¹ when the great compilation Li Chi (the so-called Book of Rites) was ready to appear concluding the consolidation of li. All this covers a period of c. 500 years from the birth of Confucius (551-479 B.C.) to the appearance of the Li Chi.

78. Shu Ching, ubi cit., pt. IV, bk. II, IV, 9, p. 183.

79. Though the date and the actual authorship of the Lun Yü ('Selected Saying', or Analects in Legge's well-known translation) are uncertain, there is little doubt, according to A. Waley, op.cit., pp. 21-26, that the compilation took place after Confucius' death and was in existence (possibly not in its present state) when Mencius and Hsün Tzu referred to the master's teachings, i.e. by the middle of the fourth century B.C. As usual, when referring to Confucius' authorship of the Lun Yü, I do so in a conventional sense disregarding the problems of authenticity involved; this applies likewise to all subsequent works of the pre-Han period. Concerning the Li Chi some similar problems are involved (vide the introductions in Li Chi, ed. New York 1967).

80. As to the dates, vide H.G. Creel, The Origins of Statecraft, ubi cit., pp. XIV, 47.

81. Previous to the Former Han dynasty is the first Chinese imperial dynasty of the Ch'in (221-207/6 B.C.) whose impact on the formation of the Chinese culture may also be seen in the controversy over fa or li as a suitable means of regulating administration and social life.

In characterizing the sum of these phases as a consolidation movement, I want to make it clear that there was no proper development, rather, a steady process of manifestation of all principal aspects of li already exhibited; in other words, a constant review takes place combining the early aspects into one complex whole. Basically no new aspect has been added, but many refinements and elaborations of concrete behaviour referring to what exists already in traditional practices of li, at least in a common understanding of what might be an appropriate practice. Thus, naturally a great number of delicate shades of meaning can be attached to the topos of li as it occurs in our sources. Consequently, it is again impossible to offer a definition of li, either in Chinese or in any other language. Likewise all the difficulties of translation remain; in a strict sense li is untranslatable, its complexity defies all successful efforts.⁸² Thus, we can be content with a broad description which already resulted (supra) in an equally complex English version: li as a socially created and accepted way of life, being firmly consolidated by the end of this second movement.

III.2. Even most expositions, comments and references concerning li as it appears in the sources, are subtle or complex, interwoven with quite different subjects or special indications so that an almost entire presentation would go far beyond the scope of this enquiry. But there are five significant propositions suitable for us to focus on the consolidation movement of the topos

82. Cf. Noah Edward Fehl, op.cit., pp. 3-4; and cf. furthermore for instance, Yungback Kwun, Exkurs: "Li" als der monistische Rechtsbegriff in der chinesischen Philosophie, in: Entwicklung und Bedeutung der Lehre von der "Natur der Sache" ..., Diss. (Universität des Saarlandes, 1963), p. 49; Herbert H.P. Ma, Law and Morality. Some reflections on the Chinese experience past and present, in: PEW 21 (1971), pp. 443-60, p. 444; Jung-Pyung Lim, Das gegenwärtige Familienrecht Südkoreas zwischen deutscher Rechtsdogmatik und fernöstlicher Sozialdoktrin, Diss. (Mainz, 1972), p. 90; Antonio S. Cua, Dimensions of li ..., in: PEW 29 (1979), pp. 373-94, p. 374.

of *li*. These can be elicited as a descriptive framework for our summary to be illustrated with characteristic passages from the original works.⁸³

The propositions are now to be given with their respective subsequent explanations, and no special importance should be attached to the order in which I have set them out: (1) No innovation or creation, but rather recurrence and insistence on ancient experience and conduct to be invoked by constant learning (*hsüeh*^(u)). (2) Maintenance and special emphasis of *li* as practice(s) against individual misconduct and social disorder, and for self-cultivation and social harmony. (3) Unceasing attention to the topos of *li* in connection with the topoi of social and moral esteem. (4) Preference of *li* over *fa*^(q) and *hsing*^(r). (5) Auspicious conservation of *li*, in general, as a socially created and accepted (and binding) way of life, and in particular, as a vast body of concrete rules of conduct.

III.3.(1): Confucius refers to himself as a transmitter of antiquity.⁸⁴ Assuming that a model or an ideal way of conduct existed then, upon which man could rely and follow in the present days of decay, transmission rather than creativity is needed, innovation is unnecessary. The topos of *li* need not be given from without to the world, there is no connection to a supramundane sphere. Great antiquity is

83. In quoting from the works concerned, I shall make use of well-known and easily available English translations, if necessary, sometimes giving more than one translation or cross-references, in order to draw attention to differences in the English versions, which are, quite naturally, the result of general and, as regards the Chinese language and literature, of special translation problems.

84. Vide *Lun Yü* ('Analects'), VII, I; cf. II, XI [referring to, or, in case, quoted after the English versions of (1) J. Legge, *The Chinese Classics* (in Chinese and English with copious comments), vol. I: *Confucian Analects*, etc., (1861), (repr. Hong Kong, 1970); (2) A. Waley, *The Analects of Confucius*, (London, 1938, 1971); (3) *Confucius, The Analects (Lun Yü)*, by D.C. Lau, (Harmondsworth (Penguin Classics), 1979).

attributed to li, its origin is ascribed to a social enterprise of sages, who sought to harmonize human behaviour with the way and order of the natural world. Thus, the Shang (Yin) dynasty followed the li of the Hsia, and the Chou the li of the Shang (Yin).⁸⁵ From a Confucian viewpoint the following passage is of central importance.

"Of the things brought about by the rites [li], harmony is the most valuable. Of the ways of the Former Kings, this is the most beautiful, and is followed alike in matters great and small, yet this will not always work: to aim always at harmony without regulating it by the rites [li] simply because one knows only about harmony will not, in fact, work."⁸⁶

Therefore, to obtain the necessary information about the 'old ways', Confucius strongly advocates to study (hsüeh^(u)) the past which includes the beneficial imitation of the 'old ways'. Hsüeh^(u), in the Confucian sense of the word, comprises the four activities, namely, learning, studying,

85. Vide Lun Yü, II, XXIII; III, IX. Hsün Tzu's discourse on li, beginning with a brief passage on the origin of li (cf. the Li Yun chapter of the Li Chi (the Book of Rites), vide infra), is most suitable to give a comprehensive account of li in the perspective of the 'younger generation' of Confucian 'scholars', in his case, of the second prominent successor of Confucius. H.H. Dubs, who translated his works (1928), calls Hsün Tzu "The Moulder of Ancient Confucianism" (so the title of his book, a study on Hsün Tzu). Vide the translation by Burton Watson, Hsün Tzu, Basic Writings, (New York - London, 1963), pp. 89-111.

86. Lun Yü, I, XII (quoted after Lau, ubi cit., p. 61; cf. the Chinese original and Legge's translation p. 143). Cf. Mencius IV, A, 1 (quotations and references after (1) J. Legge, The Chinese Classics (in Chinese and English with copious comments), vol. II: The Works of Mencius (1861), (repr. Hong Kong, 1970); (2) Mencius, transl. by D.C. Lau, (Harmondsworth (Penguin Classics), 1970).

imitating, teaching.⁸⁷ Numerous passages in the Lun Yü give ample evidence that hsüeh is regarded as a precondition for practice, especially to guiding man's moral conduct in correspondence with the rules of li or, in general, with the spirit of these rules.⁸⁸ Whereas Confucius is said not to have talked on the four subjects, viz, extraordinary things (prodigies), force, disorder, and spiritual beings,⁸⁹ he was known to teach (chiao^(p), to give instruction, to educate) "under four heads: culture, moral conduct, doing one's best, and being trustworthy in what one says"⁹⁰. Confucius' cultural and moral-educational programme was free from supernatural beliefs; he was uninterested in the supernatural

87. Vide Giles, Dict., no. 4839.

88. Vide Lun Yü (on hsüeh^(u)): II, IV, pp. 146-7; V, XXVII, p. 183; VII, II, p. 195; XVII, VIII, 3, p. 322 (pp. refer to text and translation by Legge, ubi cit.); also Mencius (quoting Confucius on hsüeh), II, II, II, 19, p. 192 (Legge); furthermore Hsün Tzu, section 1 (encouraging hsüeh), 19, pp. 15-23, 95, 102 (B. Watson, ubi cit.).

89. Vide Lun Yü, VII, XXI, p. 88 (D.C. Lau, ubi cit.); cf. ibid., VI, XXII, p. 84; XI, XII, p. 107. Hsün Tzu, in speaking of the three bases of li, does not mention the religious or supernatural world either; he speaks of the world (heaven above and earth below), of honouring the ancestors, and exalting rulers and teachers; these are the three bases of li. Vide Hsün Tzu, sect. 19 (B. Watson, ubi cit., p. 91). Whereas R. Dawson, The Chinese Experience, ubi cit., p. 93, remarks that "the increasing application of the concept of li to all human activities could make men forget its religious origins and see it mainly as an ornament to man's social life", McAleavy, Chinese Law, in: J.D.M. Derrett (ed.), An Introduction to Legal Systems, (London, 1968), pp. 105-30, emphasizes even more the fact (p. 107) that Confucius "eliminated theology altogether" [if there ever has been theology at all]. A conflict of moral teachings with religious duties is, therefore, impossible. Cf. Wei-ming Tu, Centrality and Commonality. An Essay on Chung-yung [The Doctrine of the Mean], (Hawaii, 1976), p. XIII.

90. Lun Yü, VII, XXV (Lau, p. 89); cf. the Chinese original with Legge's transl., ubi cit., p. 202 (VII, XXIV).

world, because, as we read in the Tso Chuan:

"The way of Heaven is distant, while the way of man is near. We cannot reach to the former; what means have we of knowing it?"⁹¹

III.3.(2): It is obvious that being occupied with the world of man, instruction under the above-mentioned four heads is not just desirable but necessary. Especially suitable means and measures must be available to prevent or to obviate individual misconduct that causes harm to the well-regulated five relationships (wu lun⁽ⁿ⁾) bound by ties, either of nature or social interest. Moderate individual conduct, the control of one's passions, keeps man away from antagonistic or extreme behaviour to each other, and thus keeps the core of the wu lun intact, and consequently the balance of natural, as well as social order. Evidently, Confucius and his successors derived from past experience the conviction that the practice of li provided the basis upon which man's moral conduct could be established, so that man himself could take his stand.⁹² Strong commitment to li enables, whatever may be the situation, an appropriate way of conduct (practical morality), illustrated, for instance, by Confucius' explanation of 'Filial Piety' (hsiao^(v)), a topos of central significance:

"When your parents are alive, comply with the rites [li] in serving them; when they die, comply with the rites [li] in burying them; comply with the rites [li] in sacrificing to them."⁹³

91. Tso Chuan, bk. X, year XVIII (quoted after Legge, ubi cit., pp. 669, 671).

92. Vide Lun Yü, VIII, 8; XVI, 13; XX, III (ubi cit.).

93. Lun Yü, II, V (Lau, ubi cit., p. 63); cf. ibid., IV, XIX-XXI. For a discussion of hsiao^(f) (filial piety) vide A. Waley, The Analects of Confucius, ubi cit., pp. 38-9; R. Dawson, Confucius, ubi cit., pp. 46-9. Furthermore, infra, III.3.(3).

Confirmed by many instances from past generations, especially on ceremonial occasions in the early days, and a growing conviction of the positive effects of commitment to li in the declining days of the Chou dynasty, inspired an enormous diffusion of li practices, mainly (and usually)⁹⁴ orally transmitted as the socially accepted way of life. As R. Dawson states, "it coloured all social occasions and all human relationships, in such everyday contexts meaning 'propriety', 'politeness', or 'good form'".⁹⁵

As we learn from the Lun Yü, Confucius was not so much interested in giving an account of the details of li practices; he was afraid of the harm the absence of the spirit of li could do. Thus, he gave the following illustration:

"Respectfulness, without the rules of propriety [li], becomes laborious bustle; carefulness, without the rules of propriety [li], becomes timidity; boldness, without the rules of propriety [li], becomes insub-

94. A written version may well have existed before Confucius, and in fact still during the Chou period, as far as the so-called Li Ching is concerned which was more or less lost after the "Ch'in fire" in 213 B.C. The three preserved 'Li Books', the Chou Li, the I Li, and the Li Chi, all go back to the Confucian tradition. The written version of the Chou Li may have been produced around the Warring States period recalling the long before existing li practices. The I Li giving a detailed account of li to be practised by the individual (written down in the Warring States period) has probably partly inspired the production of the Li Chi (The 'Book of Rites') which inaugurated the final consolidation of li as a socially accepted (and binding) way of life (vide infra, ad 5). Vide H.G. Creel, The Origins of Statecraft, ubi cit., pp. 478-80, 485-6; Ch'u Chai and Winberg Chai, Introduction, in: Li Chi, ubi cit., pp. XXIX-XXXI; Fung Yu-lan, op.cit., p. 412.

95. R. Dawson, Confucius, ubi cit., p. 26.

ordination; straightforwardness, without the rules of propriety [*li*], becomes rudeness."⁹⁶

Self-cultivation ranked high in Confucius' programme of practical morality. The *chün-tzu*^(w) (the gentleman or perfect man) is the model of it in the true spirit of *li*, and he gives due attention to its performance whenever the situation demands his example.⁹⁷ On him, first of all, rests success or failure of the social order to be brought about by *li* and not by law (*fa*^(q)).

"When those above are given to the observance of the rites [*li*], the common people will be easy to command."⁹⁸

Social order becomes a natural consequence, and the *chün-tzu*'s model of self-cultivation adds a state of peace and tranquillity to all people.⁹⁹ Thus, harmony [*ho*^(x)] is still kept as the supreme goal of orientation.¹⁰⁰ Harmony denotes a

96. *Lun Yü*, VIII, II, 1 (transl. Legge, *ubi cit.*, p. 208; cf. the translation provided by D.C. Lau, *ubi cit.*, p. 92). Cf. *Shu Ching*, pt. IV, bk. V, pt. II, 3 (Legge, *ubi cit.*, p. 207), quoted above (II.5.); both instances draw attention to the ill consequences of disregard of *li*.

97. Vide *Lun Yü*, XII, V; XII, XV (repetition of VI, XXVII (XXV)); VIII, II, 2; IX, XXIV (XXV); XV, XVII (XVIII); IV, XVI. Vide also *Hsün Tzu*, sect. 2 (B. Watson, *ubi cit.*, pp. 24-32). *Chün-tzu* refers to "a man of true (rather than merely hereditary) nobility", hence the practice of translating *Chün-tzu* as "gentleman" (H.G. Creel, *Confucius*, (New York, 1949, 1975), pp. 77-8). Cf. R. Dawson, *ibid.*, pp. 53-6.

98. *Ibid.*, XIV, XLI (transl. Lau, *ubi cit.*, p. 131); cf. XIII, IV ("When those above love the rites [*li*], none of the common people will dare to be irreverent." (Lau, *ibid.*, p. 119)).

99. *Ibid.*, XIV, XLII (XLV).

100. Vide *supra*, ad 1. However, the ways and means of achieving this goal are different from those advocated in the *Tao Te Ching*; vide e.g. chapter 45. Reinhard May, *Frieden und die Aufgabe des Rechts*, *ubi cit.*, pp. 121-2 (3.3.).

viable 'state of affairs' such as with man himself, between his nature and emotions, perfect with the self-cultivated *chün-tzu*, furthermore between members of the *wu lun*⁽ⁿ⁾, and particularly between members of the family, between man and nature, and between all forces of the universe. *Li* especially¹⁰¹ contributes in all its spheres of influence to such a 'state of affairs', and, in turn, depends as a socially accepted way of life on its achievement, without which the viability of *li* would have been greatly reduced or completely destroyed.

III.3.(3) Obviously, the topos of *li*, particularly due to its social viability, cannot remain isolated from other topoi of social and moral esteem. Therefore, *li* often occurs in connection with those topoi of human behaviour which are of long standing, deeply rooted in ancient experience and evaluation. Two of those topoi are *te*^(e) and *i*^(k). Both played their part in the first movement of *li*.¹⁰²

The outstanding Confucian emphasis of the topos of *li*, not so much its general maintenance as a legacy from past dynasties (including the legendary), caused opposition to a

101. Vide *supra*, ad 1, footnote 86. Hsün Tzu, discussing *li* (sect. 19) says, beautifully summarizing: "Through rites [*li*] Heaven and earth join in harmony [are in accordance with each other], the sun and moon shine, the four seasons proceed in order, the stars and constellations march, the rivers flow, and all things flourish; men's likes and dislikes are regulated and their joys and hates made appropriate. Those below are obedient, those above are enlightened; all things change but do not become disordered; only he who turns his back upon rites [*li*] will be destroyed." (transl. B. Watson, *ubi cit.*, p. 94). In interstate practice, for instance, the parties involved had to accept that even conciliation and pacification must be based on *li*; vide Keishiro Iriye, *The Principles of International Law in the Light of Confucian Doctrine*, in: *Recueil des Cours*, 1967-I (120), pp. 1-59, p. 10 (with references); cf. Erich Haenisch, *Politische Systeme und Kämpfe im alten China*, (Berlin, 1951), pp. 12-19.

102. Vide *supra*, II. 1. ff.

considerable degree. Being aware of it, Confucius himself (anticipating strong criticism) is said to have advocated principally the spirit of li in contrast to the mere formality, in performing the obligatory rules of behaviour. He himself has opposed the mere execution of li practices, often appearing as a drilled and artificial demeanour.

"The rites, the rites [li], it is not enough merely to mean presents of jade and silk."¹⁰³

In correlation with jen^(y), te^(e), and i^(k) li unfolds its true social and moral nature. Thus, Confucius clearly states:

"What can a man do with the rites [li] who is not benevolent [jen^(y)]?"¹⁰⁴

In contrast to jen^(y) (benevolence, etc.), which is first to be met with as a topos of special moral significance in the Lun Yü of Confucius,¹⁰⁵ the topoi of te^(e) and i^(k) have a comparatively long history; they have already 'framed' our understanding of the li of the initial movement. te^(e) denotes in general, as I have briefly explained, a 'moral impetus, excellent in character'.¹⁰⁶ The Lun Yü gives an illustration:

"The rule of virtue [te] can be compared to the Pole Star which commands the homage of the multitude of stars without leaving its place."¹⁰⁷

103. Lun Yü, XVII, XI, transl. Lau, ubi cit., p. 145; cf. Legge, CC I, p. 324.

104. Ibid., III, III, (Lau, p. 67; Legge, p. 155).

105. Cf. A. Waley, The Analects of Confucius, ubi cit., pp. 27-9; R. Dawson, Confucius, ubi cit., p. 37.

106. Vide supra, I.2., footnote 25a. Cf. Giles, Dict., no. 10845.

107. Lun Yü, II, I, transl. Lau, ubi cit., p. 63; cf. Legge, CC I, p. 145. Vide furthermore, Lun Yü, II, III; VIII, XX.

i^(k) generally designates 'appropriateness'¹⁰⁸; it is essential to the nature of the chün-tzu^(w) (the 'perfect man') and his activities, especially in connection with his li practices, that he 'illustrates' i^(k) in a sense of morally appropriate conduct.¹⁰⁹ In the works of Mencius, we find a reference¹¹⁰ to i^(k) significantly framing and being framed by the so-called Mencian 'virtues' or modes of behaviour (in a wide meaning), namely jen^(y), i^(k), li, and chih^(z), together called the four basic 'virtues'; if we add hsin^(aa) (sincerity, etc.), we have named the complete set of the so-called Confucian 'virtues' (modes of behaviour), which may be rendered into English (in the given order) as "humaneness, dutifulness, observance of ritual, wisdom, and good faith [or sincerity]"¹¹¹. However, of all five modes of behaviour jen^(y) is certainly the most important topos to contribute essentially to the final consolidation of li (infra, ad(5)); it is "the one unifying principle of all of Confucius' teachings"¹¹². The character jen^(y) itself is a visible expression of a (benevolent) adjustment of human relations. Without such extraordinary accentuation of humaneness which must govern especially the five relationships (wu lun⁽ⁿ⁾), the topos of li would remain (as has been indicated) an empty vessel, a pale artificiality lacking the

108. Vide supra, II.1., II.2., II.5.; cf. A. Waley, The Way and its Power, ubi cit., pp. 32-5; Giles, Dict., no. 5454.

109. Vide Lun Yü, IV, XVI, (Legge, CC I, p. 170); Mencius, I, I, I (the well-known opening chapter), Legge, CC II, pp. 125-7.

