

The Brahmin Felon and the Wise Thief

Timothy Lubin¹
lubint@wlu.edu

Abstract:

I begin by analysing Mīmāṃsā hermeneutics as employed in Viśvarūpa’s and Vijñāneśvara’s commentaries on *Yājñavalkya Dharmaśāstra* 2.21, which proclaims principles for dealing with conflicts of *smṛti*-rules, taking as an illustration the problem of self-defence against a Brahmin attacker (quoting *Mānava Dharmaśāstra* 8.348–351). I then examine Bhārucci’s and Medhātithi’s arguments on *Mānava Dharmaśāstra* 8.314–318 (the example of the ‘wise thief’ who seeks the king’s punishment as a penance). The commentators situate the legality of the king’s interests and judicial authority in relation to Veda-based, otherworldly considerations such as sin and expiation. Punishments and penances serve different purposes, are prescribed by different authorities, and occupy distinct sections in textual sources. The case of the Brahmin felon strains the distinction: it asserts that even a Brahmin (otherwise exempt from capital punishment) may be killed if engaged in the worst crimes, but this conflicts with the rules requiring expiation for killing a Brahmin. The ‘wise thief’ is the contrived exception that proves the rule that punishment and penance are distinct; the efficacy of the act hinges on the wrong-doer’s initiative, so that the king-executioner is more instrument than agent of purification, and at his own spiritual peril. The commentators discuss these cases in terms of the relation between *Dharmaśāstra* and *Arthaśāstra*, subordinating the latter to the former.

Keywords: punishment, penance, conflict of laws, legal reasoning, judicial discretion, Sanskrit

Introduction

Classical *dharmaśāstra* is a religious legal system that combined ritual norms (*ācāra*, including penances, *prāyaścitta*) with judicial and governmental norms (*vyavahāra* and *daṇḍanīti*). The Brahmin authors who produced this confection were steeped in ritual traditions that they traced

¹ Timothy Lubin is Jessie Ball duPont Professor of Religion and Adjunct Professor of Law at Washington and Lee University. This research was supported by fellowships from the US National Endowment for the Humanities and the American Council of Learned Societies, and was conducted as part of the project DHARMA (‘The Domestication of “Hindu” Asceticism and the Religious Making of South and Southeast Asia’, European Research Council grant no. 809994).

back to the Vedic religion, and a large part of the content of early *dharmasāstra* prescribed ritual practices ‘whose ultimate purposes are unseen’ (*adr̥ṣṭārtha*) in the sense that they relate to the spiritual condition of the performer, with consequences expected mainly in a future life. The other major component of *dharmasāstra* comprises precepts of statecraft and political administration, especially the adjudication of disputes and the policing and punishment of criminals. The distinctness of this material is reflected both in its transmission in a separate body of texts, of which Kauṭilya’s *Arthasāstra* is the main surviving example, and also in textual divisions within *Dharmasāstra* treatises.

The authority structures of these components are also largely distinct. Groups can settle laws (*samaya*, *saṃvid*) within their localities, guilds, and other corporate entities, and the king’s word is law at the state level, and in the courtroom. Together, these set the parameters of worldly affairs. At the same time, the *Dharmasāstras* contain sweeping claims for the juristic authority of learned Brahmins. As exponents of *Śruti* (i.e., the Veda as revelation) and *Smṛti* (i.e., precepts attributed to great sages), Brahmins are the sole authorities on conduct enjoined by sacred ‘injunction’ (*vidhi*), the aims of which are the fulfillment of sacred duties and the production of merit, divine blessings, and ‘heaven’. But the Brahmin authors also put themselves forward as advisors in matters of polity, and as assessors to assist the king in the court of law.

Inevitably, this fusion of juristic spheres raises questions about how they interact in particular situations of overlapping jurisdiction. The scholastic authors often resort to the use of hermeneutic rules and the tools of logic derived from the Mīmāṃsā school of thought to remove apparent contradictions and to clarify ambiguities, so that the authoritative sources can be understood to accord with the overarching presuppositions of *dharmasāstra* doctrine.

This article illustrates how this hermeneutic approach was deployed to explicate the jurisdictional implications of two famous exempla (*udāharaṇa*). It begins with Viśvarūpa’s and Vijñāneśvara’s commentaries on *Yajñavalkya Dharmasāstra* 2.21, which proclaims a principle for dealing with conflicts of *smṛti*-rules, taking as an illustration the problem of self-defence against a Brahmin attacker, quoting *Mānava Dharmasāstra* 8.348–351. This is followed by an examination of Bhāruci’s and Medhātithi’s arguments on *Mānava Dharmasāstra* 8.314–318, which presents the famous trope of the ‘wise thief’ who seeks the king’s punishment as a form of penance. The commentators’ arguments around these famous exempla are employed to situate the legality of the king’s interests and judicial authority in relation to Veda-based, otherworldly considerations such as sin and expiation. The case of the Brahmin felon puts the distinction between punishment and penance under strain in a particular way: it asserts that even a Brahmin (a class otherwise exempt from capital punishment) may legitimately be killed if engaged in the most egregious crimes, but this is shown to conflict with the assumptions underlying the rules requiring expiation for anyone who kills a Brahmin. The case of the ‘wise thief’ is but the contrived exception that proves the rule that punishment and penance are distinct; the efficacy of the act is shown to hinge on the wrong-doer’s initiative, so that the king-executioner is more instrument than agent of purification, and is so at his own spiritual peril. The commentators discuss these ambiguous cases in terms of the relation between *Dharmasāstra* (precepts of

Brahmanical sacred law, injunctions disclosing transcendent aims) and Arthaśāstra (precepts of polity and worldly affairs, founded on material aims), subordinating the latter to the former.

The Brahmin Felon

For the most part, Dharmaśāstrins avoided even acknowledging a distinction — let alone a tension — between the spheres of sacred and royal authority; it was thought sufficient to underline the king’s own duty to adhere to Dharma, thus implying that the latter encompasses the former. But *Yājñavalkya Dharmaśāstra* (*YDh*) 2.21 seems to tackle the issue head-on:

When it conflicts with a text of recollection (*smṛti*), however, a judicial ruling (*nyāya*)² has greater force within the context of legal procedure, and a precept on *dharma* has greater force than a precept on *artha*—that is the rule.³

Viśvarūpa (early ninth century) introduces the stanza by first pointing back to the preceding verses, which state the king’s duty to establish the facts, and to punish litigants who deny them or resort to subterfuge (*YDh* 2.19–20), with the warning that ‘facts, when not properly presented, may suffer defeat through legal procedure (*vyavahārataḥ*, 2.19)’:

One might argue that even if [the king] is not inclined to do it, that [litigant] should still be punished because he has accrued guilt, for occasions like this are the proper occasions giving rise to the king’s wealth, but otherwise the king’s punishment would be indiscriminate (*kvacid eva*). Let it not be thus!⁴

Viśvarūpa then adduces *YDh* 2.21 in answer to that objection, as laying out the parameters for the king’s discretion in issuing a ruling (*nyāya*) during litigation in light of different sorts of textual rules. He begins by suggesting that the king’s sentences (and the income they generate in fines) should accord with the principles of both *arthaśāstra* and *dharmaśāstra*:

If there should be conformity with precepts on *artha* (*arthaśāstra*), then it should indeed be thus. But when a precept on *dharma* (*dharmaśāstra*) carries more weight, the [king’s] accumulation of wealth is yet greater, so long as it is not incompatible with that [*dharma* precept].⁵

² As in *Arthaśāstra* 3.1.45 where *nyāya* = ‘command or edict of the king’ (Olivelle 2013: 308).