110. Mencius, VI, I, VI, 7 (Legge, CC II, pp. 402-3); II, I, VI, 5 (ibid., pp. 202-3); cf. Hsün Tzu, sect. 2 (last sentence), transl. B. Watson, op.cit., p. 32.

111. R. Dawson, Confucius, ubi cit., p. 51. Cf. my German versions in Frieden und die Aufgabe des Rechts, ubi cit., p. 111.

112. Y.P. Mei, The Basis of Social, Ethical, and Spiritual Values in Chinese Philosophy, in: Charles A. Moore (ed.), The Chinese Mind, (Honolulu, 1967, 1977), pp. 149-166, p. 152.

spirit that gives life and meaning to human relations and concerns. Accordingly, there are numerous passages in the Lun Yü, for instance:

"Of neighbourhoods benevolence [*jen*^(y)] is the most beautiful. How can the man be considered wise who, when he has the choice, does not settle in benevolence [*jen*^(y)]." ¹¹³

It remains to be mentioned that we have already touched upon the topos of *hsiao*^(f) (filial piety or devotion of a son to his parents, grandparents, ancestors) ¹¹⁴ which appears here in connection with *jen*^(y); we read in the Lun Yü that *hsiao*^(f) and brotherly respect could probably be regarded as the root of *jen* (benevolent, humane) actions. ¹¹⁵ And the post-Confucius classic of 'Filial Piety' (*Hsiao*^(f) *Ching*) says:

"Now filial piety [*hsiao*^(f)] is the root of all virtue [*te*^(e)], and (the stem) out of which grows (all moral) teaching [*chiao*^(p)]." ¹¹⁶

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113. Lun Yü, IV, I, transl. Lau, *ubi cit.*, p. 72; vide furthermore on *jen*^(y), *ibid.*, IV, II-VI; cf. Legge, CC I, p. 165 (his comment on the heading of book IV). Vide also Lun Yü, VI, XXX; VI, XX (Legge) or XXII (Lau); XII, I ("To return to the observance of the rites [*li*] through overcoming the self constitutes benevolence [*jen*^(y)]", transl. Lau, p. 112); Mencius, II, II, II, 6 (Legge, CC II, p. 213). Cf. also the discussion of the moral dimensions and relations of *jen*^(y) and *i*^(k) with *li* as regards Hsün Tzu's point of view presented by A.S. Cua, *Dimensions of li ...*, *ubi cit.*, pp. 375-80; and Wei-ming Tu, *The Creative Tension between Jen and Li*, in: PEW XVIII (1968), pp. 29-39, esp. pp. 34, 38.
114. Vide *The Hsiao Ching or Classic of Filial Piety* (transl. by J. Legge, in: SBE, vol. III, pp. 447-488), the concluding passage, p. 488 (ch. XVIII).
115. Vide Lun Yü, I, II, 2 (Legge, CC I, pp. 138-9).
116. *The Hsiao Ching*, *ibid.*, ch. I, p. 466. Vide also *supra*, I.2. Cf. Yu-wei Hsieh, *Filial Piety and Chinese Society*, in: Charles A. Moore (ed.), *The Chinese Mind*, (Honolulu, 1967, 1977), pp. 167-187, p. 167, 169, 175, 179, 181, 186 (stressing the moral aspect of filial piety which is of paramount social relevance, esp. with reference to ancestor worship).

Thus, hsiao^(f) constitutes also in a fundamental sense the moral essence of li practices, especially in the realm of family life. Furthermore, it is a distinct and concrete model of behaviour within the 'chain' of the five Confucian 'virtues' or basic modes of conduct, where li is given some kind of a correlative exposition. In sum, the topos of li gains or loses in social and moral esteem (not less as the "principle of social control and organization"¹¹⁷) to the extent that it is capable of maintaining a harmonious moral order within the world of man; this might be utterly impossible without the simultaneous exertion of a profound and excellent moral impetus (te^(e)) directed toward the expected cultivation of jen^(y), i^(k), chih^(z), and hsin^(aa), first of all illustratively demonstrated in the chün-tzu's^(w) ('gentleman's') way of life.¹¹⁸

III.3.(4): This proposition draws attention to the topos of li as "the principle of social control and organization"¹¹⁹. Li is directed against the preponderance of fa^(q) in combination with statutes of hsing^(r) for strict and general

117. Lin Yutang, Li: Chinese Principle of Social Control and Organization, in: The Chinese Social and Political Science Review II, 1, (Peking, 1917), pp. 106-118, p. 106.

118. If this, which sounds like a remote ideal, had always worked perfectly well corresponding to that which was firmly believed to be the Way (tao^(m)) of the Former Kings, strong opposition to the Confucian emphasis of li, in particular voiced by Lao Tzu, Chuang Tzu, and Mo Tzu, may not have been heard of (in the case of the Fa Chia's opposition the situation is somewhat different). Howsoever, criticism was strong enough to be not negligible. For instance, the Tao Te Ching, chapter 38, draws attention to the gradual deterioration of man's 'natural morality'; it says: "... Hence when the way [tao^(m)] was lost there was virtue [te^(e)]; when virtue was lost there was benevolence [jen^(y)]; when benevolence was lost there was rectitude [i^(k)]; when rectitude was lost there were the rites [li]. The rites are the wearing thin of loyalty and good faith [hsin^(aa)] and the beginning of disorder ..." (transl. D.C. Lau, op.cit., p. 99).

119. Lin Yutang, ibid.

application. There is a strong conviction attributed to Confucius that to make statutes of hsing^(r), the fa^(q) of the state gives an example of illicit intercourse with hsing^(r); the prospect of such an engagement would mean the ruin of the state.¹²⁰ The expression fa^(q) means (vide supra) a fixed and strict model, hence similar to a written norm or law; hsing^(r) means punishment.

Granted, the topos of li from the Confucian point of view is the proper means of government and education, capable of ensuring the good of man, namely social harmony, fa^(q) is, plainly speaking, superfluous. And supposing that li works properly, especially within the wu lun⁽ⁿ⁾, and the ruler himself is a model (father and mother) to his people governing his state by observing the li, little or nothing is left to require him to govern by fa^(q). Accordingly, Confucius says:

"Is (a prince) able to govern his kingdom with the complaisance proper to the rules of propriety [li], what difficulty will he have?"¹²¹

Under the rule of fa^(q), hsing^(r) becomes a hideous instrument annihilating the harmonious order brought about by the observance of li and its suasive forms of application. If fa^(q) dominated as the standard requisite of governmental actions it could be taken for granted that the natural and humane (jen^(y)) ties between ruler and subjects would quickly dissolve without a chance of adequate compensation. Confucius and his followers are firmly persuaded that confusion,

120. Vide Tso Chuan, bk. X, 29th year (Legge, CC V, pp. 729, 732); cf. supra, II.4.

121. Lun Yü, IV, XIII (transl. Legge, CC I, p. 169). Vide furthermore Lun Yü (on government in accordance with li, by good example, and sincerity): XIII, IV; XIV, XLI (XLIV, Legge); XV, XXXIII (XXXII, 3, Legge); XII, XVII; XIII, I; XIII, XVI; XII, VII.

disorder, and rebellion would be seen as a logical result; and history has verified their assumption. Furthermore, it has demonstrated that good chances of improving man by example and imitation on the traditional basis of lí had been largely ruled out. This reads in the words of Confucius:

"If the people be led by laws [*cheng*^(ab)]¹²², and uniformity sought to be given them by punishments [*hsing*^(r)], they will try to avoid the (punishment), but have no sense of shame. If they be led by virtue [*te*^(e)], and uniformity sought to be given them by the rules of propriety [*lí*], they will have the sense of shame, and moreover will become good."¹²³

With Confucius' attitude towards litigation (*sung*^(ac)) it is comparatively similar; as long as people respond to their *lí*, their traditional modes of behaviour, there is little opportunity to be involved in a *sung*^(ac) (lawsuit, litigation; i.e. according to the composition of the character: to speak or discuss in public, thus, to accuse, to litigate). Confucius' treatment of such possible affairs is again his insistence on a positive motivation of the people to do the good, and so to avoid antagonistic behaviour in order to bring about individual success detrimental to the social

122. Legge, CC I, p. 146, explains *cheng*^(ab) as opposed to *te*^(e) in the sense of laws and prohibitions; governmental orders or administrative regulations would do as well.

123. Lun Yü II, III (transl. Legge, CC I, p. 146; cf. Lau, op.cit., p. 63). Cf. Mencius, IV, I, I, 1-13 (Legge, CC II, p. 288-92); Hsün Tzu, sections 9; 19 (transl. B. Watson, op.cit., pp. 33-55; 89-111). Vide also the discussion by M. Granet, La pensée chinoise, ubi cit., pp. 456-65 (Siun Tseu [Hsün Tzu]: le gouvernement par les rites [*lí*]). and H.G. Creel, Legal Institutions, ubi cit., p. 39.

relations concerned; to give attention to li in action, is that which is necessary "to cause (the people) to have no litigations"¹²⁴.

As already indicated, the second phase in the second movement of li, the phase after Confucius until the beginning of the Former Han dynasty (206 B.C.), sees, apart from a further consolidation of the topos of li, also a rather strong opposition to Confucius' teachings and his school. To mention the most influential schools of opposition to the Ju Chia (i.e. the indigenous name for what we call Confucianism, and means the 'school of the literati'^{124a}, the most outstanding of which are the so-called successors of Confucius, Mencius (c. 371-289 B.C.) and Hsün Tzu (c. 298-238 B.C.)), we have to refer to the school of Tao^(t) ('Taoism'), to Mo Tzu especially, and to the school of Fa^(q) ('Legalism').

Already the Tao Te Ching (attributed to Lao Tzu, possibly a contemporary of Confucius) determinedly objects to the rule of li, seeking to preserve harmony (ho^(x)), the natural balance between heaven and earth, man and nature, without unnecessary and unnatural human interference, namely with wu wei^(ad) (or, an attitude of remaining passive). Neither li practices nor promulgation of fa^(q) are capable of bringing harmony about, the desired state of affairs that alone can cure the 'diseases' of the age of the declining Chou dynasty and restore the 'rule' of tao^(t), the everlasting Way.¹²⁵

124. Lun Yü XII, XIII (transl. Legge, CC I, p. 257); cf. The Great Learning, ch. IV (ibid., p. 364).

124a. Cf. the explanation given by Leon Vandermeersch, La Formation du Légisme, (Paris, 1965), p. 9, footnote 1.

125. Vide Lao Tzu, Tao Te Ching, chapters 57, 38 (supra, footnote 118), and 1 as well as 81 (the final chapter); transl. by D.C. Lau (Penguin Classics, 1963), and J. Legge, (SBE, vol. XXXIX), A. Waley, The Way and its Power, ubi cit. Cf. J.J.L. Duyvendak, The Philosophy of Wu Wei, in: Asiatische Studien, I (1947), pp. 81-102, p. 96.

A less esoteric objection to Confucius' advocacy of li has been made by Mo Tzu (c. 479- c. 381 B.C.).¹²⁶ His opposition is rather moderate compared to the severe criticism in particular in the work of Han Fei Tzu (partly attributed to Han Fei who died in 233 B.C.). Han Fei is the outstanding and widely known representative of the Fa Chia (commonly rendered with School of 'Legalism' or Law)¹²⁷, which participated in the so-called "Hundred Schools" contest during the fourth and the third centuries B.C. In brief, their doctrine is as follows: since man's nature is evil (a plausible conclusion from the social reality of the age of constant warfare until 222 B.C.), education in morals through li is of little effect, but the beginning of social disorder. In contrast the institution of order on the basis of a strong government sounds rather workable (one may think of political realism in politics), and thus it is forcefully aimed at by means of a strict organization and regulation of a centralized bureaucratic government.¹²⁸ Fa^(q), in the

126. Vide Reinhard May, Frieden und die Aufgabe des Rechts, ubi cit., pp. 136-8, 201-6 (comment with further references).

127. A. Waley, The Three Ways of Thought in Ancient China, (London, 1939, 31953), p. 199, gives the following plausible explanation: "... 'Realists' seems to me to fit the general tendency of their beliefs better than 'School of Law', which only indicates one aspect of their teaching. We might, if we wanted a narrower term, as an alternative to 'School of Law' call them the Amoralists."

128. Vide H.G. Creel, The Fa-chia: "Legalists" or "Administrators"?, in: Bulletin of the Institute of History and Philology, Academia Sinica, extra-vol. 4, (1961), pp. 607-636, p. 629. Cf. L. Vandermeersch, op.cit., pp. 6-9, 228, 271-4; Hsiao Kung-chuan, Legalism and Autocracy in Traditional China, in: Tsing Hua Journal of Chinese Studies (N.S. 2), 4, 2 (1964), pp. 108-21, p. 113; P.R. Moody jr., The Legalism of Han Fei-tzu and its Affinities with Modern Political Thought, in: International Philosophical Quarterly XIX, 3 (1979), pp. 317-31, p. 325-6; Geng Wu, Die Staatslehre des Han Fei, (Wien-New York, 1978), p. 37.

sense of strict prescription laid down in writing, made publicly known, and applicable to everybody concerned without regard for any distinction whatsoever, is their appropriate means and measure; it is extremely capable of exercising power with the instrumental use of hsing^(r), esp. by way of rewards and heavy punishments. Comparatively, the unwritten precepts of li seemed less useful particularly in view of their arbitrary interpretation. Hence, fa^(q) is both means and measure of practical politics and remedy for an imperfect state of man's social behaviour.¹²⁹ In Han Fei Tzu, we find the following passages underlining the Fa Chia's position, as sharply distinct from that of the Ju Chia (Confucianism):

"To enact the law [fa] is to lead the people, whereas if the superior esteems literary learning, the people will become sceptical in following the law [fa]."¹³⁰ "The law [fa] alone leads to political order. If laws [fa] are adjusted to the time, there is good government. If government fits the age, there will be great accomplishment."¹³¹ "... speaking about the benevolence [jen^(y)] and righteousness [i^(k)] of the early kings gains nothing for political order; but understanding clearly our laws [fa] and measures and determining our

129. For further discussion vide Reinhard May, Frieden und die Aufgabe des Rechts, ubi cit., pp. 139-43, 207-14 (with numerous references). An instructive synopsis concerning a comparison between li and fa^(q) provides O. Weggel, op.cit., pp. 17-18.

130. Fa of the following quotations is fa^(q). Han Fei Tzu, quoted after the Complete Works of Han Fei Tzu, 2 vols., translated by W.K. Liao (1939), (repr. London, 1959), bk. 18, ch. 47, vol. II, p. 251.

131. Ibid., bk. 20, ch. 54, vol. II, p. 328.

rewards and punishments is the rouge, pomade, powder ... of the state.¹³² "... Hence the saying: 'The rules of propriety [*li*] are the semblance of loyalty [*chung*^(ae)] and faith [*hsin*^(aa)]: sincerity], and the beginning of disorder.'"¹³³

However, both the teachings of the Tao Chia and the Fa Chia were unable to replace the topos of *li* or to reduce its influence to a considerable degree in man's social relations. For different reasons, they failed to judge comprehensively the extraordinary complexity of *li*, particularly with regard to its function, which regulates inter-personal behaviour into a balanced state of social harmony, despite many drawbacks in the centuries of decline. Likewise, they, specifically the Fa Chia, had been incapable of giving past experience, before Confucius, adequate credit as a continuum and model for present and future generations. On the other hand, social reality did not leave the topos of *li* unaffected; it called for adaptation under new historical circumstances. A moderate use of *fa*^(q) could lead to an acceptable compromise from the viewpoint of the Ju Chia (Confucianism). In the Wen Tzu (Han dynasty and later), we find the indication of an useful compromise as to the combination of *fa*^(q) with *i*^(k):

"Laws [*fa*^(q)] (should) arise out of justice [*i*^(k)], and justice arises out of the common people and must correspond with what they have at heart."¹³⁴

While a further consolidation of the topos of *li* took place (infra, ad (5)), the influence of the 'legalistic' position

132. *Ibid.*, bk. 19, ch. 50, vol. II, p. 308.

133. *Ibid.*, bk. 6, ch. 20, vol. I, p. 174.

134. Quoted after J. Needham, *SCC* II, p. 545.

of fa^(q) diminished considerably. No doubt, the preference of li over fa^(q), though modified, continues, including a moderate use of hsing^(r).

III.3.(5) We have now reached the last of the above-mentioned propositions to which this section has been designed to lead us, namely to focus on the final consolidation of the topos of li as exposed in the given description (supra). The Li Chi (the Book of Li)¹³⁵ most auspiciously represents the concluding phase in the movement of the topos of li which became the decisive and paramount factor of Chinese social and individual life. In other words, "by the incorporation of this work into the classical canon in the Former Han Dynasty the place of ritual was firmly established in the educational and governmental tradition of imperial China"¹³⁶.

Inasmuch as the Confucius of the Lun Yü advocated in more or less general illustrations the significance of li both for social and individual welfare, the Li Chi echoes not only Confucius but the age-old experience that "of all things by which the people live the rites [li] are the

135. Quoted after Li Chi, Book of Rites. An Encyclopedia of Ancient Ceremonial Usages, Religious Creeds and Social Institutions, translated by James Legge, edited with Introduction and Study Guide by Ch'u Chai and Winberg Chai, in 2 vols., (New Hyde Park, New York, 1967); cf. SBE, vols. XXVII, XXVIII (designated as Parts III and IV of "The Text of Confucianism", transl. and introduced by J. Legge), on which the 1967 edition is based in identical pagination. Vide also Mémoires sur les bienséances et les cérémonies (Li Chi) par Séraphin Couvreur, 2 vols., in 2 parts, (Leiden and Paris, 1930), published with the Chinese original and translated into French and Latin (quoted: Couvreur, Mémoires).