³ *smṛter virodhe nyāyas tu balavān vyavahārataḥ | arthaśāstrāt tu balavad dharmāśāstram iti sthitiḥ || YDh* 2.21 (ed. Olivelle 2019, modifying Olivelle’s translation).

⁴ *nanu asau tadanabhipretatve ’py aparādhitvād daṇḍya eva | evamādīny eva hi nṛpasyārthotpattisthānāni | anyathā tu kvacid eva rājño daṇḍaḥ syāt | maivam |*

⁵ *yady arthaśāstrānusāritā syāt, tataḥ syād apy evam | yadā tu dharmāśāstram eva balavat, tadā tadaviruddha evārthasamcayo jyāyān |*

He goes on to consider a hypothetical objection that a judicial process may lead to a finding of guilt where real culpability is lacking, resulting in a paradox:

But [one might argue that] in that case, where there is a false appearance of truth even in something untrue, there too a king may incur blame/guilt, as with the killing of Māṇḍavya, etc. For according to *smṛti*, punishment is properly imposed only on sinners, and in the circumstance described, even when there is [apparent] production of sin on account of the decree of judgement (*nyāya*), there is no sinner, because there is no sin according to higher truth. And yet there is no other basis for adjudicating a lawsuit. Hence this is a dilemma.⁶

Viśvarūpa offers two possible responses. First, he proposes to neutralize the dilemma by pointing out the limiting condition contained in the stanza itself: that the judge's decree (*nyāya*) trumps textual precept (*smṛti*) only in the context of the courtroom procedure, where judicial discretion is needed to resolve hard cases:

No, there is no dilemma here. 'Where there is conflict with *smṛti*, *nyāya* is stronger...' Why 'in the context of judicial procedure' (*vyavahāra-taḥ*)? Otherwise, the outcome will be that the judicial proceeding will fail to progress — that is what is meant.⁷

Then he proposes an alternative understanding based on an ironic interpretation of *vyavahāra* in its broader sense of 'worldly affairs', which are inherently corrupt:

Or rather, in case of conflict between *smṛti* and *nyāya*, *smṛti* alone is greater, and not *nyāya*, since the practice of *nyāya* is '*vyavahārataḥ*': '*vyavahāra*' — which is deception for the most part — is 'stealing in various ways' (*vividham avaharaṇam*) — that is what is meant. Moreover, [Yājñavalkya goes on to add that] one should not consent to that [*vyavahāra*] which is opposed to *śāstra*, because of the settled rule that *dharmasāstra* prevails over *arthaśāstra*, and any other [*vyavahāra*] is not the highest truth — that is what is meant. This explanation is in fact the best.⁸

⁶ *nanu evaṃ sati yatṛāsatyē 'pi vastuni satyatāpratibhānaṃ, tatrāpi rājño doṣaprasaṅgaḥ | yathā māṇḍavyavadhādu, smṛtyā hi samyag aparādhinām eva daṇḍavidhānāt | tatra ca nyāyato 'parādhāpādane 'pi paramārthatas tadabhāvād aparādhī naiva | na cānyo vyavahāranirñūtihetuḥ | ataḥ saṅkaṭam etat |*
⁷ *nātra saṅkaṭam | smṛter virodhe nyāyas tu balavān | kasmād vyavahārataḥ | anyathā vyavahārapravṛttyabhāva-prasaṅga ity arthaḥ |* David Brick suggested the above interpretation of the last sentence in a personal communication.

⁸ *atha vā smṛtinyāvirodhe smṛtir eva jyāyasī, na tu nyāyaḥ, vyavahārato hi nyāyapravṛtteḥ | vividham avaharaṇam vyavahāraḥ vyājabhūyiṣṭha ity arthaḥ | na cāsau śāstravirodhy apy aṅgikartavyaḥ | yasmād arthaśāstrād dharmasāstrasyaiva balīyastvam iti sthitiḥ | anyas tv aparamārtha ity arthaḥ | iyam eva ca vyākhyā jyāyasī |*

In other words, Yājñavalkya's seeming validation of *nyāya* is undercut by the adverb, as if to say 'nyāya is stronger only in the context of [corrupt] worldly affairs,' while the maxim stated in the second half of the stanza states the proper hierarchy of authorities.

Viśvarūpa next moves to address the implications of the second half of the stanza in more depth, laying out the respective scope of precepts on *artha* and precepts on *dharma*:

Standards of authority should be applied (*pramāṇa-pravṛtti*) in accordance with the matter at hand, rather than making the matter at hand conform to the applying of authority. When a matter has been raised (*sthite vastuni*), there is no objection to appealing (*avagati*) to the authority that is appropriate to it.⁹

Viśvarūpa alludes to an alternative reading of the passage whereby the conflict is between two *smṛtis* (precepts of *dharmaśāstra*) rather than between a *smṛti* and a *nyāya* — this is in fact the reading that Vijñāneśvara accepts (as we shall see below). Here the king's ruling (*nyāya*) is deemed to carry weight precisely when there is otherwise no basis for choosing between two equally authoritative textual precepts. But if the conflict is between two different *types* of *smṛti*, namely, an *arthaśāstra* and a *dharmaśāstra*, then it is resolved in favor of the *dharmaśāstra* on general principle:

But others explain this verse otherwise, saying, 'When there is conflict between a pair of *smṛtis*, *nyāya* has more weight in the context of a lawsuit because [both *smṛtis*] have the same applicability (*pravṛtṭyānugūṇyāt*). But where there is a conflict between *arthaśāstra* and *dharmaśāstra*, *dharmaśāstra* carries more weight.¹⁰ [For example,] **it is said in the chapter on procedure in a teaching on *artha* (*arthaśāstre*):**

'The slayer incurs no guilt at all in killing a felon.' (*MDh* 8.351)

Then again, in the chapter on penances, in a teaching on *dharma* (*dharmaśāstre*):

'This purification is enjoined for killing a Brahmin unintentionally; [for killing a Brahmin deliberately, there is no prescribed expiation]' (*MDh* 11.90).

On account of the greater weight of *dharmaśāstra* in this case, one is liable to incur guilt in killing a felon (i.e., if it happens to be a Brahmin felon).¹¹

⁹ *yathāvastu pramāṇapravṛtṭiḥ, na pramāṇapravṛtṭyanurodhītā vastunaḥ | sthite vastuni tadanusāriṇī pramāṇāvagatir ity anavadyam |*

¹⁰ The 'others' seem to include Nārada: *dharmaśāstravirodhe tu yuktivyukto 'pi dharmataḥ | vyavahāro hi balavān dharmas tenāvahīyate || mā. 34* ('When there is a conflict among treatises on dharma, worldly convention consistent with reason has greater force than dharma; it overturns dharma.') Nārada also cites the example of Māṇḍavya (*mātrikā* 36).

¹¹ *anye tv anyathemaṃ ślokaṃ varṇayanti: smṛtidvayavirodhe nyāyo balavān, vyavahāratas tu pravṛtṭyānugūṇyāt | yatra tv arthaśāstradharmasāstrayor virodhaḥ tatra dharmasāstraṃ balīyaḥ | yathārthaśāstre vyavahāraprakaraṇa uktaṃ: 'nātātāyivadhe doṣo hantur bhavati kaścana' iti (MDh 8.350) | punar dharmasāstre prāyaścittaparakaraṇe: 'kāmato brāhmaṇavadhe niṣkṛtir na vidhīyate' iti (MDh 11.89) | tatra dharmasāstrabalīyastvād ātatāyivadhe doṣaprasaṅga iti |*

Viśvarūpa's 'others' thus illustrate a conflict between *arthaśāstra* and *dharmasāstra* by pointing to a hard case: the case of a Brahmin felon. Note that the example of *arthaśāstra* offered is from Manu's section on *vyavahāra*. The precepts of *vyavahāra*, in other words, belong to the category of *arthaśāstra* even when they are contained within a work called a '*dharmasāstra*.'

Dharmasāstra in the narrower sense designates passages dealing with practices such as penances: those matters which, according to the Mīmāṃsā doctrine, have otherworldly (*adr̥ṣṭārtha*) rather than worldly purposes and consequences, and which have their basis in Vedic injunctions. The provisional conclusion is that the rule from the penance chapter must have greater force than the precept from the *vyavahāra* section. Viśvarūpa's retort against this viewpoint is rather elliptical, but it appears to reject this idea that the pair of *smṛtis* quoted are really in conflict:

Again, that [understanding] is not at all proper, since [the verses] are not applicable to the point in the question (i.e., whether sin attaches to the killing of a felon who is a Brahmin), and proof is lacking [for that].¹²

In discussing the same stanza 2.21, the early-12th-century commentator **Vijñāneśvara** accepts the variant reading of the first word of *YDh* 2.21 alluded to by Viśvarūpa: *smṛtyor virodhe nyāyas tu...* He broaches the topic by offering a long hypothetical objection hinging on an illustration (*udāharaṇa*) of two *smṛti* texts of Yājñavalkya that seem to conflict. The question is raised, 'since they contradict one another, how are they not rendered unauthoritative? Why resort to "fixing the sphere of applicability" (*viśayavyavasthā*)?'¹³ For this purpose, he explains, Yājñavalkya proposes that '*nyāya*, which is characterized by general and special rules, prevails.' He appears to take *nyāya* here in the broader sense of 'legal reasoning' rather than the king's ruling specifically. Where does one seek this *nyāya*? 'It is to be understood from legal procedure (*vyavahāra*), that is, established procedure of experts (*vṛddha-vyavahāra*), which is characterized by positive and negative concomitance (*anvaya-vyatireka*, grounds for probative argumentation)'.¹⁴ Here Vijñāneśvara makes direct appeal to Mīmāṃsā rules:

And hence in the present example, it is 'fixing the sphere of applicability' (*viśayavyavasthā*) that is appropriate, but in other cases too 'fixing the sphere of applicability', 'option' (*vikalpa*), or [another rule] may be applied as it is feasible.¹⁵

¹² *tat punaḥ prakṛtānupayogān niṣpramāṇakatvāc ca nātīva samyak* / David Brick suggested this understanding of this admittedly ambiguous sentence in a personal communication.

¹³ *tatrānayoḥ smṛtyoḥ parasparavirodhe satī, itaretarabāddhanād aprāmāṇyaṃ kasmān na bhavati viśayavyavasthā kim ity āśrīyate?*

¹⁴ *vyavahārata iti; vyavahārād vṛddhavyavahārād anvayavyatirekalakṣaṇād avagamate |*

¹⁵ *ataś ca prakṛtodāharaṇe 'pi viśayavyavasthaiva yuktā | evam anyatrāpi viśayavyavasthāvikalpādi yathāsambhavam yojyam |*

Moreover, he takes *YDh* 2.21cd to be a further special rule (*apavāda*): ‘It is a settled rule that *dharmasāstra* is stronger than *arthaśāstra*.’ This special rule takes precedence over any general principle that *smṛtis* are equally authoritative. He identifies *arthaśāstra* here as ‘the teaching of the Auśanasas et al.,’ which has in his view already been displaced or supplanted (*nirasta*) by *dharmasāstra* on the strength of *YDh* 2.1, which declares that the king should settle lawsuits ‘in accordance with *dharmasāstra*, devoid of anger or greed’:¹⁶

In this case, *arthaśāstra* dealing with royal policy is considered to be subsumed within *dharmasāstra*, since the phrase ‘in accordance with *dharmasāstra*’ means that the *arthaśāstra* of the Auśanasas, et al., has been supplanted thereby.¹⁷

This general subordination of *arthaśāstra* to *dharmasāstra* means that in a situation where two passages of *smṛti* seem to conflict, if one is an example of *arthaśāstra* and the other is classified as *dharmasāstra*, there will be no need to resort to Mīmāṃsā hermeneutic rules such as ‘fixing the sphere of applicability’ (*viśayavyavasthā*) or assuming an ‘option’ (*vikalpa*).

Just like Viśvarūpa, Vijñāneśvara next offers the Brahmin felon as an illustration for the provisional hypothesis (*pūrvapakṣa*) that there is a conflict between *arthaśāstra* and

¹⁶ Even though at 2.2 he quotes Kātyāyana saying that the Brahmin assessors who will assist the king should be expert in both *dharmasāstra* and *arthaśāstra*. Although the commentators clearly assume that *Dharmasāstras* like those of Manu and Yājñavalkya contain material classifiable as *arthaśāstra* and material that is *dharmasāstra* in the narrower sense, there is one instance where we can suppose that the label ‘*arthaśāstra*’ may have referred to Kautīlya’s *Arthaśāstra*: Vijñāneśvara’s comments on *YDh* 2.81, where he cites *MDh* 8.123 on the punishment for bearing false witness: ‘When individuals of the three classes give false testimony, a righteous king should first fine them and then execute them; a Brahmin, on the other hand, should be sent into exile.’ (*MDh* 8.123, tr. Olivelle) This pertains to repeated [conduct] (*abhyāsaviśaya*), since the word *kurvāṇān* is used to indicate the present tense. Having fined members of the three classes beginning with Kṣatriya, as stated earlier, [the king] should ‘*pravās-*’, i.e., execute them, since the word *pravāsa* is used in the sense of ‘execute’ in *arthaśāstra*, and this [precept] has the form of *arthaśāstra*. There too in conformity with the law dealing with false witness, ‘*pravāsana*’ may be understood as cutting off the lips, cutting off the tongue, and depriving one of one’s life-breath. But [if the perpetrator is] a Brahmin, [the king] should fine and *vivās-* him, i.e., expel from his realm. (‘*kauṭasākṣyaṃ tu kurvāṇāms trīn varṇān dhārmiko nṛpaḥ | pravāsayed daṇḍayitvā brāhmaṇaṃ tu vivāsayet*’ iti (*MDh* 8.123) | *etac cābhyāsaviśayam | kurvāṇān iti vartamānanirdeśāt | trīn varṇān kṣatriyādīn pūrvoktaṃ daṇḍayitvā pravāsayaṃ mārayet, arthaśāstre pravāśabdasya māraṇe prayogāt, asya cārthaśāstrarūpatvāt | tatrāpi pravāsanam oṣṭacchedanaṃ jihvācchedanaṃ prāṇaviyojanaṃ ca kauṭasākṣyaviśayānusāreṇa draṣṭavyam | brāhmaṇaṃ tu daṇḍayitvā vivāsayet svarāṣṭrān niṣkāsayet* /) In this case, at least in the first occurrence, the word *arthaśāstra* appears to denote the independent treatise known by that name, or anyway a passage belonging to that genre, for Kautīlya is indeed often understood to use the word *pravāsayet* in the sense of ‘execute’ (as in *KAŚ* 4.4, which prescribes it as the punishment for false witness in 4.4.11–12); Kangle (1963: 265–6) and Olivelle (2013: 631–2) opt for ‘[send into] exile’ but note the alternative meaning). Medhātithi commenting on *MDh* 8.284 likewise treats ‘execution’ as the ‘*arthaśāstric*’ meaning of the term. So in these cases, as also perhaps when they refer to ‘the *arthaśāstra* of the Auśanasas et al.,’ the commentators seem to understand *arthaśāstra* to be a distinct body of teachings, even if those teachings have been included as a subordinate element under the umbrella of *dharmasāstra*.