136. R. Dawson, Confucius, ubi cit., p. 32. The Li Chi was probably at least in part inspired by the I Li.

greatest"¹³⁷. In fact, the Li Chi accounts for the actual consolidation of li comprising the manifestation of individual precepts as well as the conservation of the spirit of li, first of all in the expression of reverence and reciprocity.¹³⁸

As has been pointed out, in the long run of two consecutive movements the topos of li emerged from the ancient forms of ancestor worship in combination with sacrificial actions and ceremonial usages and, gradually moving into all spheres of life, created, socially accepted, a vast body of concrete and distinctive rules of behaviour.^{138a} Thus, li became the kingly rule between heaven and earth and, furthermore, the ordering of affairs, without which neither tao^(m), te^(e), jen^(y), and i^(k) are accomplished.¹³⁹

137. Li Chi, bk. XXIV, p. 261 (Courvreur, Mémoires, II, 2, p. 362). Cf. Lun Yü, XII, I (Lau, p. 112). References concerning the Li Chi are given in bk. (Roman figure) and p. according to Legge.

138. So the beginning of the Li Chi: "The Summary of the Rules of Propriety li says: - Always and in everything let there be reverence [ching^(ai)] ..." (transl. Legge, I, p. 61). Regarding 'reciprocity' (altruism or benevolent (jen^(y)) actions in relation to others) the Lun Yü, XV, XXIII (Legge, CC I, p. 301), says when Confucius was asked: "Is there one word which may serve as a rule of practice for all one's life? The Master said, 'Is not RECIPROCITY [shu^(ag)] such a word? What you do not want done to yourself, do not do to others'." Cf. Li Chi I, 6 (23).

138a. Vide Li Chi, bk. VII, Li Yun (origin, development, and intention of li), J. Legge, I, pp. 364-393. Cf. D. Bodde, Basic Concepts of Chinese Law, ubi cit., p. 383 ("The li, in short, constitute both the concrete institutions and the accepted modes of behaviour in a civilized state."); A.S. Cua, Dimensions of Moral Creativity, (University Park and London, 1978), p. 58; the same, Li and moral justification: A study in the Li Chi, in: PEW 33 (1983), pp. 1-16, p. 1.

139. Vide Li Chi, VII, 14 (Legge, II, p. 97); XXV, 8 (Legge, II, p. 272); I, 5(8) (Legge, I, p. 63; Courvreur, Mémoires I, 1, p. 5).

The first book of the Li Chi, in itself a summary of the whole, gives ample evidence of it.

In constant retrospect to its own tradition, which is especially visible in many quotations from the Book of Poetry and the Book of Historical Documents, and in drawing attention to those prominent topoi of social and moral esteem just mentioned, the Li Chi demonstrates an unflagging continuity and a deep rooted conviction that the moral 'renovation' of man is better than the renovation of moral precepts.^{139a} According to the Li Chi there are 3,300 distinctive precepts or rules of behaviour made concrete in what we denote as customs, usages, habits, ceremonies, rites, etc.¹⁴⁰ On the whole they can be taken as a required situa-

139a. This idea is obvious especially from the Ta Hsueh ("The Great Learning"), one of the most important books of the Li Chi (XXXIX, Legge, II, pp. 411-424; published separately in Legge, CC I, pp. 355-381, with the Chinese original); vide the beginning, ibid.

140. Vide Li Chi, XXVIII, Chung Yung ("The State of Equilibrium and Harmony"), Legge, II, pp. 300-329, p. 323, published with the Chinese original in Legge, CC I, pp. 382-434 (transl. "The Doctrine of the Mean"), ch. XXVII, p. 422, saying that li "embraces the three hundred rules (usages) of ceremony, and the three thousand rules (modes) of demeanour". Cf. A. Waley, The Analects of Confucius, ubi cit., pp. 55, 67. The Li Chi in particular explains the flexibility of the expression li which cannot be comprehended as a well-defined concept or term. Li did not only mean different things at different times (cf. H.G. Creel, The Origins of Statecraft, ubi cit., p. 336), moreover, it has given way to a wide range of meanings according to the situation concerned. Therefore an adequate translation is extremely difficult, if not impossible at all. Vide the many possible French translations (interpretations) quoted by J. Legge, Li Chi, Introduction, p. 11. Cf. J. Escarra, Le Droit Chinois, ubi cit., p. 16; A. Waley, ibid., p. 64; J. Needham, SCC II, p. 526; R. May, Annäherung an chinesisches Rechtsverständnis, in ARSP, Supplementa I, 2 (Wiesbaden, 1982), pp. 105-9, pp. 105-7. This situation has its deep root in the Chinese language and its corresponding mode of thinking; in Hsün Tzu we find the following instructive statement: "The meaning of ritual [li] is deep indeed. He who tries to enter it with the kind of perception that distinguishes hard and white, same and different, will drown there. The meaning of ritual [li] is great indeed. He who tries to enter it with the uncouth and inane theories of system-makers will perish there. ..." (transl. B. Watson, op.cit., pp. 94-5).

tive response in conduct and as a general exemplification of the spirit of li; they are devised to support order and maintain an all-embracing social harmony, ideally, in accordance with the highly evaluated ancient way of life.¹⁴¹

In concluding this paragraph one point concerning our understanding of the topos of li remains to be mentioned. Inasmuch as the topos of li became a dominant factor of social life, the topos of ho^(x) (harmony), being vital as an eminent expression of the reality of ancient conceptions, had to guide the practice of li. As regards the teachings of the Ju Chia (Confucianism) their advocacy of creating a well-ordered and harmonious society is hardly disputable.¹⁴² Still after the breakdown of the Ch'in dynasty, that terminated the harsh rule of fa^(q), the topos of ho^(x) guided the administrative and educational practice of the new dynasty under Confucian influence. Particularly in the realm of handling social affairs a moderate compromise¹⁴³ can be observed which took place between the position of a rule with fa^(q) and that of a rule with li. In theory, no doubt the Lun Yü dictum (II, III; supra) repeated in the Li Chi¹⁴⁴ still governed the anti-fa^(q) position in favour of li on the grounds of good experience and well-known motives as stated above. In practice, however, the Ju Chia carefully adapted the topos of fa^(q)¹⁴⁵ by way of a reduced employ-

141. Vide Li Chi, VII (Legge, I, pp. 365, 367, 393); XXVIII, Chun Yung, esp. ch. I (Legge, CC I, pp. 384-5).

142. The fundamental topos of harmony and peace is greatly emphasized in particular by the School of Tao, esp. in the Tao Te Ching which, however, approaches man's life from a different angle compared to the Ju Chia.

143. Cf. A. Waley, ibid., p. 37; H.G. Creel, Confucius, ubi cit., p. 150.

144. Li Chi XXX, 3 (Legge, II, pp. 352-3; Couvreur, Mémoires II, 2, pp. 515-16).

145. Fa is used here in the sense of strict prescription (exact model) as being fixed and laid down ('positive law'), cf. supra, III.3.(4).

ment in criminal matters, yet avoiding the rude application of hsing^(r) (punishment) that had made the threat and infliction of it a dreadful instrument of exercising power under the rule of the preceding Ch'in dynasty.

As known from researches concerning the completely preserved T'ang Code (653 A.D.)¹⁴⁶ and its fragmentary precursors a gradual process of Confucianization of fa^(q),¹⁴⁷ or, conversely, the slow infiltration of fa^(q) into the realm and relations of li, had taken place from the beginning of the Han dynasty continuing through the centuries of the imperial history. Apart from fragments of the Han 9- and 16-Chapter Codes,¹⁴⁸ little information can be obtained from existing material and still less can be deduced from it as to the new and early role of the topos of fa^(q) in relation to the actual practice of li on the basis of the Li Chi. Yet, to be sure, fa^(q) or the inflexible enforcement of strict prescriptions or regulations was incompatible with the spirit of li. Hence, it is not surprising that the T'ang Code about 750 years later than the compilation of the Li Chi represents the new role of the topos of fa^(q). As W. Johnson has stated, "the primary purpose of law [i.e. in the sense of a modified understanding of fa^(q)] is to maintain a balance in society and a harmony between the human and the natural worlds"¹⁴⁹. An actual li and fa^(q) may demonstrate this situation.^{149a}

146. Cf. D. Bodde, *ibid.*, pp. 395-6; W. Johnson, The T'ang Code, vol. I, General Principles, (Princeton, New Jersey, 1979), pp. 5-9.

147. Vide D. Bodde, *ibid.*, pp. 386-88; J. Needham, SCC II, p. 528, points out with reference to the preface of the T'ang Code suggesting "that it is dangerous and ominous to 'leave li' and engage in legally fixed punishments ...". Cf. *ibid.*, p. 546.

148. Vide John Y. Kwei, The Chinese Tradition and the Chinese Law, in: Chinese Culture IX (1968), pp. 36-51, pp. 43-4.

149. *Ibid.*, p. 10.

149a. Thus, it is li that "sons and sons' wives, who are filial and reverential, when they receive an order from their parents should not refuse, nor be dilatory, to execute it". Li Chi, bk. X, (ch. XII), *ubi cit.*, vol. I, p. 455. Article 37 of the T'ang Code reads: "In all cases where there is confession of crimes that have not yet been discovered the crime will be pardoned." (Johnson, *ibid.* p.201).

Inasmuch as the topos of li can be considered as comprising in toto an internally created and commonly accepted way of life, all parts of the social stratum are necessarily involved and under the obligation of their respective li practices which admit no exclusion of any part. Apart from a slightly misleading passage in the Li Chi (which we find often misinterpreted), viz, "the rules of ceremony [li] do not go down to the common people, the penal statutes [hsing^(r), punishments] do not go up to great officers"¹⁵⁰, there is on scrutiny no such broad demarcation;¹⁵¹ however, we find quite naturally, that irrespective of the general commitment to li each individual situation calls for an adequate and distinctive li response.¹⁵² Moreover, the Li Chi leaves no doubt that li is universally valid and obligatory, including all parts of society, though with proper distinctions and effects. Failure and shortcoming in one's li duty usually entails a socially agreed and sanctioned correction, a kind of disciplinary measure; both exhortation and punishment are seen to be appropriate consequences in a programme of moral education, in order to secure a better social behaviour in future.

In the social realm of non-criminal affairs the prevention of any form of litigation is regarded as far better than (even successful) efforts in arbitration which can only work after disturbances have been caused. But what matters is that there should be no cases for arbitration.¹⁵³ In repeating Confucius' statement thereon the Ta Hsueh ('The Great

150. Li Chi, I, 10 (50-1), (Legge, I, p. 90; Couvreur, Mémoires, p. 53).

151. Vide e.g. Li Chi, I, 6, (25), (Legge, I, p. 65; Couvreur, Mémoires, p. 8). Cf. Legge and Couvreur, ibid.; also H.G. Creel, Legal Institutions, ubi cit., p. 39.

152. Vide for instance Li Chi, I, part IV.

153. Vide Li Chi XXXIX (Ta Hsueh), ch. IV (Legge, CC I, p. 364; cf. E.R. Hughes, Ta Hsueh, ubi cit., p. 151); also J. Needham, SCC II, pp. 544-5.

Learning'), the most valuable book of the first class series of the Li Chi, adds that "then inhuman men would be barred from acting out their (inhuman) contentions, and people's private-mindedness would be greatly checked"¹⁵⁴. Continuous endeavours at giving no rise to litigation through moral education reveals once more that there is in fact an alternative in a self-regulating procedure of li, the substantial consolidation of which is capable of maintaining social harmony on a broad scale, and thus making the old 'legalistic' use of fa^(q) and the handling of sung^(ac) (litigation) completely undesirable and in practice possibly superfluous.

154. Ibid., ch. IV (transl. E.R. Hughes, ibid.).

§ 15 Origin and Development of *nomos* (νόμος)

The subject of *nomos* (νόμος) including various related *topoi* has especially attracted scholarly attention with sometimes exhaustive treatment during the 19th and the present centuries, not to mention the previous investigations.¹ Taking advantage of this situation but excluding details of philological, historical, or philosophical interest the following survey exclusively attempts, in a reasonable scope, to present a general understanding of the basic ideas for comparative purposes, hereafter in § 16.

I.1. Tracing the early 'imagination' of *nomos*^{1a} as being ideally existent in prephilosophic sources in Greece we find its first mention in Hesiod (c. 700 B.C.):

1. Cf. Max Pohlenz, *Nomos*, in: *Philologus*, Bd. 97 (1948), pp. 135-142, where the learned author commences his article saying "zu den meistgebrauchten und bedeutungsschwersten Begriffen des hellenischen Denkens gehört der *Nomos*. Für die klassische Zeit ist der Sinn im wesentlichen klar" (p. 135). Cf. furthermore Viktor Ehrenberg, *Anfänge des griechischen Naturrechts*, in: *Archiv für Geschichte der Philosophie*, Bd. 35 (1923), pp. 119-143. Werner Jaeger, *Die Anfänge der Rechtsphilosophie und die Griechen*, in: *ZphF*, Bd. 3 (1948), pp. 321-338, p. 323 with reference to his work *Paideia. Die Formung des griechischen Menschen*, 3 Bände, (Berlin, 1934, 1944, 1947) where "Recht" centres in the ancient Greek civilization. Erik Wolf, *Griechisches Rechtsdenken I: Vorsokratiker und frühe Dichter*, (Frankfurt a.M., 1950), esp. "Problemstellung und Leitgedanken" (pp. 9-18), p. 11: "Ebenso ist das bleibende "Wesen", was den *Nomos* in einer frühgriechischen Polis als "Recht" erscheinen läßt, heute wie damals dasselbe." Martin Ostwald, *Nomos and the Beginnings of the Athenian Democracy*, (Oxford, 1969), esp. pp. 1-57. Jacqueline de Romilly, *La loi dans la pensée grecque des origines à Aristote*, (Paris, 1971), esp. pp. 24-29. Cf. also Rudolf Hirzel, *ΑΡΡΑΦΟΣ ΝΟΜΟΣ*, in: *Abhandlungen d. Königlich Sächsischen Gesellschaft d. Wissenschaft, phil.-hist. Cl. XX*, 1 (1903) pp. 1-100.

1a. 'νόμος' (to be distinguished from νομός: pasture) goes back to νέμειν (so does νομός) which means to dispense, deal out, or pasture cattle; vide also footnote 19.

"For the son of Cronos has ordained this law [νόμον] for men, that fishes and beasts and winged fowls should devour one another, for right [δίκη] is not in them; but to mankind he gave right [δίκην] which proves far the best."²

Whereas Hesiod uses nomos in several instances (vide infra) this topos does not occur in Homer, neither in the Iliad nor in the Odyssey.³ However, Hesiod's usage, and apparently his understanding of nomos is not unrelated to some distinct ideas of Homer.

I.2. There are Homer's themistes (θέμιστες: decrees of the gods, oracles), and themis (sing. of themistes, θέμις: that which is laid down or established), furthermore, dike (δίκη: order, right, judgement (that which is right)), and eunomia (εὐνομία: good order (that which is well established)) to mention only the most significant.⁴ Of the themistes Homer⁵ says that they come from Zeus "the counsellor

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2. Hesiod, Works and Days 276-280, quoted after the original version with an English translation by Hugh G. Evelyn-White, Hesiod, (London-Cambridge, Mass., 1914, repr. 1967), pp. 22-24, hereafter only: WD; the same applies to Hesiod's Theogony and the Fragments of Unknown Position (both quoted after H.G. Evelyn-White, ibid., [hereafter only Th. and Frg.]).
 3. Vide Liddell/Scott/[-Jones], A Greek-English Lexicon, (Oxford, 1843, ⁹1940, 1968, repr. 1977), [hereafter only: Liddell, Lexicon], p. 1180, and W. Jaeger, Anfänge ..., ubi cit., p. 323.
 4. As to those topoi and their possible English translation, vide Liddell, Lexicon; cf. also the German versions in Gemoll, Griechisch-Deutsches Schul- und Handwörterbuch, (München/Wien, 1954, ⁹1965).
 5. Vide Homer, The Iliad (original version), with an English translation by A.T. Murray, 2 vols., (London, 1924, repr. 1965), [hereafter only: The Iliad or Il.]; and Homer, The Odyssey (original version), with an English translation by A.T. Murray, 2 vols., (London, 1924, repr. 1966), [hereafter only: The Odyssey or Od.].

most high" (Il. VIII, 22) and that they are based on him. Zeus acts as "the father of gods and men" (Od. I, 28), to whom 'civilized' man owes the necessary institutions for his 'regular' communal life, such as the king (βασιλεύς), the assembly (ἀγορή) and the 'advice' or council (βουλή). 'Uncivilized' man lacks these institutions, and correspondingly he is regarded as living and dying without themistes.

"Neither assemblies nor council have they
[the Cyclopes], nor appointed laws [θέμιστες]".⁶

Hence themistes are of vital importance in the evolution of a 'civilized' life of man. Throughout Homer and still in the later compositions of Hesiod themistes are to be considered as originally divine regulations or ordinances being issued by Zeus and imposed upon, or better granted to, mortal mankind for their benefit in life. A king, instituted by Zeus, is in charge of themistes, says Homer:

"To thee Zeus hath vouchsafed the sceptre
and judgements [θέμιστας], that thou mayest
take counsel for thy people."⁷

Acting on earth in place of the god the king is obliged to

6. The Odyssey IX, 112, cf. ibid. IX, 215; for the translation of themistes cf. Liddell, Lexicon, p. 789. Cf. W. Jaeger, Anfänge ..., ubi cit., p. 324 ("Die barbarische Welt der Kyklopen, die noch in einem primitiven Naturzustand leben, ist eine Welt ohne Gesetz (themis). Jeder einzelne von ihnen ist Herrscher und Richter über seine Frau und seine Kinder. So maßt er sich die Macht an, die in der homerischen Gemeinschaft nur die Könige und bestellten Richter ausüben. Cf. also Rudolf Köstler, Die homerische Rechts- und Staatsordnung, in: the same, Homerisches Recht, (Wien, 1950), pp. 7-25, pp. 7-10 ff, with further references.

7. The Iliad IX, 98-9.

care for order in communal affairs taking themistes as both means and measure.⁸

I.3. Once divine regulations have been transferred to the world of man they command due attention and visible reaction in order to secure a minimum of good order (εὐνομία).⁹ But with man's growing selfconsciousness the imagination of divine order could gradually retreat. This process takes place with shifting emphasis from themis to dike, and, by a second step (though some time later), from themis or themistes to nomos or nomoi.

Any regular exercise of power (ἀνάσσειν),¹⁰ namely to be a master, is regarded as a fundamental function of a ruler, however, not without a limitation on the ruler's part and responsibility concerning the correct assessment of nomoi. The steadily unfolding presence of nomos becomes a lucid though not often verbalised feature in Hesiod's imagination of reality still only to be visualized in an undistinctive mixture of mythos and logos.¹¹ Comprising the divine

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8. Vide The Iliad I, 237; II 102, 204-206. Cf. M. Pohlenz, Nomos, ubi cit., p. 136; R. Köstler, op.cit., pp. 13-16; E. Wolf, op.cit., pp. 72-76; Nelly Tsouyopoulos, Strafe im frühgriechischen Denken, (Freiburg/München, 1966), pp. 13-17 ("Themistes sind immer mit der Tätigkeit des Königs und vor allem mit der ... [beratenden Versammlung] verbunden." p. 15).
9. Cf. the discussion of the "conception of eunomia" in Victor Ehrenberg, Aspects of the Ancient World, (Oxford, 1946), pp. 74-77.
10. Vide Liddell, Lexicon, p. 121; Rudolf Köstler, Zum Verständnis der homerischen Rechts- und Wirtschaftsordnung, in: the same, Homerisches Recht, (Wien, 1950), pp. 26-28, p. 27.
11. Cf. W. Jaeger, Anfänge ..., ubi cit., pp. 324-5 (Hesiod's "Theogonie beschreibt die Genealogie der Götter in einer Weise, die Aristoteles später [Metaph. B 4, 1000 a 18 cf. 9] treffend als "rationales Denken in mythischer Form" [ibid.] definiert."). Cf. furthermore Alfred Verdross, Die Begründung der antiken Rechtsphilosophie durch Hesiod, (Graz-Wien-Köln, 1966), pp. 24-5; Bruno Snell, Die Entdeckung des Geistes, Studien zur Entstehung des europäischen Denkens bei den Griechen, (Göttingen, 1975, 5¹⁹⁸⁰), pp. 30-55 ("Der Glaube an die olympischen Götter" and "Die Welt der Götter bei Hesiod"), esp. pp. 38-41.

and human spheres where gods and men 'live' and play their respective parts Hesiod reveals (in his "Theogony" and his "Works and Days")¹² the subtle complexity of nomos, a topos which occurs in three nuances.

First, there is nomos (vide WD 276-280, quoted above, I.1.) as an entity being established and ordained by Zeus in place of Homer's themis (vide I.2.) and consequently being of necessity for life as such¹³ and thus including already an organized conduct of communal man who needs nomos as a directive or guiding principle, as an indication of a "manière correcte d'agir"¹⁴; and only in concrete situations is nomos bound to secure the realization of dike (i.e. that which is right). Although nomos did exist in the divine world it is no initial divine word.¹⁵

Secondly, nomos appears as an independently established practice or habit (usage), something that is practised over and over again anticipating a beneficial result; eventually nomos may be an advantageous rite of a goodly age. Hesiod says (Theogony 416-418):

"For to this day, whenever any one of men on earth offers rich sacrifices and prays for favour according to custom [κατὰ νόμον], he calls upon Hecate."

A similar idea is expressed in a fragment of unknown position attributed to Hesiod:

12. For the references vide supra footnote 2.

13. Somewhat differently Erik Wolf, op.cit., explaining nomos as the "'objektiv' Gültige, woraus erst jeder 'subjektive' Anspruch (δίκη) folgen kann, ... Der Nomos ist 'naturhafte' Ordnung, trägt noch gar keinen 'politischen' Zug" (p. 151).

14. Marcel Hofinger, Lexicon Hesiodeum, (Leiden, 1978), p. 457.

15. Vide E. Wolf, op.cit., p. 169.

"Howsoever the city does sacrifice, the ancient custom is best [νόμος δ' ἀρχαῖος ἀριστός]." ¹⁶

And thirdly, nomos may be understood as that which conforms to the regularity of nature; ¹⁷ that which is naturally given, says Hesiod (WD 383-388):

"When the Pleiades, daughters of Atlas, are rising [early in May], begin your harvest, and your ploughing when they are going to set [in November]. Forty nights and days they are hidden and appear again as the year moves round, when first you sharpen your sickle. This is the law [νόμος] of the plains, ..."

In another instance (Th. 66) Hesiod makes the Muses celebrate with a song the nomoi of all so as to praise his new insight into the ways of nature (in an all-embracing sense) including the realm of regular human activities which is not different from "the goodly ways of the immortals" (Th. 66-7). ¹⁸

I.4. Obviously there is some correspondence between Homer's conception of themistes and Hesiod's nomoi, namely when Homer points out that he "whoso obeys the gods, to him do they gladly give ear" (Il. I, 218) and when Hesiod refers to the advantage of action in accordance with nomos [κατὰ νόμον]. On the one hand "all men have need of the gods" (Od. III, 48) and their (divine) themistes and on the other hand the same holds true of Hesiod's nomoi, which may

16. Frg. 20, quoted after the English version of Evelyn-White, Hesiod, ubi cit., pp. 278-9.

17. Cf. E. Wolf, op.cit., p. 151.

18. Ibid.

be understood in Homer's perspective as the emancipated issues of themistes.

Hesiod's imagination of reality represents the complexity of nomos in at least two distinct aspects (combining the three above mentioned nuances), namely as that which may be comprehended as the given, general and regular way of life, whether as granted divine directions (according to man's fancy) or 'communicated' usages, and the non man-made, pre-existing (natural) phenomena of visible regularity enabling man to evince respective reactions.¹⁹ The first aspect is not far from the (later emerging and influential) idea of living according to cultivated standards commonly accepted, *laid down* and sanctioned for the benefit of communal life as an organic whole.

19. Cf. Alfred Verdroß-Droßberg, Grundlinien der antiken Rechts- und Staatsphilosophie, (Wien, 1948), p. 17 ("Hesiod nimmt also eine doppelte Gesetzlichkeit der Welt an: den Nomos der vernunftlosen Natur und den der vernünftigen Wesen. Jener ist das Gesetz der Gewalt (Bia), dieser das Gesetz des Rechts (Dike). Bia ist der Ausdruck des naturgesetzlichen Müssens, Dike das Symbol des sittlich-rechtlichen Sollens. Doch ist dieses Sollen nicht freischwebend, sondern kosmisch verankert. Hinter ihm steht die Gottheit, die es trägt und gegen die Rechtsverletzer durchsetzt."). Cf. also V. Ehrenberg, Aspects, ..., ubi cit., p. 75. Furthermore Felix Heinemann, Nomos und Physis, (Basel, 1942, 1972), pp. 61-65; M. Pohlenz, Nomos, ubi cit., p. 139; M. Ostwald, op.cit., pp. 21-2; J. de Romilly, op.cit., pp. 24, 27-8. J. Walter Jones, The Law and Legal Theory of the Greeks, (Oxford, 1956), p. 34; Douglas M. MacDowell, The Law in Classical Athens, (London, 1978), p. 44.

As to the etymological evidence of nomos that ought to complete the previous investigation and may underline our present understanding of nomos, vide the following explanations: F.M. Cornford, From Religion to Philosophy, (London, 1912), p. 29-31 ("The connection of Nomos (Law) with the verb nemein, to 'distribute' or 'dispense', was clearly felt by the Greeks." (p. 29)). Concerning the various meanings of the verb νέμειν, vide Liddell, Lexicon, p. 1167. Cf. also F. Heinemann, op.cit., pp. 59-61, with further valuable references. M. Pohlenz, Nomos, ubi cit., pp. 139-142. E. Wolf, op.cit., p. 169.

Still within Hesiod's imagination of reality dike stands for the right that one deserves, or, in other words, for the correct treatment of the individual according to the nomos (in the first aspect) which calls for general attention and permits no transgression.²⁰

I.5. The original close connexion and consistency of Mythos and Logos surfaces in man's manifold activities as there arise his speculations and observations, his invention of distinctive topoi to govern his behaviour and to handle concrete situations, on the whole his unceasing endeavours to achieve a good result fit to be appreciated by gods and men alike. There is no abstract problem of truth but of concrete arete (ἀρετή: excellence [goodness] of any kind, e.g. of prosperity or merit),²¹ the 'virtue' of communal man, the man of the polis (πόλις: city).²²

This situation is still on the whole characteristic of the initial complex imagination of nomos, however, it is soon seen to be changing and giving way to a new understanding of nomos corresponding to the developed imagination of reality. The specific relation of thesmos (θεσμός: divine 'law', ordinance [reminiscent of θέμις] that which is laid down, fixed)²³ with nomos illustrates the significant shift

20. Dike denotes in Hesiod a share of earthly 'justice' between human beings. Yet, there was no problem of abstract justice. Cf. E. Wolf, op.cit., pp. 139-141 ("δίκη-haben ist ein Wesenzug des Menschen, der ihn vom Tier unterscheidet." (p. 139). "Was er [Zeus] den Menschen an "δίκη" zuteilt [i.e. in the sense of nemein (vide above)], ist eine Anerkennung ihres Soseins und Demgemäß-Handelns von Fall zu Fall." (p. 140)). Cf. also R.J. Bonner/G. Smith, The Administration of Justice from Homer to Aristotle, 2 vols., (Chicago, 1930), pp. 10 ff.

21. Vide Liddell, Lexicon, p. 288; F.E. Peters, Greek Philosophical Terms, (New York-London, 1967), p. 25; W. Jaeger, Anfänge ..., ubi cit., p. 322.

22. Cf. E. Wolf, op.cit., p. 169; for the word polis vide Liddell, Lexicon, pp. 1433-4.

23. Vide Liddell, Lexicon, p. 795. Cf. Max Pohlenz, Nomos und Physis, in: Hermes, vol. 81 (1953), pp. 418-438, p. 428. Concerning the problem of synonymity of themis and thesmos vide E. Wolf, op.cit., p. 33, footnote 6 with further references.

of emphasis that is more than the disclosure of a hitherto merely unknown aspect; it is the emergence of a new topos in the old guise of the expression nomos, the comprehension of which partakes in our modern topos of custom or customary law, authoritatively laid down as a binding precept.

The fixed thesmoi of Solon (c. 634-560 B.C.) replace the ancient nomoi (and neither the goddess Themis nor the divine word themis appears in his works), if not always in content yet in the form of his thesmoi; however, the topos of nomos does not virtually disappear thereafter, it assumed during a later period the meaning of thesmos, i.e. a fixed decree of authoritatively stated (written) law, namely that which is laid down to be practised for the benefit of the whole community.²⁴ The meaning 'a law' especially 'statute law' appears (obviously) still later.^{24a}

I.6. With the developing imagination of reality under the emerging rule of logos and abstract reasoning divine words lose their influence as topoi and are ever more neglected in thinking until they are virtually out of date as

24. Cf. W. Jaeger, Anfänge ..., ubi cit., p. 337, footnote 39; and E. Wolf, op.cit., I, pp. 124, 192, esp. 210-214 (passages V and VI with an exposition of the lines of development); cf. also H.J. Wolff, Vorgeschichte und Entstehung des Rechtsbegriffs im frühen Griechentum, in: Fikentscher, Franke, Köhler, Entstehung und Wandel rechtlicher Traditionen, (Freiburg/München, 1980), p. 562; J. Walter Jones, op.cit., p. 33.

24a. M. Ostwald, op.cit., points out in a careful and detailed investigation that "thesmos and nomos do not overlap chronologically in the sense of 'statute'" (p. VII); there are thesmoi until at least 511/10 B.C. (pp. 5, 173), however, "no example of a legal-political thesmos [is found] in Athens enacted after 464/3 B.C. and no example of a legal-political nomos before that date" (p. VII). "We know that nomos was firmly entrenched in Athens as the proper term for 'statute' by 403/2 B.C. and that thesmos had lost this meaning in Athens more than a hundred years earlier ..." (p. 10). From then on "the law intended to deprive of legal validity any nomos which was not written and, we may assume, officially published in an authoritative manner" (p. 1). The author concludes from his enquiry that there are "strong reasons for the adoption of nomos in place of thesmos as an integral part of Cleisthenean policy (p. VIII), cf. p. 173.

is the case with themis²⁵ and thēsmos, the latter of which retains the meaning of "sacred nomos"²⁶. Presocratic thinking then slowly but steadily draws the curtain aside to give view to an unbroken development from mythos to logos²⁷

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25. However, themis did not completely disappear, it figures for instance in Parmenides, Frg. B 1, 28 [Diels I, 230, 10], in Empedocles (ibid. together with nomos), Frg. B 9, 5 [Diels I, 313, 2] and in Plato's "Nomoi" 875c. Diels, abbr. for Hermann Diels/Walther Kranz, Die Fragmente der Vorsokratiker, Griechisch und Deutsch, 3 Bände, (Berlin/Zürich (Weidmann), 1903, ¹⁵1975); on thesmos which appears in Pindar vide E. Wolf, Griechisches Rechtsdenken, Vol. II: Rechtsphilosophie und Rechtsdichtung im Zeitalter der Sophistik, (Frankfurt a.M., 1952), pp. 185-7
26. "Sakrale 'νόμοι'", E. Wolf, op.cit., vol. I, p. 213.
27. Early evidence of a gradual change from mythos to logos goes back as far as Homer where hints of a process of decomposition of mythic imagination of reality are already transparent. Vide B. Snell, Die Entdeckung des Geistes, ubi cit., pp. 202-4. Mistrust in mere 'activities' of θαυμάζειν (to wonder at), namely at incomprehensible phenomena, eventually stimulates the new way of θεωρεῖν (to contemplate, to consider rationally). Vide Kurt Riezler, Das Homerische Gleichnis und der Anfang der Philosophie, (1936), in: H.-G. Gadamer, Um die Begriffswelt der Vorsokratiker, (Darmstadt, 1968), pp. 1-20, esp. p. 20; Wilhelm Nestle, Die Vorsokratiker, (1956), (Wiesbaden, 1978), ibid. Einleitung, pp. 7-93, esp. pp. 20-21; cf. the same, Vom Mythos zum Logos, (Stuttgart, 1940, ²1941, repr. 1975), pp. 1-3, 13, 18 ff, 80-82. In contrast Nelly Tsouyopoulos, op.cit., argues as follows (p. 11): "Der Mythos ist eine Mitteilung des Wesentlichen und als solche nichts anderes als Logos. ... Demnach läßt sich die griechische Philosophie nicht als der Weg vom Mythos zum Logos, von der mythischen zur logischen Auffassung der Wirklichkeit begreifen, sondern eher als die Kraft des Gründens und Gestaltens, die aus dem Stauen (θαυμάζειν) entspringt, aus jener Haltung nämlich, welche das Selbstverständliche aufhebt, indem sie es nach dessen Sinn befragt. Mythos und Logos sind gleichermaßen ursprüngliche Ausdrucksweisen des θαυμάζειν..." On the peculiar relation of religion and early forms of 'rational' thinking vide Eduard Zeller, Die Philosophie der Griechen in ihrer geschichtlichen Entwicklung, vol. I, 1, (¹1855, repr. Darmstadt, 1963), pp. 55-7; Eduard Meyer, Geschichte des Altertums, vol. I, 1, (Stuttgart-Berlin, 1884, Sonderausgabe: Darmstadt, 1981), pp. 130-33; F.M. Cornford, op.cit., p. 39. Cf. furthermore G.F. Else, God and gods in early Greek thought, in: Transact. Proceed. Amer. Philol. Assoc., vol. 80 (1949), pp. 24-36; O. Gigon, Die Theologie der Vorsokratiker, in: La notion du divin depuis Homère jusqu'à Platon, (Paris, 1954), pp. 127-55.

whose decisive pioneering step leads to a continuous search for an arche (ἀρχή: first principle)²⁸ or, in other words, to the obstinate question of what is the beginning and basic 'stuff' (Urstoff) of what is. Anaximander²⁹ is the first Greek 'scholar' to think this 'problem', into which (including delicate translation problems) we need not penetrate at present. However, broadly speaking, Anaximander makes sure that whatever exists does so in being inevitably exposed to the order of time ("κατὰ τὴν τοῦ χρόνου τάξιν")³⁰, an idea that is suggestive and by no means negligible with respect to Heraclitus' comprehension (below) of nomos.

II.1. Abstract reason and pure intellect being set into creative and speculative motion with Heraclitus' (c. 540-475 B.C.) observation and contemplation³¹ adds a third aspect to our previous understanding of nomos. His famous saying (Frg. 114) speaks of a nomos theios (divine nomos) in contrast to all anthropeioi nomoi (human nomoi). Both topoi are only comprehensible within the framework of some other of his more important sayings to which I shall refer incidentally. In full length fragment 114 (91b) reads as

28. Vide Liddell, Lexicon, p. 252; F.E. Peters, Greek Philosophical Terms, ubi cit., p. 23.

29. On Anaximander (610-547 B.C.) vide (for general information) William L. Reese, Dictionary of Philosophy and Religion, Eastern and Western Thought, (New Jersey, 1980), p. 15; on Thales (640-546 B.C.) vide ibid., p. 573; according to Aristotle Thales initiated the question of an arche; cf. also Capelle, Die Vorsokratiker, (Stuttgart, 1963), pp. 5, 70-1 (with ref.); W.K.C. Guthrie, A History of Greek Philosophy. vol. I, (Cambridge, 1962), pp. 78-9; furthermore F.M. Cornford, op. cit., pp. 40-1; G.E.R. Lloyd, Polarity and Analogy, Two Types of Argumentation in Early Greek Thought, (Cambridge, 1966, repr. 1977), p. 213.

30. Anaximander B 1 [Diels I, 89, 15].

31. Vide Heraclitus, Frg. B 1, and the following Frg. B 40; 41; 50; 108; 112 [Diels I, 150-176].

follows:

"Men must speak with understanding and hold fast to that which is common to all, as a city holds fast to its law [νομῶ], and much more strongly still. For all human laws [ἀνθρώπειοι νόμοι] are nourished by the one divine [θείου] law. For it prevails as far as it wills, suffices for all, and there is something to spare."³²

Nomoi comprise everything that exists in a perceptible regularity including the pattern of change within opposites.³³ They belong to the uncreated cosmic totality³⁴ whether in the sphere of man's practices and habits or in the realm of nature, of non-human (non man-made) phenomena. Whatever happens does so according to an underlying organizational scheme (κατὰ λόγον)³⁵ that makes sense even of the changing phenomena in the world,³⁶ as there are, for instance, man's variable nomoi (in the meaning of usages and customs) within one city (polis) and even more between different cities. However, nomos is still the dominant constitutional element of the polis without which the polis could not exist.³⁷

32. Heraclitus, Frg. B 114 (91b) [Diels I, 176], trans. after W.H.S. Jones, Heraclitus, in: Hippocrates, vol. IV, (London-Cambridge, Mass., 1931, repr. 1967), p. 499.

33. Vide Heraclitus, Frg. B 10 and 67 [Diels I, 152 and 165].

34. Vide Heraclitus, Frg. B 30 ("Diese Weltordnung ["κόσμον τόνδε"], dieselbige für alle Wesen, schuf weder einer der Götter noch der Menschen, sondern sie war immerdar und ist und wird sein ewig lebendiges Feuer, erglühend nach Maßen und erlöschend nach Maßen." [Diels I, 157-8].