¹⁷ *dharmasāstrānusāreṇety anenaivaśāsanādyarthaśāstrasya nirastatvāt, dharmasāstrāntargatam eva rājānītilakṣaṇam arthaśāstram iha vivakṣitam* /

dharmasāstra. The illustration hinges on some well-known precepts concerning a class of egregious criminals called *ātatāyin*, as defined in *Vasiṣṭha Dharmasūtra*:

An arsonist, a poisoner, a man brandishing a weapon, a robber, a man who seizes one's land or one's wife—these six are called felons.

One may seek to kill a felon, even an expert in Vedas, who approaches with the intent to kill. One does not thereby become a 'Brahmin killer'.¹⁸

(*VDhS* 3.16-17)

This set of crimes largely corresponds to the cluster of serious crimes designated in English common law as felonies (as opposed to misdemeanours): murder, wounding, arson, rape, and robbery. According to these and similar stanzas, those in the act of committing such a crime may be killed not merely with impunity but also without incurring the consequences of sin. The code of Manu includes similar verses:

When a felon attacks with the intent to kill—whether he is an elder, a child, an old person, or a learned Brahmin—one may surely kill him without hesitation.

In killing a felon, the killer incurs no fault; whether it is done openly or in secret, wrath there recoils on wrath.¹⁹

(*MDh* 8.350–351, translation adapted from Olivelle 2005: 185–6)

VDhS 3.17 and *MDh* 8.350–351 thus make the bold assertion that even a felon who is a learned Brahmin — 'one who has crossed to the end of Veda' (*vedāntapārāga*) or a 'Brahmin of great learning' (*bahuśruta brāhmaṇa*) — may be killed thus, despite other precepts that make the killing of a Brahmin an unbreakable taboo, and *MDh* 11.90, which declares that there is no penance for killing a Brahmin deliberately (under any circumstances).

In his comments on *YDh* 2.21, Vijñāneśvara begins by quoting those stanzas from *Vasiṣṭha* and *Manu*.²⁰ Whereas Viśvarūpa considers the question whether the authority of the *dharmasāstra* verse (*MDh* 11.90, on penance) prevails over the so-called *arthaśāstra* verse (*MDh* 8.351), Vijñāneśvara argues that the Brahmin felon verses do not actually assert what they seem to say; they are only speaking rhetorically, as if to say: 'if one might kill even felons who are teachers or the like, who are most inviolable, how much more so others [of lesser status]?' (*gurvādīn atyantāvadhyaṅ apy ātatāyino hanyāt kim utānyān iti*). The *Vyavahāra Mayūkha*

¹⁸ *agnido garadaś caiva śastrapāñir dhanāpahaḥ |kṣetradāraharaś caiva ṣaḍ ete ātatāyinaḥ || ātatāyinaṃ āyāntam api vedāntapāragam |jighāṃsantaṃ jighaṃsīyān na tena brahmahā bhavet ||*

¹⁹ *guruṃ vā bālavṛddhau vā brāhmaṇaṃ vā bahuśrutam |ātātāyinaṃ āyāntaṃ hanyād evāvicārayan || nātātāyivadhe doṣo hantur bhavati kaś cana | prakāśaṃ vāprakāśaṃ vā manyus tanmanyum ṛcchati ||*

²⁰ In some manuscripts of *MDh*, one or both of the stanzas *VDhS* 3.16–17 appear as part of the body of the text, probably as a by-product of their being cited in commentarial passages like this.

suggests that this a fortiori (*kaimutika*) argument of Vijñāneśvara’s is meant mainly to justify the killing of non-Brahmin felons.²¹

To demonstrate his own view (the *siddhānta*, ‘conclusive view’), Vijñāneśvara offers another illustration (*anyad ihodāharaṇam*) of apparent conflict of *smṛtis*. Once again, one verse is presented as *arthaśāstra*, and another as *dharmasāstra*, but in this case, both occur in *YDh*. In fact, the ‘*arthaśāstra*’ verse comes from the Ācārādhyāya, that is, in a chapter which one would imagine to be about *dharmasāstra*: ‘Since gaining allies is better than gaining gold or land, one should strive to obtain those.’²² And the verse tagged as ‘*dharmasāstra*’ is the first verse of the Vyavahārādhyāya — ‘the king should settle lawsuits in accordance with *dharmasāstra*’ (*YDh* 2.1) — a verse that he has already invoked as affirming that *arthaśāstra* must give way. The perhaps surprising textual locations of these stanzas suggests how the two spheres interpenetrate. On closer inspection, we can see why *YDh* 1.351 is classed as it is. It expresses in verse form an idea derived from Kauṭilya’s *Arthaśāstra*, praising the importance of securing allies by offering them land or gold:

Among the gain of an ally, money, and land, the gain of each subsequent one is better than each preceding when undertaking a military expedition after making a pact; or an ally and money result from gaining land, and an ally from gaining money— or else, that gain which, when secured, secures one of the remaining two.²³

(*KAS* 7.9.1–3, tr. Olivelle 2013: 302)

These precepts would come into conflict in the context of a king adjudicating a case: the king might be inclined to follow the *arthaśāstra* rule, deciding the case unjustly in favor of his friend or ally, but the *dharmasāstra* rule enjoins him to be impartial and disinterested.

Medhātithi likewise cannot accept *MDh* 8.350–351 at face value, and defangs it by resorting to the tools of Mīmāṃsā. Verse 350 poses the bigger problem because it contains an optative verb form (*hanyāt*), the sign of an injunction (*vidhi*). But he is able to avoid the unwanted implication by severing the two halves of verse 350 so that the actual injunction is restricted to the second line: ‘When a felon attacks with the intent to kill, one may surely kill him without hesitation.’ He argues that the mention of teacher, the elder, the child, and the learned Brahmin, in the first line, is merely explanatory (*arthavāda*), for rhetorical effect: if they deserve to die (though they must not in fact be killed) how much more so others!? As for verse 351, that is just *arthavāda* rather than *vidhi*.

²¹ §24 (p. 241, lines 15–17): *tadapiśabdād vāśabdācca brāhmaṇabhinnātātāyivadhaparam | brāhmaṇagrahaṇam tu kaimutikanyāyārtham | ātatāyī brāhmaṇo ’pi vadhyaḥ kim utānya iti mitākṣarāyām.*

²² *hiraṇyabhūmilābhebhyo mitralabdhīr varā yataḥ | ato yateta tatprāptau [...]* // *YDh* 1.351.

²³ *saṃhitaprayāṇe mitrahiraṇyabhūmilābhānām uttarottaro lābhaḥ śreyān | mitrahiraṇye hi bhūmilābhād bhavataḥ, mitram hiraṇyalābhāt | yo vā lābhaḥ siddhaḥ śeṣayor anyataram sādhayati ||.*

For self-preservation, one should fight without hesitation, so [Manu] shows [*MDh* 8.350].*ātatāyin* means someone who is prepared to destroy one's person, property, wife, or son by whatever means. Without hesitating, one should strike him. The mention of a teacher, etc., is rhetorical explanation (*arthavāda*): if even they should be killed, how much more so others? But [in fact] there is no killing of them even if they are committing a felony. The killing of wrong-doers (*apakārin*) is forbidden on the basis of *MDh* 4.162. One might connect *guru* with *ātatāyin*, such that it is a modifier of *ātatāyin*. But then how could there be a prohibition of a felon other than one who is *guru*? For there is not other statement to do that.

Now [one might object that] there is another statement that proposes a general rule, namely verse 8.351.

This is also not correct, because no injunction is heard [in v. 8.351], and it [only] supplements what was put forward the preceding [verse 8.350], in the nature of an explanation.

However you sirs here say: Although only the words 'when a felon...' constitute an injunction and the rest is explanation, nevertheless this permits the killing of the teacher and the others.' Since there is a difference between [unintentional] offence and felony, one who causes some particular injury but not with the whole body, etc. (i.e., with all one's faculties), is [just] a 'wrong-doer,' but a felon is someone different than that.²⁴

Medhātithi here is leaning heavily on the Mīmāṃsā distinction between *vidhi* and *arthavāda* to neutralize the dissonance, restricting the *vidhi* to *MDh* 8.350cd, and treating the rest of the passage as rhetoric. Moreover, he asserts that *MDh* 8.350cd is itself restricted on the basis of *MDh* 4.162, in the general rules of discipline for *snātakas* (Brahmins under special vows, the rules for whom have been embedded in the broader discussion of householder status): 'He must never cause harm to his teacher, instructor, father, mother, elder, Brahmins, cows, and all who are given to austerities.'²⁵ The implication seems to be that this is a special rule constituting an exception to a general rule permitting the killing of murderous felons expressed in 8.350cd.

²⁴ Quotations from Medhātithi are drawn from Olivelle 2021a, including variants recorded therein, with lemmata from the root-text in bold: *āmaparitrāṇārtham avicāreṇa yoddhavyam | tad anudarśayati | ātatāyī ucyate yaḥ śarīradhanadāraputranāśe sarvaprakāram udyataḥ | tam avicārayan [M, G add: na vicārayet; DhK adds: na vicārayan] hanyāt | gurvādigrahaṇam arthavādaḥ | ete 'pi hantavyāḥ, kim utānya iti | eteṣāṃ tv ātatāyitve 'pi vadho nāsti | 'ācāryam ca pravaktāram' (MDh 4.162) ity anenāpakāriṇām api vadho niṣiddhaḥ | gurum ātatāyīnam iti śakyah sambandhaḥ | tathā saty ātatāyiviśeṣaṇam etat | tato gurvādivyatiriktasyatātatāyīnaḥ pratiśedhaḥ kutaḥ syāt | vākyāntarābhāvāt | atha 'nātāyivādhe doṣaḥ' (MDh 8.351) ity etad vākyāntaram sāmānyenābhyanujñāpakam iti | tad api na, vidher āsravaṇāt, pūrvaśeṣatayā cārthavādatve prakṛtavacanaṭvāt | iha bhavantas [M, G: bhavatāms] tv āhuḥ: yady ātatāyīnam [M, G: yad yathātatāyīnam (emend: yadyapy ātatāyīnam?)] ity eva vidhiḥ, avāśiṣṭo 'rthavādaḥ, tathāpi gurvādināṃ vadhānujñānam | yato 'nyad apakāritvam anyad ātatāyītvam | yo hy anyāṃ kāmca pīḍāṃ karoti na sarveṇa śarīrādinā so 'pakāri, tatas tv anya [DhK omits: anya] ātatāyī [M, G: karoti sa sarveṇa śarīrādinā steyakāritas tv ātatāyī]*

²⁵ *ācāryam ca pravaktāram pīḍāṃ mātarāṃ gurum | na hiṃsyād brāhmaṇān gās ca sarvāṃś caiva tapasvīnaḥ || MDh 4.162.*

Later Dharmaśāstrins find still other criteria for negating the force of the Brahmin felon passage. The *Vyavahāra Mayūkha* (242–3, Kane ed.; cf. tr. pp. 261–3) rules out the killing of a Brahmin assailant on the grounds that it is not allowable in the Kaliyuga — an example of the phenomenon of ‘change of law’ mentioned by Patrick Olivelle in his contribution to this collection: ‘Hence, in the Kali age, a Brahmin assailant should not be killed even by one who is himself about to be killed, but he could be killed in other ages’ (*ataḥ kalau svavadhodyato ’py ātatāyī vipro na vadhyaḥ, yugāntare tu vadhya eva*).

The Wise Thief

The implications of the distinction between *arthaśāstra* and *dharmasāstra* as components within the broader Dharmaśāstra help us understand another well-known passage, *MDh* 8.314–318, the case of the ‘wise thief’ — wise because he repents of his sin and seeks absolution by presenting himself before secular authority, his sin also constituting a crime. The first four stanzas of the passage lay out the scenario:

A wise thief, with his hair loose, should go to the king confessing his theft: ‘I have done this. Punish me,’

and carrying on his shoulder a pestle, a club of Khadira wood, a spear with both ends sharpened, or an iron rod.

Whether he is punished or released, the thief is released from the theft; but if the king fails to punish him, he takes upon himself the thief’s guilt.

The murderer of a learned Brahmin rubs his sin off on the man who eats his food, an adulterous wife on her husband, a pupil and a patron of a sacrifice on the teacher, and a thief on the king.²⁶

(*MDh* 8. 314-17, tr. Olivelle 2005: 184)

This example, which appears in two Dharmasūtras and in post-Manu codes as well, has often been cited to prove the claim that Dharmaśāstra did not make a distinction between religious and secular modes of law. I elsewhere have argued (Lubin 2007) that this is properly to be understood primarily as a penance, only incidentally involving a punishment. A penance is undertaken willingly by the guilty party to avert an otherworldly consequence; a punishment is imposed by the king or his agent upon a passive and usually unwilling guilty party for societal aims.²⁷ The same example in fact reappears in Manu’s chapter on penances (*MDh* 11.100–101).

²⁶ *rājā stenena gantavyo muktakeśena dhīmatā | ācaksāṇena tat steyam evamkarmāsmi śādhi mām || skandhenādāya musalaṃ laguḍaṃ vāpi khādiram | śaktiṃ cobhayatas tīkṣṇām āyasaṃ daṇḍam eva vā || śāsanād vā vimokṣād vā stenaḥ steyād vimucyate | aśāsītvā tu taṃ rājā stenasyāpnoti kilbiṣam || annāde bhrūṇahā mārṣti patyau bhāryāpacāriṇī | gurau śiṣyaś ca yājyaś ca steno rājani kilbiṣam ||*

²⁷ For a full, more recent discussion of this distinction, see Brick 2012.

In this sense, its inclusion in chapter 8 is an excellent occasion to expose the seams where the fabric of the two juridical spheres are stitched together.