35. Vide Heraclitus, Frg. B 1; 2 and 50, also 126a (doubtful authenticity) [Diels I, 150; 151; 161; 179].

36. Vide Heraclitus, Frg. B 49; 91; and 88 [Diels I, 161; 171; 170].

37. Cf. E. Wolf, op.cit., vol. I, pp. 270-1, 274-5.

In this sense we may refer to Heraclitus' illustration where he says:

"The people should fight for their law
[νόμον] as for a wall."³⁸

Within the polis' walls, the proper domain of nomos, it constitutes the ordinary, regular and traditional way of life supported and nourished by the 'aspirations', demands, and determinations of the one nomos³⁹, the nomos theios of the above quoted saying (Frg. 114), which may be taken in consideration of its context as the invisible basic structure, the holding-together of all the human nomoi, the elements of existence despite struggle and dispute.⁴⁰

II.2. Although there are immense difficulties in understanding Heraclitus' crisp sayings I should try to state what Heraclitus neither said nor meant when he used the topos of nomos theios (in my opinion) in a metaphorical sense to elucidate the great significance of the human nomoi. First of all, nomos theios is not to be conceived of existing outside the imaginative sphere of logos (vide II.1.) and therefore not in a 'higher' domain of the gods. It is by no means a divine command with respective consequences, not the expression of the will of a celestial lawgiver, it is neither ius divinum nor lex nor Gesetz, and it is no fixum in a static sense. There is also no room for a divine personification in Heraclitus' basic imagination of reality. Therefore, if we can go thus far, we might (positively)

38. Heraclitus, Frg. B 44 (100) [Diels I, 160], trans. after W.H.S. Jones, Heraclitus, in: Hippocrates, vol. IV, (London-Cambridge, Mass., 1931, repr. 1967), p. 503. Vide also W. Jaeger, op.cit., pp. 334-5.

39. Vide Heraclitus, Frg. B 33 [Diels I, 159].

40. Vide Heraclitus, Frg. B 53; 80 [Diels, I, 162; 169].

expound nomos theios as the logos of nomos, or the inherently creative principle that arises with man's developing imagination of reality that is thus capable of embracing a world of gods and men alike;⁴¹ in other words, nomos theios is not 'above' the world but 'within' the different realms of the natural human world as well as the non man-made 'nature'.^{41a}

Heraclitus' nomos theios slightly touches upon the (about half a century) later most influential and controversial distinction between nomos and physis (vide infra). Moreover, the tendency to an abstract conception of nomos is close at hand. Yet it is still a metaphor not unlike Pindar's topos of "King Nomos" (νόμος βασιλεύς)⁴². Both topoi

41. Cf. Marcello Gigante, Nomos Basileus, (Napoli, 1956, repr. New York, 1979), pp. 50-5; Uvo Hölscher, Anfängliches Fragen. Studien zur frühen griechischen Literatur, (Göttingen, 1968); René Marcic, Geschichte der Rechtsphilosophie, (Freiburg, 1971), p. 162; Wolfgang Röd, Geschichte der Philosophie, vol. I: Die Philosophie der Antike 1: Von Thales bis Demokrit, (München, 1976), pp. 89-90.

41a. M. Ostwald, op.cit., p. 28, gives the following not completely satisfying interpretation (leaving aside the logos problem) when he states: Nomos "is not the norm itself [nomos theios] but the fountain-head of norms, which it issues and which are regarded as binding by those who, in the words of frg. 114, 'speak with intelligence'".

42. Pindar, Frg. 169 (quoted after F. Heinemann, op.cit., p. 67). As to the general relationships of theology, religiosity, poetry, and philosophy Olof Gigon, Die Kultur der Griechen, (Frankfurt a.M., 1969, repr. Wiesbaden, 1979), gives the following suggestive exposition that should be quoted at some length: "Die theologische Substanz wird aufgezehrt durch den Mythos auf der einen, die philosophische Theologie auf der anderen Seite. ... Bei den Griechen zuerst beobachten wir, wie Dichtung und Philosophie sich bemühen, dieses Pathos [in Religion und Kultus] für ihre Zwecke nutzbar zu machen. ... die dichterische Arbeit und der philosophische Erkenntnisweg werden mit Begriffen umschrieben, die eigentlich die Berührung mit dem Göttlichen meinen. ... Die Entwicklung kann dazu führen, daß mindestens bei den Gebildeten das gesamte Pathos des Religiösen aufgesogen wird durch Bereiche, die es gar nicht als solches im Sinne haben, sondern lediglich metaphorisch ausbeuten." (pp. 95-6).

share the idea of nomos that is universally valid and persistent despite all varieties and irregularities of individual nomoi.⁴³

II.3. Pindar trusts that nomos still is king, namely the supreme ruling authority of the polis, and so do the great poets, Aeschylus, Sophocles and Euripides, who have an unwritten nomos (νόμος ἄγραφος) in mind when they advocate the good old traditional order in the sense of Hesiod's above quoted (I.3.) saying, that "the ancient custom is best". Nomos agraphos means in substance a constitution of the polis such as is pleasing to the gods; it deserves submission with due acknowledgement and true honour; deviation from it leads to destruction and decay of the good 'political' order (eunomia) and favours absence of individual justice (in the sense of the word dike).⁴⁴ If nomos is deprived of its authority whether in form of the gods' receding and vanishing or a weakened trust in its essence as moral force of traditional sanctity, it sinks down to a mere (unwritten)

43. Heinemann, ibid., remarks "daß nomos bei Pindar nicht bloß heißt "wie es die Menschen gelten lassen", sondern daß "dem Begriff immer etwas Ehrwürdiges, gewissermaßen Geheiligtetes innewohnt" [with references]". Cf. also E. Wolf, op.cit., II, pp. 187-94; W. Jaeger, op.cit., pp. 335-6; M. Gigante, op.cit., pp. 72-102, 103 ff. (with a detailed discussion on Pindar's Frg. 169); H.E. Stier, Nomos Basileus, in: Philologus 83 (1928), pp. 225-258; R. Marcic, op.cit., pp. 159-60; William Chase Greene, Moirai. Fate, Good and Evil in Greek Thought, (Cambridge, Mass., 1944), pp. 415-16.

44. Cf. E. Wolf, op.cit., I, pp. 342-5, II, pp. 215-6, 454; J. Walter Jones, The Law and Legal Theory of the Greeks, (Oxford, 1956), pp. 35-6. In stressing the significance of nomos agraphos Aristotle refers in his "Rhetoric" (1373b) to Empedocles' most distinctive evaluation which may allude to the comprehension of moira (fate), namely as "... the supreme power in the universe [which] was very closely allied to Nomos, in the sense of constitutional order" (F.M. Cornford, op.cit., p. 54); vide also Rudolf Hirzel, Agraphos Nomos, in: Abhandlungen der Königlich Sächsischen Gesellschaft der Wissenschaft, phil.-hist. Classe XX, 1 (1903), pp. 1-100, p. 94.

expression, to a 'shallow status' without effect on individual conduct and communal integrity.⁴⁵ In fact, the 5th century B.C., celebrated as the "Grand Century" and known as the age of the sophists, sees a strong devaluation of trust in nomoi, especially of unwritten traditional customs (νόμοι ἄγραφοι) on the one hand, and on the other of codified (written) precepts (laws), the given communal constitutions (νόμοι γεγραμμένοι).

Casting a cursory glance at history we learn that after the early epic period 'laws'⁴⁶ ('communal charters') were usually put down in writing (codified) to ensure their public validity as a set of precepts of an individual lawgiver who was supposed to act for the benefit of the polis.⁴⁷ However it was not before the constitution of Cleisthenes that the 'laws' of Athens were called nomoi (vide I.5.).⁴⁸ Irrespective of differences in terminology there is altogether little respect for unwritten customary rules (nomoi agraphoi) and the application of equity rules. Strict codified 'laws' as such (not an individual ruler) mark the key to good order in the course from the 6th to 5th centuries

45. Cf. J.C. Stobart, The Glory that was Greece, (London, 1911, repr. 1978), pp. 64, 73; Kurt Latte, Heiliges Recht. Untersuchungen zur Geschichte der sakralen Rechtsnormen in Griechenland, (Tübingen, 1920), p. 1; F. Heinemann, op.cit., p. 72; Louis Gernet, Einführung in das Studium des alten griechischen Rechts, in: E. Bernecker (Hrsg.), Zur griechischen Rechtsgeschichte, (Darmstadt, 1968), pp. 4-38, p. 31.

46. Vide supra (I.5./6.).

47. Cf. Bonner/Smith, op.cit., pp. 67-8, 72, 74-5; John Burnet, Law and Nature in Greek Ethics, in: Essays and Addresses, (London, 1929), pp. 23-28, p. 27.

48. Vide F. Heinemann, op.cit., p. 72; also supra footnotes 24, 24a.

B.C.⁴⁹ However, by the middle of the 5th century the so-called sophists declare both kinds of nomoi to be merely unreliable, arbitrary and perishable products of man. Eventually this conviction surfaced in the well-known antithesis of nomos and physis and led to the inauguration of distinctive ethical speculation.

III.1. Observation of manifold 'inconstant' nomoi raised the problem of their capability to do justice to those concerned, especially when nomoi agraphoi were deemed insufficient as a regular basis for decision in litigation.⁵⁰ It was held true by eminent thinkers of the 5th and 4th centuries B.C. that neither unwritten, customary regulations (nomoi agraphoi) nor written, statutory regulations (nomoi gegrammenoi), once the conviction of divine beneficency had given way to the superiority of the products and insights of man's reason, were able to constitute (according to their imagination of reality) the necessary basic state of order whereupon justice could be founded. The traditional divine word, Dike, is seen to become gradually supplanted and displaced with the new abstract conception of dikaiosyne (righteousness, justice).⁵¹ Man-made and conventional nomos is the new topos (irrespective whether they have been attributed to the gods or a heroic lawgiver inspired by the

49. Cf. Olof Gigon, Die Kultur der Griechen, ubi cit., pp. 22-5; D.M. MacDowell, The Law in Classical Athens, (London, 1978), p. 44 ("Nevertheless, by the fourth century nomos was the normal word for a statute, a law published in writing and validated by a political process."); cf. furthermore Martin Ostwald, Nomos and the Beginning of the Athenian Democracy, (Oxford, 1969), pp. 137-73.

50. Vide, H.J. Wolff, op.cit., pp. 566-7.

51. The origin of nomos and dike is no longer envisaged as a "Wohlthat der Götter, sondern lediglich eine Leistung menschlicher Klugheit" (R. Hirzel, op.cit., p. 83). The new word dikaiosyne appears for the first time in Theognis (about 546 B.C.); vide John Ferguson, Moral Values in the Ancient World, (London, 1958), p. 42; and E. Wolf, op.cit., I, p. 334.

gods) and the opposite of that which is the product of physis (φύσις).

III.2. Considerations on physis had a good tradition in Pre-Socratic thinking (e.g. Xenophanes and Heraclitus "περι φύσεως"⁵²) so it was a natural consequence to contrast nomos from physis, in other words, to observe the natural order of things in contrast to the mere conventional. Physis⁵³ denotes that which is not man-made, no product of culture, but a process or result of growth,⁵⁴ an 'elementary' phenomenon subject to metron and number,⁵⁵ self-supporting, independent, resting in oneself; thus Democritus (460-370 B.C.) states: "φύσις δὲ αὐτάρκης"⁵⁶.

Quite generally physis is often (inadequately) rendered 'nature' which misses the early topos of physis as regards Pre-Socratic sources;⁵⁷ nomos and physis are not merely our

52. In Diels I, pp. 135, 150.

53. Still in Heraclitus, B 123 (10), [Diels I, 178, 8-9] we read that physis loves to hide herself ("φύσις ... κρύπτεσθαι φιλεῖ").

54. Vide Liddell, Lexicon, pp. 1964-5; J. Burnet, op.cit., pp. 23-4. "Der Begriff der Physis ist eine Schöpfung der ionischen Wissenschaft [with references], die in ihm ihr ganzes neues Weltverständnis zusammenfaßte. ... Auf diesen Begriff gründete sie die Naturwissenschaft, die dem Orient fremd war" (M. Pohlenz, Nomos und Physis, ubi cit., p. 426); cf. J. Burnet, ibid.

55. Like the sun in Heraclitus, B 94 (29), [Diels I, 172, 8-10].

56. B 176 (64N), [Diels II, 180, 10]. "Als Naturforscher hat Demokrit ein ganz neues physikalisches Weltbild begründet. Sein Grundgedanke war die unaufhörlich aus sich selbst heraus stattfindende Bewegung der Atome, der unteilbaren Grundeinheiten des Weltstoffes. Sie geschieht nach strenger Notwendigkeit ..." (E. Wolf, op.cit., II, p. 338). Vide esp. Democritus B 125 [Diels II, 168, 5-6], namely, that in reality there are atoms and the void.

57. Cf. W. Jaeger, Die Theologie der milesischen Naturphilosophen, in: H.G. Gadamer (Hg.), Um die Begriffswelt der Vorsokratiker, (Darmstadt, 1968), pp. 49-87, p. 53; J. Burnet, op.cit., p. 23.

'law' and 'nature'.

In antithesis to his understanding of physis (as the real) Democritus emphasizes with nomos "the unreal character of our everyday knowledge of the world"⁵⁸. Antiphon, a contemporary of Socrates, offers the following clear-cut distinction between nomos and physis:

"For the [orders] of nomoi are arbitrary, those of physis, by contrast, necessary; the [orders] of nomoi are conventional, not grown; those of physis are grown, and not conventional."⁵⁹

Accordingly physis suggests a 'fundamentum inconcussum' that stands for the trustworthy, real order of things; as such it is also able to disclose the true basis for justice to be granted both in the realms of moral and legal conduct, of nomos agraphos (in the sense of ethos) and nomos gegrammenos (in the sense of statute law).

58. J. Burnet, *ibid.*, p. 26. However, Democritus never refused to pay due attention to the actual nomos of the polis. For "er sah nämlich im Nomos der Polis ein Abbild der kosmischen Geordnetheit; wie diese, so ist jener notwendig" (E. Wolf, *op.cit.*, II, p. 342). Rudolf Hirzel, Themis, Dike und Verwandtes, (Leipzig, 1907), p. 388), points out that already the (below quoted) statement of Antiphon refers (in its context) to the concept of a 'necessity of nomos' or a 'nomos of nature' [νόμος φύσεως]; cf. F. Heinemann, *op.cit.*, p. 131.

59. Antiphon Frg. 44 (Col. I), [Diels II, 346-7, 23-34].

IV.1. The intention and scope of this enquiry do not permit us to go into details neither of the highly suggestive physis-nomos controversy⁶⁰ nor of the following period of Greek philosophy, when Plato and Aristotle exercised their great and lasting influence on occidental legal thinking. It is also impossible to discuss the view of historians and orators, who, broadly speaking, did not develop a distinctively

60. Max Pohlenz, Nomos und Physis, ubi cit., observes (p. 434): "Wer zuerst programmatisch vom Nomos an die Physis als die höhere Instanz appelliert hat, ... können wir nicht sagen." However, a reliable point of reference seems to be a contemporary of Democritus, namely Hippocrates "On Airs, Waters, Places", where for the first time physis and nomos appear in a fixed terminology (M. Pohlenz, ibid., p. 419; Heinimann, op.cit., p. 13); eventually after 430 B.C. the physis-nomos controversy was firmly established and exercised great influence in the realm of moral philosophy which was just emerging and well represented in Socrates (469-399 B.C., a contemporary of the above-mentioned so-called (from Socrates' viewpoint) Sophist Antiphon). The literature on this problem is very extensive. W.C. Greene, Maira, ubi cit., gives a helpful arrangement of works in a roughly chronological order, beginning with 1889 and ending with W. Jaeger's Paideia (op.cit.; Engl. trans., 1939). As to the period pre-1889 I should add Eduard Zeller, op.cit., I, 2, pp. 1384-1428, with valuable and copious footnotes, and post-1939 Felix Heinimann's "Nomos and Physis" (op.cit., originally Diss. Basel 1942) and Erik Wolf, op.cit., II: Rechtsphilosophie und Rechtsdichtung im Zeitalter der Sophistik, (Frankfurt a.M., 1952), vide esp. pp. 9-17 (introduction).

new aspect of nomos.⁶¹

We have already touched upon an abstract ideal of right, a conception of τὸ δίκαιον that was unfolded out of the strict antithesis of φύσει δίκαιον and νόμῳ δίκαιον, yet firmly based upon the clearly visualized reality of physis. Henceforth the new conception of abstract justice in agreement with the re-evaluated topos of nomos brings about the widely acknowledged 'intrapolis' orientation of nomoi on a broad scale. These become the general signposts for justice to be sought individually and for communal ('political') constancy. At the basis of legal thinking surfaces the synthesis of 'natural' nomos as a necessary result of the rigid nomos-physis antithesis, or, as John Burnet has put it, "a compromise of 'natural rights'" with respect to a society demanding a reasonable solution. Already Democritus (9 years younger than Plato's teacher Socrates) indicated

61. The historians regarding (most generally) nomos as being quite transitory take interest in the function of nomoi in their historical continuity and leave aside the 'ideological' aspect of nomos. Vide E. Wolf, op.cit., vol. III, 2: Die Umformung des Rechtsgedankens durch Historik und Rhetorik, (Frankfurt a.M., 1956), pp. 14-16. Herodotus and Thucydides conceive the function of nomos as law-and-order; the positivity and validity of nomoi are strongly accentuated. Vide M. Ostwald, op.cit., p. 31; E. Wolf, ibid., pp. 42 ff, esp. 45-6, and 68-80. "Most famous in Thucydides is the nomos ... that both gods and men rule whatever they have in their power" (M. Ostwald, ibid., p. 23). On the orators' conception vide E. Wolf, ibid., pp. 157 ff.

As to inscriptions with respect to various kinds of nomoi (a subject which I shall leave aside as being only marginal for our general understanding of the topos of nomos) we know that the 5th century B.C. meant a culmination of inscriptional fixations, a fact (irrespective of content) that we should keep in mind for comparative purposes. Vide Wilhelm Larfeld, Handbuch der griechischen Epigraphik, (Hildesheim-New York, 1971), vol. I, pp. 174-5, and e.g. pp. 451-460 (nomoi of non-sacral and sacral kinds outside of Attica), and M.N. Tod, A Selection of Greek Historical Inscriptions, 2 vols., (Oxford, 1946, 1948), referred to by M. Ostwald, op.cit., p. 1, footnote 4 with details).

62. Op.cit., p. 28. Cf. R. Hirzel, Agraphos Nomos, ubi cit., p. 97.

the step to overcome the gap between the pro and contra nomos arguments. For him it was quite evident that men need to obey appropriate nomoi for their own welfare because of their natural ($\phi\acute{\upsilon}\sigma\epsilon\iota$) tendency to do harm to each other.⁶³

IV.2. Also Plato and Aristotle deal with the nomos-physis controversy in order to overcome and to adjust its excesses.⁶⁴ For Plato (427-347 B.C.) nomos⁶⁵ is acceptable and valid to the extent that it participates in the idea of justice.⁶⁶ Thus Plato distinctly reacts against a material-

63. Vide Democritus, Fragments 245 (140 N), 248 (139 N), 249 (138 N), [Diels II, 194-5]; cf. E. Wolf, op.cit., II, pp. 342-49.

64. Vide Plato, Gorgias 483 e, 484 c; Protagoras 337 c/d; Nomoi [Laws] 889 d/e - 890 a; Aristotle, Nicomachean Ethics 1094 b 13. The works of Plato are quoted after "Werke in Acht Bänden", Griechisch und Deutsch, hg. v. G. Eigler, (Darmstadt, 1973 ff); Parmenides (infra) is quoted after the edition of "The Loeb Classical Library", Plato in twelve volumes, IV, with an English transl. by H.N. Fowler, (London-Cambridge, Mass., repr. 1970), pp. 198 ff. The works of Aristotle are also quoted after the edition of "The Loeb Classical Library", Greek with an English translation.