Bhārucci (seventh century), the earliest commentator on Manu, in fact addresses this explicitly:

The following verse [*MDh* 8.314], which provides for the thief's penance (*prāyaścitta*), is uttered in this same section because of its relevance to the king. ... He approaches the king voluntarily because his soul is immersed in the need for penance and he believes in it. He is 'wise' because he knows that this is a means of purification for him, as the text says 'by various forms of death' (*MDh* 8.309–10), that being the sense of the Śāstra dealing with penance.²⁸

(Bhārucci on *MDh* 8.314, tr. Derrett 1975: 185)

MDh 8.316 explicitly confirms that it is the thief's turning himself in, and not the king's punishment, that removes the sin: 'Whether he is punished or released, the thief is released from the theft; but if the king fails to punish him, he takes upon himself the thief's guilt.' Bhārucci elucidates this point:

Accordingly this punishment must be understood to be a penance for both of them, for it is a cause of purification. So his voluntarily approaching the king is of value for both of them. He will add 'Those who have been punished by kings' (*MDh* 8. 317) to show it. However the thief who is forcibly punished or even put to death is not released from guilt by that punishment alone. Therefore even one who has undergone such a punishment must still perform the penance. And if he has already begun his penance on his own initiative the king must not interfere with this. Manu will raise the point at 'But those who perform their penance' (*MDh* 9.240). And even though he has undergone his punishment he must still satisfy the owner of the property by restitution.²⁹

(Bhārucci on *MDh* 8.316, tr. Derrett 1975: 186)

Medhātithi (ninth century) goes into much greater detail to consider the implications of this scenario for the king:

²⁸ *rājasambandhāc ca stenaprāyaścittasyedam etatprakaraṇa evocyate ... atra tatpratryavamarśātmakasya śraddadhānatayā rājābhigamaṇam svayam dhīmatā vividhena vadhena ca śuddhihetur idam prāyaścittaśāstrasāmarthyād ity evaṃ jānatānena |*

²⁹ *evaṃ ca saty etad anayoḥ prāyaścittaṃ śuddhihetuvād vijñeyam | tathā ca rājābhigamaṇam svayam anayor arthavad bhavatīti | vakṣyati hi 'rājabhiḥ kṛtadaṇḍās tu' iti | yas tu rājñā balād daṇḍyate vadhyate vā na tasya tena daṇḍena niṣkṛtir asti | yataḥ tena daṇḍena daṇḍitenāpi satā prāyaścittaṃ kartavyam eva | yaś ca svayam eva prāyaścittam ārabhate na tatra rājñō hastaparakṣepo 'sti | tathā ca vakṣyati 'prāyaścittaṃ tu kurvānāḥ' iti | tuṣṭyutpattis ca dhanasvāmīno 'nena daṇḍitenāpi kāryaiva |*

How is there no forbidding [of killing performed by the king]? The general prohibition, ‘one should not harm creatures’ cannot be set aside except by a special injunction (*vidhiviśeṣa*).

Now the correct view is that the prohibition does not apply to present case because it is has a ritual purpose (*karmārthatvāt*). How can we understand it to have a ritual purpose in the absence of an injunction? If it is known from worldly affairs (*lokataḥ*), then its performance is worldly. In that case, how would a prohibition affect it?

And, one might object, let the performance be examined in its main aspect. So long as it is a Vedic performance, it is so in its subsidiary parts on that account, and also in the harm [entailed], for the performance of the subsidiary and the main elements are one single thing. But when the performance arises from a desire for gain even in just a subsidiary act, the [Vedic] performance lies therein as well; then how much more so is worldly harm such as this?

For the rule authorizing the protection of subjects by one whose purpose is livelihood is not a matter of [Vedic] injunction (*na vaidhaḥ*). Accordingly, harm, though it is subsidiary, is subject to prohibition, since it is on a par with the Śyena sacrifice.³⁰ And this [harm], being worldly, does not have a necessary subsidiary role, nor is it impossible to protect subjects without causing harm, for it is also possible to employ imprisonment, etc. It is not a requirement that the performance of a subsidiary and a main act should take the same form, for then there would be no distinction between the Śyena rite and the [model] Agnīśomīya rite. Hence we must admit that even when a main act is based on desire, the subsidiary act may be based on an injunction. The act of harm in this case, however, cannot be regarded as motivated by an injunction, since by its very nature, both the acts of protecting and of injuring are worldly (*laukika*). But if [the harm] were motivated by an injunction, then there would be an option (*vikalpitum*) for it to be prohibited by the words of the judgment, just as with the holding or not holding of the Śoḍaśin vessels [based on a śāstric option].³¹

³⁰ Śabara (*PMS* 1.1.2) explains that the Śyena ritual, whose purpose is to bring about the death of the sacrificer’s enemy, is described in Vedic sources as a ritual means for obtaining a particular, immoral end, but is nowhere positively enjoined. Because harm is entailed, it is in fact against dharma, and forbidden. The killing of an animal to accomplish the ritual is not counted as harm (*himsā*) either in the Śyena or other Vedic rites like the Agnīśomīya, because those acts are enjoined by the Veda; it is the harm external to the Śyena rite but caused by it that sets it apart. On this issue, see Halbfass 1983.

³¹ *kathaṃ na pratiśedho ‘na himsyād bhūtāni’ iti sāmānyataḥ pratiśedho vidhiviśeṣam antareṇa na śakyo bādhitum / athocyate / naivāyaṃ pratiśedhasya viśayaḥ, karmārthatvāt | kathaṃ punar antareṇa vidhiṃ karmārthatā śakyāvagantum / lokata itī cet, laukikī tarhi pravṛttiḥ | kathaṃ tarhi pratiśedhas tatrāvataret / nanu ca pradhāne pravṛttir nirūpyatām / yadi tāvad vaidikī pravṛttis tatas tadaṅge himsāyām api tata eva | ekā hi pravṛttir aṅgapradhānayoḥ [M, G: antaraṅga-] | atha lipsāto ‘ṅge ‘pi tatra [DhK: tata eva] pravṛttiḥ, sutarām tarhi himseyam laukikī | jīvikārthino hi prajāpālanādhikāranīyamo na [M, G, DhK: ‘tra] vaidhaḥ | teneyam aṅgasthāpi himsā śyenena [M, G: mukhyena; J: śyena-] tulyatvāt pratiśedhaviśayaḥ / na ca laukikam asyā niyatam aṅgatvam /*

(Medhātithi on *MDh* 8.316)

Medhātithi's approach in this case is to make a sharp distinction between the duties and authority of the king in punishing criminals, which has a visible, worldly purpose, and Vedic rites, which are instigated only by Vedic injunctions.

He goes on to address the question of how the king's judgement then can ever become the mechanism for a penance. Medhātithi ends up concluding that only a Brahmin can achieve penance through death in this way — here again on the strength of a verse from the *prāyaścitta* section: 'Or, if he so wishes, he may make himself a target for armed men who are cognizant of his state. Or he may throw himself headlong three times into a blazing fire' (*MDh* 11.74).³² In other words, he is cleansing himself of sin by penitential suicide; the king is not the agent of penance, only the instrument! And in the case of non-Brahmin criminals, they can be purged of their sin only by being released, not killed, for then the king takes on their sin for them!

The 'wise thief' episode in *Manu* 8 concludes with a stanza that, taken at face value, might be understood to state a general principle that being executed by a king purifies the guilty party of sin:

When men who have committed sins are punished by kings, they go to heaven
immaculate, like virtuous men who have done good deeds.³³

(MDh 8.318)

This stanza is lacking in the older sources for this idea, the Dharmasūtras (*Āpastamba* 1.25.4–8, *Gautama* 12.43–45, *Baudhāyana* 2.1.16–17 and *Vasiṣṭha* 20.41–42). It is particularly striking that in *Vasiṣṭha Dharmasūtra*'s version, the king does not himself strike down the thief but only provides the weapon with which the thief kills himself. Self-immolation is offered as an alternative method of achieving the same purification:

When someone has stolen gold from a Brahmin, the thief should dishevel his hair and run to the king, saying, 'I am a thief, sir! Do punish me, lord.' The king should hand him a weapon made of Udumbara wood. With that the thief should kill himself. It is stated: 'He will be purified after death.' Alternatively, he may shave his hair, smear his body with

no [DhK: na] hiṃsām antareṇa prajāpālanam aśakyam, nirodhādīnāpi śakyatvāt | naiṣa niyamaḥ |
ekarūpāṅgapradhānayoḥ pravṛttir iti syān nāgnīṣomīyayor anena na [M, G, J omit: na] viśeṣaḥ syāt | ato
lipsālakṣaṇe 'pi pradhāne 'ṅge vidhilakṣaṇam [M, G: pradhānāṅgavidhilakṣaṇam] abhyupetavyam | na caiṣāṃ [M,
G, J: caiṣa] hiṃsā vidhilakṣaṇāśakyābhyupagantum svarūpasya kāryasya ca laukikatvāt pālanasya hiṃsāyās ca |
atha vidhilakṣaṇā ṣoḍaśigrahaṇavad [M, G: ṣoḍaśa] vikalpitem arhati śāsanavacanena pratiśiddhā | The standard
Mīmāṃsā example of the Ṣoḍaśin vessels comes from Śabara's commentary on *PMS* 10.8.6.