65. In his early Socratic period we find alongside the revival of the old pre-philosophic mythos a personification of nomoi (Kriton 50a-52a); finally in his last work "Nomoi" [Laws] the indication of a theology intertwined with cosmological (also astronomical) and legal-philosophical considerations, variously culminating in suggestive statements like god is the measure of all things, not man (directed against Protagoras, that man is the measure of all things), vide Nomoi 716c, or, with reference to Thales [A 22; Diels I, 79, 27] that all is full of gods, vide Nomoi 899b. For men it is not only indispensable to enact nomoi and to live according to nomoi in order to be different from wild animals (Nomoi 874e/875a), but moreover, to serve the nomoi, since this is a service to the gods (Nomoi 762e). On Plato's "Nomoi" and therein the "Motiv des θεός" vide Hans Erich Stier, Nomos Basileus, in: Philologus 83 (1928), pp. 225-258, pp. 255-57. As to different meanings of the word nomos, vide the list given by M. Ostwald, op.cit., p. 1 n. 3.

66. On the participation ($\mu\acute{\epsilon}\theta\epsilon\chi\iota\varsigma$) in the ideas, vide Plato, Parmenides 132 d (c-e). Cf. Emmanuel Michelakis, Platons Lehre von der Anwendung des Gesetzes und der Begriff der Billigkeit bei Aristoteles, (München, 1953), p. 9; Carl J. Friedrich, Die Philosophie des Rechts in historischer Perspektive, (Berlin, 1955), pp. 7-8.

istic conception of physis and declares the divine nous (intellect, as being immanent in human souls) to be the creative, vital, and true physis wherein nomoi participate. Hence nomoi (justified from the existing difference between divine and human reason) are necessary for the regular life of human beings, although nomos and taxis (order) are inferior to nous (intellect and reason) which comprises the divine, cosmic, and human spheres. Nomos rules over the polis as a second best possibility and nous rules over those three spheres, so that nomos is a just rule as it complies with this overarching nous. In his "Nomoi" Plato gives the following statement:

"... for no law [νόμος] or ordinance [τάξις] is mightier than Knowledge, nor is it right [θέμις] for Reason [νοῦν] to be subject or in thrall to anything, but to be lord of all things, if it is really true to its name and free in its inner nature [κατὰ φύσιν]. But at present such a nature [i.e. a human ability to do the best] exists nowhere at all, except in small degree; wherefore we must choose what is second best, namely ordinance and law, which see and discern the general principle, but are unable to see every instance in detail."⁶⁷

IV.3. Aristotle (384-322 B.C.) rejects Plato's conception of nomos as a participation in the idea of the good and the just, but agrees with him that it is inevitable for man to have nomoi and to live accordingly, because otherwise man will be not different from wild beasts. Aristotle's realistic imagination of reality conforms to the demand that

67. Nomoi [Laws] 875 c-d. Vide also ibid. 890 d.

nomos ought to rule over man as a 'political animal'⁶⁸ that has to exercise virtue as a citizen, in the last resort according to the moral (habitual) way of life (ethos)⁶⁹. This conception reads in the words of Aristotle's "Politics" as follows:

"He therefore that recommends that the law [i.e. nomos] shall govern seems to recommend that God and reason alone shall govern, but he that would have man govern adds a wild animal also; ... Therefore the law is wisdom without desire."⁷⁰

For Aristotle all that which happens according to the rule of nomos (in the above given connotation) enables the realization of justice, the practised virtue of which essentially makes for the quality of the polis.⁷¹ The supreme position in the polis, however, pertains to the 'autonomous' man. He is a man who by virtue and ability excels all others and thus can never more be subject to the law, for he is himself a law.⁷² All this 'speculation' on nomos and justice, to be sure, is not unrelated (if not explicitly directed) to the regulations of daily life, in particular disputes between citizens, or citizens and their cities, or even between cities.

68. Aristotle, Politics 1253 a 1-5 (Bk. I.I.9), pp. 8-9 (for references on Aristotle vide footnote 64).

69. Vide Aristotle, ibid. 1287 b 5-10 (Bk. III.XI.6-7), pp. 266-7.

70. Aristotle, ibid. 1287 a 25-35 (Bk. III.XI.4-5), pp. 264-5.

71. Aristotle, The Nicomachean Ethics, Bk. V.I.12, pp. 256-7; Politics 1253 a 30 - 1253 b (Bk. I.I.12), pp. 12-13. Cf. the exposition of J. Ferguson, op.cit., pp. 43-44, esp. on the different positions held by Plato and Aristotle regarding the problem of justice.

72. Vide Aristotle, Politics, 1284 a 10-15 (Bk. III.VIII.2), pp. 240-1.

In his conception of the nomos idios (special) and nomos koinos (universal), the former distinction of nomô dikaion and physei dikaion has been overcome in favour of the new topos of 'natural law'. This reads in Aristotle's "Rhetoric":

"Now there are two kinds of laws, particular [ἴδιον (νόμον)] and general [κοινόν (νόμον)]. By the particular laws I mean those established by each people in reference to themselves, which again are divided into written [γεγραμμένον] and unwritten [ἄγραφον]; by general laws I mean those based upon nature [κοινὸν δὲ τὸν κατὰ φύσιν]. In fact, there is a general idea of just and unjust in accordance with nature [φύσει κοινὸν δίκαιον καὶ ἄδίκον], as all men in a manner divine, even if there is neither communication nor agreement between them."⁷³

To complete Aristotle's conception given in his own words we should add a previous statement, namely:

"By particular [ἴδιον (νόμον)], I mean the written law [γεγραμμένον (νόμον)] in accordance with which a state is administered; by general [κοινόν], the unwritten regulations which appear to be universally recognized [or admitted]."⁷⁴

73. Aristotle, The "Art" of Rhetoric (short: Rhetoric) 1373 b (Bk. I.XIII.2), pp. 138-9.

74. Aristotle, ibid. 1368 b (Bk. I.X.3), pp. 104-7.

To sum up, we can take notice of Aristotle making those clear-cut distinctions which are significant for a conception of the developed topos of nomos. Particular (the special and practicable) nomoi comprise both the statutory laws (nomoi gegrammenoi) and the customary observances (nomoi agraphoi) as well as the inter-individual moral conduct (ethos) of an overarching validity; the latter two of which are the unwritten sources of equity considerations in addition to the imperfect body of written (positive) laws.⁷⁵ Taken together both sets of nomoi may be typified as the necessary body of man-made 'conventions' (in a broad and general artificial sense, one could also say: 'conglomerations') which ought to govern the state (polis), the natural unity that binds human beings together for the benefit of each other in an organic whole.

The man-made 'conventions' or standards of living with binding force (of both types, statutory and customary laws) are just in that they are not in contradiction to the universal (koinos) unwritten nomos, the natural order of things perceptible and present under the rule of god (theos) and reason (nous). And yet, this order of things is not unchangeable or static in the concrete and real phenomenal world, however, it is basic and firm enough to ground the true

75. Vide Aristotle, Rhetoric 1374 a 13 (Bk. I.XIII.13: "... equity is justice that goes beyond the written law." (trans. J.H. Freese)), pp. 144-5; The Nicomachean Ethics, Bk. V.X.1-8, on equity and justice in general ("... equity ... is not legal justice, but a rectification of legal justice ... it is a special kind of Justice, not a different quality altogether" (ibid.), trans. H. Rackham), pp. 313-17. Jacqueline de Romilly, op.cit., p. 38, has highlighted the essence of equity in saying: "l'équité comporte ... que l'on soit indulgent aux faiblesses humaines, que l'on considère non la lettre de la loi, mais son esprit."

'political' constitution.⁷⁶ Considering this well-developed conception, which encircles theory and practice without excluding the facts of historical reality, it is not difficult to argue substantially that there may well be just actions opposed to statutory law (e.g. in the case of Sophocles' Antigone) though with only little chance of recognition in the 'political' reality.

IV.4. Regarding the present stage of development it appears to me that two lines of development of the topos of nomos can be envisaged *cf.* being interrelated in Aristotle's philosophy of nomos, the interrelation of which accomplished a development of its own reality exerting a significant influence in the history of occidental legal philosophy, and still, as it seems, is not brought to an end.

Nomos (agraphos) developed, including the interplay of thesmos and retaining the aspects discussed above, without disappearing or falling out of use, into the intra-communal ('political') most powerful, influential, clearly and indisputably stated nomos (gegrammenos), which could come into at first sporadic then common practice with the invention and diffusion of the art of alphabetical writing, a fact that must be taken into account. Nomos gegrammenos (first as thesmos, namely as that which was authoritatively fixed and laid down) was handled according to given provisions in often changing codes, the early species of which "contained

76. Vide Aristotle, Politics 1282 b (Bk. III.VI.13); The Nicomachean Ethics, Bk. V.VII.3-4. Both, Plato and Aristotle are quite aware of the dependence of the effectiveness of their 'legal' conceptions on appropriate means of education, for the nomoi themselves have an educational function; vide e.g. Aristotle, Politics 1280 b 1-10 (Bk. III.V.11), pp. 214-15; Plato, Apology, 24 d-e; cf. with further references Herwig Görgemanns, Beiträge zur Interpretation von Platons Nomoi, (München, 1960), pp. 16-19, 21.

provisions regarding assault, housebreaking, arson, all sorts of family matters, debt, slavery, transfer and distribution of property, business relations, perjury, religious matters, homicide, sumptuary legislation"⁷⁷.

The great mass of subjective (individual) 'rights' concerning relevant provisions enabled and often resulted in antagonistic litigious behaviour demanding an appropriate court-decision. In agreement with Aristotle's conception, private or public nomoi (not sharply distinguished) were "regarded as essential not (as the Romans mainly considered it) to adjust the relationships of individuals, but as a means of supporting the constitutional structure"⁷⁸. It is, therefore, readily accepted that one may find social peace largely depending on reasonable nomoi gegrammenoi, and a fair jurisdiction bound to apply them;⁷⁹ yet apparently with little success considering that "the litigiousness of the Athenians was proverbial"⁸⁰. Even the 'idealist' Plato who conceived the object of rule to be the true and objective good (that is a just social order in an abstract sense) did not reject or condemn (in his "Politeia") the use of litigation as a weapon in political disputes.⁸¹

The other line of development follows a slowly but steadily growing tendency, namely to think in general and abstract terms rendered possible under the impact of the

77. R.J. Bonner/G. Smith, op.cit., II, p. 2.

78. Colemann Phillipson, The International Law and Custom of Ancient Greece and Rome, 2 vols., (London, 1911), I, p. 52.

79. Vide Victor Ehrenberg, From Solon to Socrates, (London, 1968), p. 70.

80. R.J. Bonner, Lawyers and Litigants in Ancient Athens, (Chicago, 1927), p. 96.

81. Cf. R.J. Bonner, ibid., p. 101.

Greek language-structure.⁸² Thus, we are able to observe such a line, for instance, in the νόμος θεῖος of Heraclitus, to the τὸ θεῖον of Empedocles and the νόμος κοινός κατὰ φύσιν (including the abstract term of physis) of Aristotle, that represents a rather conclusive development towards a firmly based abstract legal thinking; however, this may encounter all the difficulties inherent in mediating the concrete with the abstract, or the world of phenomena with the mere noumenon. Concluding and characterizing the topos of nomos (in sum) it may be comprehended as a constituted (verfaßte) order of society, a partially fixed way of life comprising individual duties as well as subjective individual rights.⁸³

V. For reasons of a comparative chronology I should still mention that the Stoa added nothing decisively new to the development of nomos as described above. There may be one exception concerning the evolution of the nomos topos with regard to the nomos of physis (the law of nature),⁸⁴

82. Vide Julius Stenzel, Über den Einfluß der griechischen Sprache auf die philosophische Begriffsbildung (1921), in: the same, Kleine Schriften zur griechischen Philosophie, (Darmstadt, 1972), pp. 72-84, pp. 82-84. Reinhard May, Frieden und die Aufgabe des Rechts, (Wiesbaden, 1979), pp. 14-16, 83-93.

83. M. Ostwald, op.cit., has similarly pointed out (now summarized) "although the origin of this norm [nomos] may on various occasions be attributed to the gods, to a lawgiver, or to an enactment by a society as a whole, the crucial point is that, regardless of origin, it is recognized and acknowledged as the valid norm within a given milieu" (p. 21); "they [the nomoi] denote a general order of life" (p. 33). However, the decisive element of this order is that it is firmly constituted as the ruling factor of an emancipating society.

84. Vide Edgar Zisel, The Genesis of the Concept of Physical Law, in: The Philosophical Review LI,3 (1942), pp. 245-279, p. 251; Joseph Needham, Science and Civilization in China, vol. II: History of Scientific Thought, (Cambridge, 1956, repr. 1975), p. 534 (pp. 533-539, on "stages in the Mesopotamian-European differentiation of natural law and laws of nature"); Klaus Reich, Der historische Ursprung des Naturgesetzbegriffs, in: Festschrift Ernst Kapp, (Hamburg, 1958), pp. 121-134, p. 133.

a problem of great significance, that emerges already, as I would suppose, with Hesiod's "nomos of the plains" (vide supra). But this problem will be discussed elsewhere.

The school of the Stoa regarded nomos (characteristically) to be of divine universal rationality wherein every human nomos is incorporated.⁸⁵ The idea of nomos empsychos is visualized. Finally, we learn from Cicero (106-43 B.C.) in a passage of his "De legibus" where he compares (in I, 6, 19) the Greek word nomos (from nemein in the sense of 'to distribute') with lex, the word of his language (from legere meaning to pick out, to select, to choose), that lex, which also agrees with the meaning of nomos (as mentioned), is supreme reason incorporated in nature commanding that which ought to be done and prohibiting the contrary.

"... lex est ratio summa, insita in natura, quae iubet ea quae facienda sunt, prohibetque contraria."⁸⁶

85. Vide Max Pohlenz, Die Stoa. Geschichte einer geistigen Bewegung, 2 Bände, (Göttingen, 1943, 1970), I, p. 132-3. A. Verdroß-Droßberg, op.cit., p. 159. The philosophy of the Stoa regarding the problem of nomos and physis goes back as far as Heraclitus, and remains more in the tradition of Plato than of Aristotle in attempting to overcome the opposition of nomos and physis. Vide Maximilian Forschner, Die stoische Ethik, (Stuttgart, 1981), pp. 18-19, p. 15. ("Die Stoa wird den Gedanken der Relativierung von Gesetz und Sitte zugunsten der Physis und die Begründung der Rechtmäßigkeit oder Unrechtmäßigkeit des Nomos aus der Natur bewahren und teleologisch uminterpretieren."). Chrysippus (c. 280-206 B.C.), the completer of the stoic philosophy, resumes Pindar's nomos basileus as the supreme ruling authority for men in their 'political' community; vide Stoicorum Veterum Fragmenta, ed. by H. von Arnim, 4 vols., (Stuttgart, repr. 1964), vol. III, VI De iure et lege, § 2, 314, p. 77.

86. Marcus Tullius Cicero, De legibus I, 6, 18 (quoted after Cicero. Staatstheoretische Schriften. Lateinisch und Deutsch von Konrat Ziegler, (Berlin (Ost), 1974 1979), p. 222.

Though god (deus) is according to Cicero (*De re publica*) the inventor, transmittor and keeper of the one eternal and unchangeable law ("... una lex et sempiterna et immutabilis ..., ille [deus] legis huius inventor, disceptator, lator; ..." ⁸⁷) there is still a good distance to the conflation with the Jewish-Christian tradition and Aquinas' significant distinction between lex aeterna, lex divina, and lex naturalis.

87. Cicero, De re publica III, 33 (for reference vide supra), p. 150.

CONCLUSION . .

§ 16. Similarity and Disparity between dharma, li, and nomos

No doubt our comparative enquiry so far leads to the general conclusion that the three topoi of dharma, li, and nomos took, each of them without foreign influence, their peculiar and unmistakable course of formation. At the end of it¹ they continued to exist disparately in what I have described as a distinctive post-formative process of promotion in the case of dharma, of extension and consolidation in the case of li, and of development in the case of nomos.

In contrast to the many obvious disparities which the comparative juxtaposition of dharma, li, and nomos has produced, now easily obtainable from §§ 1-15, it is in fact rather difficult to account for distinctly similar² features which might induce us to speak of a sound parallelism instead of more or less vague correspondences. Though, broadly speaking, as key topoi of their respective cultures, seeking to find plausible and lasting answers in the form of mental and physical activities to the fundamental problems of world-orientation and communal life, we are at most entitled to say that they found corresponding answers. However, bearing in mind that all three topoi exhibit quite diverse intra-cultural relations, we can only conclude on good grounds that dharma is for India (Hinduism) what li is

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1. That is about 500 B.C., the so-called "Achsenzeit" of world history; vide K. Jaspers, Vom Ursprung und Ziel der Weltgeschichte, (Frankfurt a.M./Hamburg, "1957), p. 14.
 2. We must be aware of the fact that the descriptive use of the English language often produces an impression of similarity where the juxtaposition of Chinese, Sanskrit, and Greek take us on quite different ways of thought with sometimes remarkable differences, which are rather difficult to express appropriately when we only have for instance a choice between one or two words. I have dealt with this problem at some length in "Frieden und die Aufgabe des Rechts" (3. Sprachkritische Einsicht im rechtsvergleichenden Bereich, pp. 9-10, 61-8, including the problem of cross-cultural translations), op.cit.

for China, and both are counterparts of what nomos was and became in ancient Greece (and eventually in the earliest strata of Judaic-Christian cultures)³. Yet, it would be entirely misleading to suggest that these topoi were equivalents.