³² lakṣyaṃ śastrabhṛtām vā syād viduṣām icchayātmanaḥ | prāsyed ātmānam agnau vā samiddhe trir avāksirāḥ ||

³³ rājabhir dhṛtadaṇḍās tu kṛtvā pāpāni mānavāḥ | nirmalāḥ svargam āyānti santaḥ sukṛtino yathā ||

ghee, and get himself burnt from feet upward in a fire of cowdung. It is stated: ‘He will be purified after death.’³⁴

(VDhS 20.41–42)

Whereas *Āpastamba* and *Baudhāyana* include this while discussing penances, *Gautama* places it beside other matters of courtroom law. But *Manu* goes furthest in attributing, in *MDh* 8.318, the expiatory power of the king’s punishment, which attracts the commentators’ attention.

Elisa Freschi’s article in this collection examines Medhātithi’s reasoning on *MDh* 8.318 in detail. She shows how he raises (and refutes) arguments that corporal punishment serves worldly purposes, viz., to protect the public (*pālana*, *rakṣaṇa*), or to discourage others from committing the same crimes, both of which would count as being ‘for the sake of the king’ (*rājārtham*). But Medhātithi deduces that it is a means of correcting or sanctifying the guilty party’s person (*tvak-saṃskāra*), and thus ‘will bring about an unseen effect’ (*adr̥ṣṭam ādhāsyati*) as a ritual consecration would. He concludes:

Therefore, it is established that there is release from sin in the case of corporal punishment, and not in the case of a monetary penalty. And accordingly, branding (*aṅkana*) will be prescribed for the sake of averting social intercourse with great sinners whose entire property has been seized and who have [already] been punished by plunging them into water. If they could be purified through with the monetary penalty, the additional branding would have no purpose.³⁵

(Medhātithi on *MDh* 8.318)

It remains unclear, however, why it is necessary to conclude that the corporal punishment has an expiatory effect, since Medhātithi still admits that the branding serves the manifest (worldly, *rājārtha*) purpose of preventing innocent people from coming into contaminating interaction with such sinners. In fact, if the corporal punishment actually released the sinner from the sin, such social exclusion would no longer serve a purpose.

Bhārucci’s approach to explaining the stanza is to limit its scope to the context of the preceding stanzas, a standard Mīmāṃsā method for removing logical contradictions — in this case, the contradiction between the general consensus that the king’s punishment is worldly, and the seemingly contrary claim in *MDh* 8.318 that it is purifying. He describes it as merely an ‘expression of praise’ for the righteous act of seeking the king’s punishment:

³⁴ *brāhmaṇasavarṇaharaṇe prakīrya keśān rājānam abhidhāvet steno ’smi bho śāstu māṃ bhavān iti tasmai rājāudumbaraṃ śāstraṃ dadyāt tenātmānaṃ pramāpayen maraṇāt pūto bhavatīti vijñāyate | niṣkālako vā ghṛtātko gomayāgninā pādaprabhr̥ty ātmānam abhidāhayen maraṇāt pūto bhavatīti vijñāyate |*

³⁵ *tasmāc charīradaṇḍe pāpān muktir na dhanadaṇḍa iti sthitam | tathā ca mahāpātakināṃ hṛtsarvasvānām apsu praveśitadaṇḍānāṃ saṃvyavahāraparihārārtham aṅkanaṃ vakṣyati | yadi ca dhanadaṇḍena sudhyeyuḥ punar aṅkanaṃ anarthakaṃ syāt |*

As the context shows the expression ‘free from stain’ relates to the removal of the sin of theft, since this is a penance appropriate to a theft. In this sense the text is correct. As for their going ‘to heaven free from stain’ this can occur only by means of their auspicious acts previously achieved and tending to send them up to heaven. Therefore the text is not without foundation, being as it is a commendation of the course known as approaching the king, seeing that it performs a service for both parties at the moment when the action which the teaching provides is performed.³⁶

(Bhārucci on *MDh* 8.318, tr. Lariviere 1975: v. 2, 186–187)

That is, Bhārucci explicitly limits the scope of this stanza to the context of the wise thief (as opposed to viewing it as a general claim that the king’s corporal punishment expunges sin), and he locates the sin-removing factor here in the act of the wise thief, which constitutes a penance.

Conclusion

Although, as we have seen, Dharmasāstrins generally recognized a distinction between the king’s authority to punish and the Brahmin’s authority to prescribe penance, they sometimes seemed willing to efface, at least partially, the line that separates them. The stock example of the wise thief is the most famous example of blurring the line, but there are others. One could also cite *YDh* 3.233–4 on the case of the *gurutalpaga*, ‘one who violates an elder’s bed’, any man who has sex with his father’s sister, maternal uncle’s wife, daughter-in-law, mother’s sister, mother’s co-wife, sister, teacher’s daughter, teacher’s wife, or his own daughter. Yājñavalkya prescribes: ‘Having cut off his member, his execution [is to be performed], as also of the woman if she was willing’ (*chittvā liṅgaṃ vadhas tasya sakāmāyāś ca yoṣitaḥ*).³⁷ Aparārka (early twelfth century) explains it thus:

When one goes to (i.e., has sex with) any women on the list beginning with one’s father’s sister, one becomes a *gurutalpaga* (‘one who enters the elder’s bed’). In other words, he becomes one who deserves the penance of a *gurutalpaga*, and the king should cut off his procreative member and execute him, except in the case of a Brahmin. Among the women specified, that woman who, her desire aroused, instigates the man also should

³⁶ *prakaraṇāt steyapāpanirharaṇaviṣayam eva nirmalavacanam, yena steyanimitam evedaṃ asya prāyaścittam | ato yuktam idam | yat te nirmalāḥ svargam āgaccheyuḥ, pūrvopātena svargārohaṇikena kuśalakarmaṇā | evaṃ ca saty ubhayor apy anayā śiṣṭakriyayā tatkālopakārasaṃbandhāpekṣāyām idam rājābhigamanapakṣe praśaṃsāvacanam, na nirbījam iti |*

³⁷ Olivelle’s translation (2019: 273). Olivelle cited this passage in his comments on an earlier draft of this article. These stanzas are 3.232–3, with variant readings but the same sense.

have her member cut off; the aforesaid execution is her punishment. The sin of one punished in this way is destroyed.³⁸

(Aparārka on *YDh* 3.232–3)

Aparārka is explicit that the execution is a punishment, and that this punishment has an expiatory effect, thus fusing the two functions, since in this case there is no hint that the one who is punished seeks or welcomes the sentence.