Each culture, of course, independently formed its indigenous pattern and exists as a whole, within which its basic topoi circulate in mutual connection consistently with a general world outlook.⁴ But though cultures fulfil some similar function for their societies there is not, and ought never to have been, a serious suggestion that their 'world-conceptions' and their basic topoi overlapped or entirely corresponded inter se. There is the problem of non-overlap-

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3. It is beyond the framework and scope of this enquiry to suggest that in a comparative study of nomos the Jewish topoi of Torah translated in ancient times into Greek should figure (likewise the Buddhist topoi of dharma translated into Chinese in the early centuries A.D.), or the subtle blend of Jewish and Hellenistic ideas which surfaced under the protean expression nomos in the earliest Christian texts, viz. Paul's letters and some deuteropauline letters. Vide Gerhard Kittel, Theologisches Wörterbuch zum Neuen Testament (IV), (Stuttgart, 1933 ff). Cf. John C. Plott, Global History of Philosophy I, (New Delhi, 1963), pp. 66, 72. Nevertheless without the Hellenistic inheritance of nomos from the classical age the topos could not (probably) have been used in religion. Its adaptation to the religious sphere is a testimony to its vitality by the end of the classical age. It is of significance that at 1 John III,4 we gather that sin is anomia ("Whosoever commits sin transgresses also the law: for sin is the transgression of the law."), which by this date could not have meant "breach of the Torah". This development of the topos of nomos is, like other ancient Greek topoi, e.g. logos, contained in potentia within the classical Greek conception of reality (its specific world outlook) even if instances of such use cannot be found, except by implication, in, e.g. Plato. The bridge (as I have indicated, at the end of the enquiry in nomos, vide § 15 V) was apparently the Stoa, particularly the later Stoa.
4. On the disparity between the Chinese and the Occidental world outlook ("Vorstellungswirklichkeit und Wirklichkeitsvorstellung") vide Reinhard May, Frieden und die Aufgabe des Rechts, ubi cit., pp. 22-3, 104-6, 108-12, 151-64.

ping. An idea might be present in dharma which is absent in li, and again nomos may provide a presupposition absent from both.⁵ In the comparison of these three topoi we must be constantly on our guard against assuming an overlapping, or entire correspondence, which never existed in any mind, still less in any state of facts; and we must be prepared for what I shall call 'Leerstellen', i.e. empty spaces where our cross-cultural comparisons produce a zero response. These are of great interest in themselves, but to analyse them is much easier than to account for them, as this must take us into aetiological speculations foreign to this thesis.⁶

As to an account of similar features in the course of formation of these three topoi we may find that they share to some degree a conception of order. In the early topos of dharma the idea of order is significantly present in referring to an eternally constituted and support providing state of the world as a whole, where every part of it is in its functionally right position, so that such stability could be conceived as the very basis of all human activities or, in other words, the factor of an all-embracing scheme of existence. This conception of order, at first visualized in the expression ṛta,⁷ was incompatible with the idea of a creator to whose ingenuity man owed his worldly existence.

In comparison with nomos there is no hint of an idea of divine agencies creating the universe nor an existing imagination of gods issuing commands or fixing rules directed to

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5. E.g. the idea of karma in connection with the promotion of the topos of dharma, or the Confucian interrelation between the topoi of li and jen^(Y), or nomos containing the potential of 'legislation', of man-made law, a potential absent from dharma and li.
 6. Cf. the quite different intention directed to aetiological speculations from an Occidental point of view in Max Weber, Gesammelte Aufsätze zur Religionssoziologie, (Tübingen, 1978), Vorbemerkung, pp. 1-16.
 7. Vide W. Halbfass, Indien und Europa, (Basel/Stuttgart, 1981), p. 360-66.

govern and control the world, and there is no reference to usages and habits of men, no separation between determinants of cosmic and social norms though both topoi are corresponding in that they refer to supernatural spheres, which, however, are differently related to the worldly existence of man.

Whereas the topos of li conveys the idea of order in an almost exclusively intramundane context relating to appropriate ways of conduct, product of the human ingenuity to influence and regulate man's worldly existence in harmony with nature in an all-embracing sense, the topos of dharma produced a viable conviction of man's duty to comply with the pre-existing order, or the cosmic⁸ constitution of the world. If we should like to have a comparative formula, it may be worth while to consider the difference or incongruity between the early topoi of dharma, li, and nomos in relation to the idea of order in terms of the following general types: dharma, as an existent, preordained order, an uncreated exstatum; nomos, as an instituted constitutional order granted from without; and li, as an adapted order granted from within.

In contrast to nomos neither the topos of dharma nor the topos of li prepared for an idea of law governing the affairs of men from outside through divine agencies. While dharma inaugurated an authoritative corpus of texts devoted to teaching man his duty in order to support and to preserve the dharmic state of the world (and thus expostulating the conception of karma which produces a comparative zero response in nomos

8. The invention of the idea of a cosmic world pre-existent to divine or extra-mundane forces (gods) cannot only be ascribed to the Greeks' mind as has often been (falsely) suggested, thus, e.g. H. Blumenberg, Die Genesis der kopternikanischen Welt, (Frankfurt a.M., 1975), p. 16; obviously, the Indian mind via śruti grasped this idea, first of all in the conception of ṛta, some 500 years earlier, cf. supra, § 3 II.2.

and li)⁹, li became the social obligation of distinct behaviour directed to fit into the harmonious or balanced state of the world as existing in the Chinese reality of conceptions (or the realisation of their ideas [Vorstellungswirklichkeit]).¹⁰

The post-formative phases see all three topoi in an increasing significance; their status being raised correspondingly, in the cases of dharma and li to a general way of life serving respectively as an organizational pattern of human existence, however, on different levels, with different purposes, and with different effects.

This, however, is only partly true with nomos, namely to the extent that it marks a specific, partially fixed (and codified) way of life, especially in its later restricted sense of nomos gegrammenos as opposed to nomos agraphos, a distinction of utmost importance to the developed state of nomoi, but absolutely disparate to the all-embracing and all-pervasive tendencies of the li- and dharma-orientated societies in China and Hindu India.

The validity of the topos of li never depended (in contrast to nomos) on the fact that individual li precepts were authoritatively stated and fixed to be laid down in a codified form being publicly available in a written edition. And unlike in ancient Greece it did not occur that li was ever attributed to the work of a divine lawgiver or to a deified person. Such attribution was also foreign to dharma, though in contrast to li a sacred literature of eternal

9. Only vague correspondencies exist for instance in rta, dike, and tao, or between t'ien-ming (d) and natural law (in the sense of nomos koinos kata physin, vide § 13 IV); but it has been suggested as if these were equivalents, vide e.g. the references given by J. Needham, SCC II, p. 571, and H.J. Kim, Fundamental Legal Concepts of China and the West, Port Washington, N.Y./London, 1981), pp. 25 ff, 145 ff, as to the problem of natural law.

10. Cf. supra, fn. 4, also Kitaro Nishida, Fundamental Problems of Philosophy, transl. (Tokyo, 1970), pp. 237, 248, 250.

validity (śruti) figured as the allegedly unchangeable basis, the authority of which could not be replaced, howsoever.¹¹

Both India and China emphasized in the topoi of dharma and li the possibilities of man's education, and therefore (last not least for reasons of effectivity) they relied on person to person (oral) transmission (not because of a lack of facilities), which was part of the educational programme of man; to be effective age-old practical wisdom, whether moral, or, religious and moral (in the case of dharma), had to be translated into concrete ways of life (a corpus of manifold individual rules) which resulted reciprocally from the practical application of its precepts and the conception of its practicability, in the case of dharma to secure social order and to realize the supreme goal of man, mokṣa, and in the case of li to achieve social harmony and a balanced state in the relation of man to nature.¹² Hence, the topoi of dharma and li were far from being only "the second best" as Plato had admitted of the rule of nomos.

11. An association with Heraclitus' nomos theios, the early expression of an all-encompassing 'fundamentum inconcussum', is near at hand; however there seems to be only a vague correspondence; vide § 13 II.2.

12. In a very brief article, C.P. Ramaswamy Aiyar, Doctrine of Li and Dharma, in: Indo-Asian Culture, vol. XV, 2 (1966), pp. 129-33, concludes in contrasting both topoi that "Dharma regulates human conduct with advertance to cosmic views and Li emphasizes the practical regulation of life and of government by means of reliance on common sense and the recognition of human and domestic values" (p. 133). Cf. the articles by R.M. Gimello, The civil status of li in classical Confucianism, in: PEW 22 (1972), pp. 203-11 (li and dharma are exposed as normative principles, thus touching upon one important aspect of both topoi), and A.C. Danto, Role and rule in Oriental thought: Some metareflections on dharma and li, ibid. pp. 213-20 (his apprehension of dharma "in its extraordinary and extramoral sense" (p. 217) is in my opinion rather misleading as I have attempted to demonstrate, vide supra, §§ 10-13).

As to the dharmic way of life the Indian mind successfully attempted to abstract (idealiter) and to promote an imperative under the presupposition of śruti and within the scope of smṛti, namely dharma, the ever present imperative, from an infinitely varied corpus of data of actual practices (including superstitious, intuitive, rational, empirical standards), so that (not unlike the imperative ascribed to the spirit of li) this imperative, presupposing varṇāśrama, was sufficiently well-linked to the rules of behaviour as they existed in form of all kinds of usages, customs, or habits.¹³ A workable corpus of enforceable (legal) rules emerged from it, even at the hands of European administrators.¹⁴ On the whole the topos of dharma gives custom an underlying basis without denying the self-regulating force of custom within varṇāśrama. Custom, therefore, can be means of a court decision apart from the question of support by the smṛtis.¹⁵

In comparison to the situation of nomos it was a rare exception when nomos agraphos (the unwritten customary law) played any role as an accepted rule of law equivalent to nomos gegrammenos.¹⁶ Only written and codified rules were

13. Cf. K.V.R. Aiyangar, Some Aspects ..., ubi cit., pp. 157-8.

14. For an illustration, vide infra.

15. P.V. Kane, History of Dharmaśāstra, ubi cit., vol. III, pp. 260-1.

16. R. Hirzel, Agraphos Nomos, ubi cit., p. 98, draws attention to the significant fact: "Dass agraphoi nomoi in die athenische Gesetzgebung bei der Revision Aufnahme fanden, ergibt sich aus dem Verbot, in Zukunft sich nicht mehr auf ungeschriebene Gesetze zu berufen." No doubt the Greeks preferred and insisted on written (constituted) laws, at best with eternal validity, even if these laws are not 'the best' possible; vide M. Mühl, Untersuchungen ..., ubi cit., pp. 88-9, with reference to Plutarch's reports on the laws of Lycurgus, and those of Solon which should remain in force for 100 years. Cf. furthermore H.J. Wolff, Vorgeschichte ..., ubi cit., p. 560, and the same, Gewohnheitsrecht und Gesetzesrecht in der griechischen Rechtsauffassung, in: Deutsches Landesreferat zum VI. Internationalen Kongreß für Rechtsvergleichung in Hamburg, 1962, pp. 3-18, pp. 6, 17.

respected and qualified as nomoi (laws); in this sense they became the key to good order in the polis. This must be also considered in relation to the Legalists' fa^(q) and the Confucian aversion against it.¹⁷ In the existence of fa^(q) we can see some kind of a parallel to nomos gegrammenos, but without assuming that they are equivalents.

Whereas the topos of dharma and all related conduct in man's varṇāśrama fixation rests on a "suprasensible basis"¹⁸, the topos of li is anchored within the wu lun⁽ⁿ⁾ scheme of relationship, totally intraworldly orientated, deriving its authority from the past, from the experience with a perfectly cultivated social organism.¹⁹ An 'evolutionary' step from the concrete to the abstract (for several reasons, I guess), with which we are accustomed through the Greeks' ways of

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17. That the Chinese have had written records of precepts (fa^(q)) at a comparatively early date can be taken for granted, however, they never emphasized their existence, but widely preferred (evaluating the spirit of li-bound ways of life) "custom, arbitration, compromise, confining positive law to purely penal (criminal) purposes ..." [so to say in profound accordance with their proverbial wisdom that] "for each new law a new way of circumventing it will arise" (J. Needham, SCC II, pp. 519, 522). In contrast, we find in the Greek tradition the intriguing idea "what does not harm law (nomos), then, does no harm to citizen or city" (Marcus Aurelius Antoninus, X, 33, 4; quoted after C.R. Haines (LCL), London-Cambridge, Mass., 1916, repr. 1970).
18. K.V.R. Aiyangar, op.cit., p. 62.
19. Cf. Lin Xiaoyan, Review: Yao Gongxian, The Rites [li] - Spiritual Civilization - Patriotism, in: Social Sciences in China IV, 1 (1983), pp. 224-6.

thinking, took place neither in India nor in China.²⁰ With some restrictions Heraclitus' nomos theios may have been the intellectual opening in Greece, full of consequences, to be demonstrated in a successful development towards the emergence of Aristotle's nomos koinos kata physin, generally represented as natural law with universal validity.

As to such (rather intricate) development, to which only the Occident owes (for good or bad) the early insight into the existence of laws of nature (already indicated, yet unscientifically, in Hesiod), the Indian (Vedic) conception of dharma (the same is true for the topos of li) does not seem to have inspired a speculation on 'laws of nature'.²¹ Even in pursuit of the promotion of the (inherited) topos of dharma under the authoritative impact of a literature devoted to the task of promoting dharma, there is not even the slightest hint of it. On the contrary, as regards the dharma-śāstrīs' occupation, they never engaged in attempts to discover the ways of the non-human nature, in order to establish a rule over nature in analogy to a (instituted) law-bound rule over man. Indeed, no research was conducted into behaviour-patterns of human beings other than caste Hindus. The line of continuity between śruti and smṛti did not allow a deviation from the primordial paths

20. This is not the opportunity to penetrate into this highly interesting philosophical and linguistic topic; vide for instance the discussions in: Betty Heimann, Indian and Western Philosophy, (London, 1937), pp. 48-9; J. Escarra, Le Droit Chinois, ubi cit., p. 26. From a comparative philosophical point of view, including all three cultures, vide for instance: Hajime Nakamura, Ways of Thinking of Eastern Peoples, (Honolulu, 1964, ⁵1971), pp. 3-38, 130-51, 185-95; R.T. Oliver, Communication and Culture in Ancient India and China, (Syracuse, N.Y., 1971), pp. 258-61, 265 ff; W.S. Haas, The Destiny of the Mind, (London, 1956), pp. 159-84; P.T. Raju, Introduction to Comparative Philosophy, (1962, London and Amsterdam (Southern Ill. Univ. Press), 1970), pp. 270-83; Ben-Ami Scharfstein, et al., Philosophy East / Philosophy West, (Oxford, 1978), pp. 116-127.

21. Cf. W. Halbfass, op.cit., p. 365; J. Needham, SCC II, pp. 521 ff, 582.

of action and knowledge (karmamārga and jñānamārga), both of which exist only under the eternally fixed obligation of Hindu man to adjust his own way of life in accordance with the support of dharma (order), even by means of non-action (so in the fourth āśrama), so that man may be finally released from the bondage of life. Therefore, it became the dharma-śāstrīs' duty to tell man his duty, to give guidance in close adherence to śruti, that is to expound and teach what lay beyond their own competence of invention or innovation.²² To speak of promotion of dharma, as I have proposed, seems entirely apt to the Indian situation post-śruti. Such promotion of enjoined patterns of social and religious behaviour, to be taught to the extent of an all-embracing duty-bound way of life, and not to be laid down in cold materialized letters, was apparently little conformable with any general idea of stating and distributing (in the sense of νέμειν) individual rights.²³ Likewise, the consolidation movement of the topos of li sees no disposition for anybody's rights, deduced from whosoever authority. The conception of an all-pervading harmony to be practically sought within all human relations excluded such means that permitted or paved the way for antagonistic behaviour instead of stimulating a diallagmatic attitude toward each other.²⁴ The Athenian proverbial litigious-

22. Vide J.D.M. Derrett, Religion, Law and the State in India, ubi cit., pp. 153-4, with reference to Medhātithi on Manu II, 6.

23. However, we find the topos of 'right' verbalized, but merely as a counterpart of duty, or as reciprocal ties of duties; the predominance of the latter is distinctly stressed, thus K.V.R. Aiyangar, op.cit., emphasizes "'dharma", as enjoined duty" (p. 155); cf. for China, H.J. Kim, op.cit., p. 148.

24. Diallagmatic: in the sense of a harmonious (or concordant) behaviour; an attitude of (ex ante) conciliation. Vide Reinhard May, Annäherung an chinesisches Rechtsverständnis. Diallaktik und Antagonistik im Unterschied zwischen chinesischem und abendländischem Rechtsdenken, in: ARSP, Supp. I, 2, (Wiesbaden, 1982), pp. 105-9; cf. the same, Frieden ..., ubi cit., pp. 107, 144-9, 217 ff.

ness under the impact of nomoi is just the opposite, a 'struggle for law and justice' fatal to harmony.

The internal coherence of duty-bound ways of life, pre-ordained and promoted in the topos of 'dharma',²⁵ and socially created and accepted in the consolidated topos of li, makes enough provision (though the contents of duties given with the topoi of dharma and li may and, in fact, do widely differ) to cope with human habits, usages, or customs. These are not the 'third best' so to say, after Plato's nomoi, but integrated and utilized patterns of conduct, expression of human cultivation, under the impact of the spirit of li, or, in the

25. Cf. P. Hacker, Dharma im Hinduismus, in: Kleine Schriften, (Wiesbaden, 1978), pp. 496-509, p. 506 (characterizing the topos of dharma as "ein konkretes, positiv-heilswertes Verhaltensmodell"); W. Halbfass, op.cit., p. 366, describes 'dharma' (rather congruous with my approach) as "der in sich differenzierte "Brauch", der die Lebensform der Ārya konstituiert, der ihre Identität gegenüber den Mleccha gewährleistet, ..." It is worth while to consider that the basis of adherence (rather than mere obedience) being the voluntary submission of groups to the teachings (śāsana) of the sages, the dharmaśāstra however has no 'imperialistic', 'missionary' attitude towards Mlecchas (foreigners) or 'insufficiently Hinduised' peoples. What is true for the caste Hindus' dharmic way of life has never been true for others. It is therefore debatable to speak of an 'orthodoxy' or an "orthopraxie" (J.F. Staal, Über die Idee der Toleranz im Hinduismus, in: Kairos 1959/60, pp. 215-18, p. 217) in this context. Though one must admit that the dharmic way of life nowadays has somehow succumbed to modern accidentally infiltrated conceptions of a 'law'-bound way of life, it does not imply, as shown by contributions in O'Flaherty-Derrett, The Concept of Duty in South Asia, op.cit., that the topos of dharma has vanished from consciousness of Hindus, since the expression dharma/dharm/taruma is till a 'trigger'-word in all cultures utilizing an Indo-Aryan or a Dravidian language from Kashmir to Cape Comorin. Although dharma/dharm/taruma may not supply rules of law, nor even norms of social intercourse (both in the broad sense of a regulative way of life), but it supplies as such motivation in any sphere where a supersubstantial 'ought' arises, precisely the sphere in which the old Mīmāṃsakas declared it operated.

case of dharma, social and religious practices, and valid as 'legal' rules to the extent that their qualification can be ascertained in terms of dharma, even if they conflict with the dharmaśāstra's dharma!

In particular behind and beyond the smṛti, 'law' (in the sense of such rules that are "capable of being enforced by, or recognised as essential by, state courts"²⁶) existed as rules of customary origin and development, being observed from a sense of inner constraint under the impact of the religious (also superstitious) compulsion often associated with it.²⁷ "Dharma is thus above law, and within law!"²⁸ Apparently the smṛtis and nibandhas sought to supply answers to the usual question: In this specific doubt - whether or not a dispute - what legitimation or authentication can one offer for a solution which is not arbitrary nor subjective, and which can be remembered as an appropriate (if not an ideal) resolution of a doubt thrown up by change of situation. The task consists in seeking an enduring and permanent answer arising out of a flux.²⁹ By way of contrast one may suggest that it is rather doubtful whether there is more than a vague correspondence in both li and nomos, on the one hand, in connection with the Imperial codes as exemplification of li,³⁰

26. J.D.M. Derrett, Dharmaśāstra ..., ubi cit., p. 2. Most disputes were settled in a decentralized manner through local procedures, in village or caste panchayats. Vide J.D.M. Derrett, et al., Beiträge zu Indischem Rechtsdenken ..., ubi cit., pp. 61 ff; cf. furthermore K. Gnanambal, Religious Institutions and Caste Panchayats in South India, (Calcutta, 1973), for instance pp. 176 ff; N.K. Bose, ed., Data on Caste, Orissa, (Calcutta, Memoir No 7, 1960), pp. 179-192.

27. Vide N.C. Sen-Gupta, Evolution of Ancient Indian Law, (London, 1953), p. 3.

28. J.D.M. Derrett, The Hindu Conception of Law, ubi cit., p. 111.

29. Cf. the editors' preface to J.D.M. Derrett, Beiträge ..., ubi cit., Studien zu nichteuropäischen Rechtstheorien, hg. v. Th. Viehweg und R. May, pp. VIII-IX.

30. Vide D. Bodde/C. Morris, Law in Imperial China. Exemplified by 190 Ch'ing Dynasty Cases, (Cambridge, Mass., 1967), pp. 29 ff.

and on the other hand in the relation of the topos of nomos (agraphos as well as gegrammenos) to dike.

The following EXCURSUS müst be understood as an illustration of a particular situation of the recognition of dharmaśāstra in relation to the significant role of usage or custom (caritra), to be applied as 'legal' rules or not in a lawsuit (vyavahāra),³¹ a role which is generally rather foreign to customary law in classical Greece;³² and in China, for instance, as we know from the T'ang Code,³³ there is only a vague correspondence.

As to the Indian situation, it is a reasonable question whether vyavahāra within the 'four feet decision-basis' maxim³⁴ implied the independence of any particular court³⁵ from dharma precepts, so that the contents of the dharmaśāstra could be reduced to the status of a visionary catalogue of what the śāstrīs thought ought to be 'law'³⁶ in

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31. Vide supra, esp. § 13 II, III. It is perhaps superfluous to add that concrete records of customs (which seem to have existed at different times and places in ancient India) are not what is meant by caritra in the 'four feet decision-basis' maxim. To enable caritra to be voiced and to claim priority over dharma in a given piece of litigation the written and authentic record of long-standing custom may have a part to play (and so might the testimony of living witnesses) but this alone would not determine whether caritra was decisive in the overarching sense of dharma.
32. Vide supra, footn. 16, and the orations by Demosthenes as being referred in the discussion by E. Wolf, Griechisches Rechtsdenken, III, 2, ubi cit., pp. 359-65.
33. Vide W. Johnson, The T'ang Code, ubi cit., pp. 5-6; cf. J. Needham, SCC II, p. 546, and O. Weggel, Chinesische Rechtsgeschichte, ubi cit., pp. 170 ff.
34. Vide supra, § 13 II.
35. Vide footn. 26.
36. Vide J.D.M. Derrett, Religion, Law and the State in India, ubi cit., pp. 35-55, 171 ff; the same, Essays ..., I, ubi cit., p. 142.

ideal conditions, which might never exist. Additionally, one may be reminded that the vyavahāra portions of the dharmasāstra were never absolutely binding (in general, an idea which is quite foreign to nomos gegrammenos, and to the Chinese fa^(q), but not absent from li precepts); for they were open to rational arguments and modifications in 'legal' practice.

The problem was brought to light when British courts were endowed with the responsibility to enforce dharmasāstra as the 'personal law' of Hindus. A large number of śāstric precepts would, if understood as 'rules' (in the above-given sense), produce undesirable consequences with a change of time and situation.³⁷ It is not necessary to enter here into a list of the occasions on which then śāstric material was recognized, scrutinized, debated, and either set aside or manipulated to produce results other than those within their authors' contemplation.³⁸ Three examples may suffice for all.

It seemed that the dharmasāstra prohibited the alienation of self-acquired immovable property by the acquirer when he was a member of a joint family (strictly 'coparcenary'). After almost interminable debates it was held that although one should not make such alienations they were, after they were made, valid.³⁹ A study of a wide range of prohibitions ended with the recognition that 'factum valet': - a prohibition which the court could recognize as 'moral' would not affect the 'legal' validity of the transaction.⁴⁰

37. Vide J.D.M. Derrett, Forbidden Occupations in Smṛti and their Aftermath, in: Ludwik Sternbach Felicitation Volume, (Lucknow, India, n.d.), pp. 189-197, 196.

38. Vide Derrett, Religion ..., *ibid.*, pp. 274 ff (ch. 9).

39. *Ibid.*, pp. 78, 417 with footn. 3.

40. *Ibid.*, pp. 122 ff (ch. 5); cf. the same, Essays ..., I, *ubi cit.*, pp. 266 ff.

For a second example we may take the question of a woman's inheritance from a woman. The dharmaśāstra was clear that women inherited the property of women for an absolute estate, i.e. that they could alienate freely that which they had inherited. The Privy Council however held that they must inherit for a limited estate, with no right of absolute disposal, the next heirs of the former owner taking the residue after the heiress's death.⁴¹

The third example is of the 'right' of a woman to retain property she inherited from her husband if she became unchaste during her widowhood. The dharmaśāstra almost certainly implied that she should be divested of such property for her unchastity. The courts held, ultimately, that so to hold would be unreasonable; that a widow unchaste at the time of her widowhood would be disqualified from inheriting her husband's estate, but that subsequent unchastity could not divest her.⁴²

It is more than probable that in all three cases the British version of vyavahāra put into effect not what dharma propounded, and in a sense expected, but what custom, and 'good morals', in the ultimate analysis, would countenance. The courts never operated specifically on this principle, nor expressly referred to it; but it seems this is the nature of vyavahāra within the overarching requirement of dharma. As to rājadharma, it requires the ruler to deviate from dharma precepts as and when these would be unpropitious. This is particularly possible in the solution of social and property disputes. Economic considerations are notoriously subject to fluctuation, however gradual.

41. Vide Sheo Shankar v. Debi Sahai (1903) 30 I.A. 202; Derrett, Religion ..., *ibid.*, p. 310, footn. 3; the same, Introduction to Modern Hindu Law, (Bombay, 1963), § 627.

42. Vide Moniram Kolita v. Kerry Kolutany (1880) 7 I.A. 115; cf. Derrett, Religion ..., *ibid.*, p. 297, footn. 5, and the same, Essays ..., II, *ubi cit.*, p. 211, footn. 22.

An answer to the problem which confronted the Occidental administrators of law in the first half of the nineteenth century may therefore be that the British court, with its closely defined jurisdiction and limited functions, operated a version of vyavahāra, and that therefore the non-congruence of Anglo-Hindu law with dharmaśāstra was generally acceptable.⁴³

As to the 'visionary' character of the dharmaśāstra, one could not take a better example than its provisions concerning the mixed castes. These combine cosmogony and a teleologically orientated scheme of analysis of a hypothetical, timeless, universal (Hindu) caste and subcaste structure.⁴⁴ This, so far as we know, never corresponded to any framework actually enforced or even recognized by any Hindu monarch; yet that Hindu monarchs were concerned with varṇāśramadharmā is certain.

Before closing I want to make two more remarks. First, it seems evident that India in contrast to the development of the early topos of nomos, namely from the unwritten customary nomos and the eminent idea of an 'instituted' nomos, to the highly evaluated nomos gegrammenos, the positive law, on the one hand, and on the other in contrast to the idea of

43. Vide Theodor Goldstücker, On the Deficiencies in the Present Administration of Hindu Law, (London, 1871); L. Rocher, Indian response to Anglo-Hindu Law, in: JAOS 92 (1972), pp. 419-24.

44. Vide Manu X; Bhārucci on Manu X, 1-73 (Derrett, op.cit.) which is subject to Horst Brinkhaus, Zu J.D.M. Derretts Textausgabe und Übersetzung von Bhāruccis Manuśāstra-vivarāṇa-Fragment, in: Wiener Zeitschrift für die Kunde Süd- und Ostasiens, XXIV (1980/81), pp. 147-80; cf. the same, Die altindischen Mischkastensysteme, ubi cit., L. Rocher, Notes on mixed castes in Classical India, ubi cit., pp. 132-46.

nomos koinos kata physin, the natural law, took the direction "from dharma to law"⁴⁵, that is from order to 'law' without losing cohesion with usage or custom (ācāra and caritra), and not from custom to law and thus to order. This remains true even though customs themselves played a large (though undefined) part in the formation of smṛti precepts, though custom went a long way towards defining what was sad-ācāra (the usage or custom of the good) - itself a source of dharma (vide supra, § 9), and though custom (caritra) could overrule dharma in the judicial solution to 'legal' problems (vide supra, § 13). The process of thought, however, was from dharma (order) to 'law', custom being wholly ancillary.

China on her part arrived at no time at the conception of natural law (in the above sense)⁴⁶, already the idea of a divinely 'instituted' nomos is foreign to her, whereas the topos of fa^(q) had acquainted her with positive 'law', which stood, however, in no relation to the idea of any divine law-giver. Neither the 'positivation' of li precepts nor the li-bound correction of fa^(q) demonstrate similarity with the development of the topos of nomos, and, I should say, with the promotion of the topos of dharma.

Secondly, from a trans-cultural comparative point of view it is now rather doubtful whether we remain justified in evoking the assumption of universality of the 'natural law' conception; indeed even the expression 'law' in relation to the Hindu Indian and Chinese regulative ways of life should be used with appropriate caution. In order to do justice to their own (juris-)prudential achievements, both non-Occidental cultures should be considered in the light of their own merits, in terms that evoke as little confusion as possible, last but not least in view of their still living cultural heritage.

P.T.O. p. 215a

45. J.D.M. Derrett, Dharmaśāstra ..., ubi cit., p. 2.

46. Cf. J. Needham, SCC II, p. 579; R. Moore, The wider lessons of Chinese law, in: PEW 26 (1976), pp. 229-35, p. 232; the same, Review Article on: V.H. Li, Law without Lawyers: A Comparative View of Law in China and the United States, (Stanford, 1979), in: PEW 29 (1979), pp. 237-40.

FINAL REMARKS

The following issues may be considered in addition:

1. Granted that nomos is visualised as arising externally to the individual (the same is the case with the Torah), the Western idea of law assumes that obligation starts from outside. Hence law is easily identified with codes, statutes, by-laws, case-law.
2. The coexistence of law and religion can thus be visualised as both forces operating on the individual from outside. The individual must react, sooner or later, to demands made upon him from others.
3. In dharma the focus of obligation is the self (ātman), and karma is made and unmade by the self. Attempts are made in religion to identify (mystically?) the individual self with the Great Self, etc.; But these attempts show that this was never self-evident.
4. In China li suggests spontaneous expressions, and is not imposed on individuals from without. There is no suggestion that villagers get together and make up a li which is different from one made up by the villagers next door. Li is therefore very different from fa, which occurs externally, and is imposed from without (but not from 'above'). The authority of li and dharma is similar, in that they purport to originate in the individual and community. Scriptures in both cultures do not deny this, for even sacrifice is optional. On the contrary they reinforce the notion that li is a reality of more or less natural origin.
5. Therefore both in (Hindu) India and China law, as understood in the West may be sensed only as a temporary expedient, unworthy of reflective study, unsuitable for pedagogic purposes.
6. Where obligation arises from without and is an intrusion upon the person, there occurs a need to justify and defend individual laws. There can be a conflict between customary 'law' and statutory 'law', and differences of opinion as to which is more effective or more worthy. Where obligation arises from within, the only questions are devoted to discovering what it is, and drawing out the hidden or obscure sources of obligation.
7. The great discovery in such comparisons of nomos with dharma and li probably lies not in any of them but in the light this throws on a system not studied in the thesis, namely Torah. But, that apart, the thesis attempts at providing the most eloquent proof of the different characters of discipline in West and East, with obvious implications for inter-personal and inter-group, and inter-national dealings. An individual or corporation which has a different inside (internal essence and quality) cannot share a common dharma or li; and machinery to impose a common disciplinary organ, instrument, or technique is bound to be futile: So long, at least, as the internal qualities of human beings remain unknown or controversial.
8. The assertion found in Gaius and in Ps. Plato, Minos, to the effect that human beings in general share many important laws, is a misunderstanding and misleading. It betrays an optimism characteristic of the West, that if there are discrepancies someone's will-power can iron them out.

GLOSSARY

I India (Skt.)
in Roman alphabetical order

- ācāra good behaviour, an established rule of conduct, manner of action, esp. religious usage
- ahiṃsā non-injury, abstaining from doing injuries to men and animals
- artha wealth, material prosperity as one of the four aims of human existence
- arthaśāstra teaching (science) of gaining material prosperity, of means and measures, including political government
- āśrama a stage in one's life (there are four āśramas)
- ātman breath; the essence of life, the self, the soul
- brahma (brahman) the one self-existent Spirit, the Absolute having neither beginning nor end, the only real entity
- brāhmaṇa (1) portion of the Veda, (2) one of the four main classes of Hindu society; the supreme priestly class whose duty is to sacrifice and to teach
- caritra custom, usage, conduct, behaviour esp. of a secular character
- daṇḍa lit.: a stick; punishment; application of power
- darśana 'looking at' the meaning of Vedic texts; later used as signifying the 'views' of the six (orthodox) Hindu schools of learning

jāti	.....	(birth), sub-caste
jñānamārga	.....	the way of knowledge, esp. esoteric or mystical knowledge
kāma	.....	pleasure, enjoyment; love, esp. sexual love or sensuality
karma	.....	act, performance; effects of actions upon the actor's destiny, or the causal principle whereby deeds are recompensed either in this life or another
kṣatriya	.....	a member of the military or kingly order which constitutes the second <u>varṇa</u> (class of society)
mīmāṃsā	.....	school of text-interpretation, interested in the solution of problems (e.g. <u>mokṣa</u>) by critical examination
mleccha	.....	non-Hindu, foreigner
mokṣa	.....	salvation or final release from the cycle of rebirth; one of the four goals of human existence
puruṣārtha	.....	any one of the four objects or aims of human existence
rāja (rājan, rājā)	...	king, sovereign
rājaśāsana	.....	edict of the king, royal order
ṛṣi	.....	ancient legendary sage who is said to have 'heard' the hymns of the Veda
sabhā (samiti)	.....	public audience, assembly, council, meeting
sādhāraṇa-dharma	.....	common <u>dharma</u> or residual <u>dharma</u>
saṃhitā	.....	collection of texts, esp. of the four Vedas
saṃnyāsin	.....	wandering ascetic in the final stage of life (the fourth <u>āśrama</u>)

samsāra	the cycle of transmigration, the bondage of life, death and rebirth
samṣkāra	initial preparatory rite, purificatory ceremony, sacrament
śāstra	an authoritative treatise (of scientific character)
śāstrī	professor of the śāstra, scholar
smṛti	sacred (remembered) traditional literature; texts of less antiquity and sanctity than <u>śruti</u> , i.e., the epics, Purāṇas, and Dharmaśāstras
śruti	sacred knowledge orally transmitted by Brahmins from generation to generation
śūdra	member of the fourth <u>varṇa</u> (class of society)
svadharma	one's own duty, namely that which has to be done as a member of a specific class in society
vaiśya	member of the third <u>varṇa</u> (class of society)
varṇa	lit.: colour, outward appearance; the four classes of society
veda	sacred texts which constitute the basis of 'knowledge'
vyavahāra	litigation; a method of judicial decision
yajña	sacrifice or worship

II China

- cheng*^(ab) administrative prescription; administration of affairs
- chiao*^(p) moral lesson, doctrines; to teach
- chih*^(z) wisdom; (practical) knowledge
- chih*^(s) regulations
- ching*^(af) reference, respect
- chung*^(ae) loyalty, faithfulness
- chün tzu*^(w) gentleman, perfect man; a man who is a model for other men
- fa*^(q) (written) regulations, rules, prescriptions, statutes, laws
- ho*^(x) harmony
- hsiao*^{(f) or (v)} filial piety
- hsin*^{(l) or (aa)} sincerity; confidence
- hsing*^(r); *wu hsing* punishment; the five punishments
- hsüeh*^(u) learning; teaching; studying
- i*^(k) righteousness, that which is right to do as someone's duty
- jen*^(y) benevolence, humaneness; "an inward and spiritual love for all mankind, of which *i*^(k) is the outward and visible manifestation" (Giles, Dict.)
- li*^(a) a vessel used in sacrificing
- shang ti*^(g) ruler above, supreme ruler
- shih*^(b) to sign, to show, to signify, to exhibit, to make known
- shu*^(ag) altruism; reciprocity; to be humane in a devotional manner

<i>sung</i> ^(ac)	.....	litigation
<i>tao</i> ^(m)	.....	way, course
<i>te</i> ^(e)	.....	virtue in the sense of moral impetus excellent in character
<i>ti</i> ⁽ⁱ⁾	earth
<i>t'ien</i> ^(c)	.....	heaven, sky
<i>t'ien hsia</i> ^(h)	.....	under heaven, on the earth, in the world
<i>t'ien ming</i> ^(d)	.....	mandate, appointment or decree of heaven
<i>t'ien tao</i> ^(t)	.....	way or course of heaven
<i>wu lun</i> ⁽ⁿ⁾	the five human relationships
<i>wu tien</i> ^(o)	.....	the five sections or relations of society and the duties attached to them
<i>wu wei</i> ^(ad)	.....	non-action, non-interference; to remain passive

III Greece

<i>agore</i> (ἀγορή)	.....	assembly, the council of chiefs (in the Iliad)
<i>anassein</i> (ἀνάσσειν)	....	to rule, to be lord or master
<i>arete</i> (ἀρετή)	.....	excellence (of any kind); goodness; virtue of the man of the <u>polis</u>
<i>arche</i> (ἀρχή)	.....	first principle, basic 'stuff', under- lying substance
<i>basileus</i> (βασιλεύς)	....	ruler, king, master, lord
<i>boule</i> (βουλή)	.....	council of elders; will; determination
<i>dikaiosyne</i> (δικαιοσύνη)	.....	righteousness, justice

dike (δίκη)	right, order, judgement (that which is right), justice
eunomia (εὐνομία)	good order (that which is well established)
methexis (μέθεξις)	participation
nomos agraphos (νόμος ἄγραφος)	unwritten <u>nomos</u>
nomos gegrammenos (νόμος γεγραμμένος) .	written <u>nomos</u>
nomos idios (νόμος ἴδιος)	particular <u>nomos</u>
nomos koinos kata physin (νόμος κοινός κατὰ φύσιν)	universal natural law (<u>nomos</u>)
nous (νοῦς)	mind, reason, intellect
polis (πόλις)	city
physis (φύσις)	nature, natural form or constitution of person or thing
themis, themistes (θέμις, θέμιστες) ...	that which is laid down or established (by custom); decrees of the gods; oracles
thesmos (θεσμός)	divine 'law', that which is laid down, ordinance

INDEX of Chinese Characters

li	禮		(r)	刑	五刑
(a)	豐		(s)	制	
(b)	示		(t)	天	道
(c)	天		(u)	學	
(d)	天	命	(v)	孝	
(e)	德		(w)	君	子
(f)	孝		(x)	和	
(g)	上	帝	(y)	仁	
(h)	天	下	(z)	智	
(i)	地		(aa)	信	
(k)	義		(ab)	政	
(l)	信		(ac)	訟	
(m)	道		(ad)	無	為
(n)	五	倫	(ae)	忠	
(o)	五	典	(af)	敬	
(p)	教		(ag)	恕	
(q)	法				

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