This blurring of the distinction may be a side-effect of the hybridization process that produced Dharmaśāstra in the first place: encompassing *daṇḍanīti* — the ‘wielding of the sceptre’ of governance and punishment — alongside *ācāra* and *prāyaścitta* under the banner of *dharma* as the *dharma* of the king, attributing a ‘higher purpose,’ an *adyṣṭārtha*, to the king’s role. It is on this basis, too, that the king is sometimes called upon to enforce the penances prescribed by Brahmins. The very notion of an ‘enforced penance’ seems an oxymoron if the penance is supposed to be voluntary; but, because the most egregious sins — the *mahāpātakas*: killing a Brahmin, drinking liquor, stealing (a Brahmin’s gold), having sex with the wife of one’s teacher or elder (i.e. *gurutalpa*), and associating with someone guilty of such a crime (*MDh* 9.235, 11.257; *VaiDh* 33.3) — entail a loss of caste status and thus a pose threat to public order, they spill over into the jurisdiction of the state.

Such may be the case of *gurutalpa*-type offences. Of course, the king is not explicitly mentioned by Yājñavalkya, though the word *vadha* (‘execution’) implies his role as agent. But we should note that the motif recurs at *YDh* 3.259–60 which, in describing the very same sin and its remedy, makes it sound like the sinner should cut off his own testicles and ‘give up his body’ (*utsyjet tanum*), manifestly a deliberate act on the part of the sinner, corresponding to the ‘execution’ (*vadhaḥ*) in *YDh* 3.233. In this case Aparārka’s explanation may be influenced by the rhetoric of purification-through-being-killed-by-a-king, with the ‘wise thief’ case in mind. For in fact, this passage in *Yājñavalkya* follows immediately upon the ‘wise thief’ stanza (*YDh* 3.257) — again filed under *prāyaścitta* — this time paired with verse 258 which reaffirms that the king is conceived as an instrument rather than an agent of purification:

A man who has stolen a Brahman’s gold, however, should present a pestle to the king, proclaiming his deed. Whether he is killed or released by him, he is purified.

To become purified without proclaiming it to the king, he should perform the observance for a man who has drunk liquor. Or, he should give gold of the same weight as himself or as much as would gratify a Brahman.³⁹

³⁸ *pitṛbhaginyādīnām anyatamām gacchan gurutalpaḥ bhavati | gurutalpagaprāyaścittabhāg bhavatīty arthaḥ | yasya ca brāhmaṇavyatirikṭasya liṅgaṃ prajānaṃ chītvā rājñā vadhaḥ kāryaḥ | uktānām yoṣitām madhye yā yoṣid utkaṭakāmā satī puruṣaṃ pravartayati, tasyā api liṅgacchedaḥ pūrvokto vadha eva daṇḍaḥ | evaṃ daṇḍitasya pāpakṣayo bhavati |* Text as presented in Olivelle 2021b, omitting variant readings which do not affect the sense.

³⁹ *brāhmaṇasvarṇahārī tu rājñe musalam arpayet | svakarma khyāpayams tena hato mukto 'pi vā śucih || anākhyāya nṛpe śuddhyai surāpavratam ācaret | āmatulyaṃ suvarṇaṃ vā dadyād vā vipratuṣṭikṛt ||*

(YDh 3.257-8)

Hence, although the passages discussed here show how the largely distinct conceptions of guilt and legal authority — the king’s jurisdiction to suppress crimes and harms, and the Brahmins’ jurisdiction in matters of *dharma* and the removal of sin — can converge under the overarching logic of Dharmaśāstra, they do so in fact in a very limited set of contexts. The Dharmaśāstras, the root texts of the discipline, in the course of absorbing *arthaśāstra* material into the overarching framework of Brahmanical *dharma*, brought together precepts that could appear to conflict. This process might be seen in Foucauldian terms as the transformation of sovereign-judicial power into a form of disciplinary power,⁴⁰ in which much authority to punish is delegated to (or arrogated by) Brahmins, whether as juristic experts or as judicial officers — e.g., as *dharmādhikārin* (‘judge’; later, often specifically a judge in religious matters, who prescribed penances) or *sabhya* (‘assessor’ in court).

The medieval commentators relied on hermeneutic rules to disambiguate and harmonize their sources. The result of their efforts was to remove the appearance of contradiction either by assimilating the purposes of the king’s command and the sacred injunction, or by subordinating the former to the latter. The logic of Dharmaśāstra is that the king pursues his own interests while adhering to his own sacred duty: the protection of his subjects. When, on occasion, a *śāstra* suggests that the king’s corporal punishment can also expunge sin, the exegetes turn to their hermeneutic tools to decide whether it is because the king’s punishment can be sought out by the sinner as a means of penance, or because the king’s own *dharma* confers that capacity upon him.

ACKNOWLEDGMENTS

This article is an extended and revised version of the paper presented during the [European Conference on South Asian Studies 2021](#), in the panel on ‘[Sanskrit jurisprudence and hermeneutics on how to solve legal controversies](#)’ (id: hiflq). I benefited greatly from responses from others on the panel, especially the organizers, Elisa Freschi and Patrick Olivelle, and David Brick, as well as from the comments of an anonymous reviewer. Remaining errors are my own.

ABBREVIATIONS

- G* *Manubhāṣya* of Medhātithi (ed. Gharpure 1958)
DhK *Dharmakośa* (ed. Joshi et al. 1971–2005)
J *Manubhāṣya* of Medhātithi (ed. Jha 1932–39)
KAŚ *Kauṭīliya Arthaśāstra* (ed. Kangle 1972, tr. Olivelle 2013)
M *Manubhāṣya* of Medhātithi (ed. Mandlik 1886)
MDh *Mānava Dharmaśāstra* (ed. and tr. Olivelle 2005)

⁴⁰ See especially the first two chapters of Foucault 1977.

- PMS* *Pūrva Mīmāṃsā Sūtra* (ed. Abhyankar and Joshi 1971–80)
VDhS *Vasiṣṭha Dharmasūtra* (ed. and tr. Olivelle 2000)
VaiDh *Vaiṣṇava Dharmasāstra / Viṣṇu Smṛti* (ed. and tr. Olivelle 2009)
YDh *Yājñavalkya Dharmasāstra* (ed. and tr. Olivelle 2019)

REFERENCES

- Abhyankar, Kashinath Vasudev and Ganesasastrī Ambadasa Joshi, eds. 1971–80.
Śrīmajjaiminipraṇīte Mīmāṃsādarśane: Mīmāṃsakakaṇṭhīrava-Kumārīlabhaṭṭapraṇīta-Tantravārtikasahita-Śābarabhāṣyopetaḥ. 2d ed. Ānandāśramasamskṛtagranthāvalīḥ, 97. Poona: Ānandāśrama.
- Brick, David. 2012. ‘Social and Soteriological Aspects of Sin and Penance in Medieval Hindu Law.’ In: *Sins and Sinners: Perspectives from Asian Religions*, edited by Phyllis Granoff and Koichi Shinohara. Leiden: Brill, 9–30.
- Foucault, Michel. 1977. *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan. New York: Vintage Books.
- Gampert, Wilhelm. 1939. *Die Sühnezeremonien in der altindischen Rechtsliteratur*. Monografie Archivu Orientálního, 6. Prague: Orientalisches Institut.
- Gharpure, J. R. 1958. *Manusmṛiti with the Bhāṣya of Bhaṭṭa Medhātithi*. Second Edition with the help of Swami Kevalananda of the Prājña Maṭha of Wai. Poona: Aryasamskriti Mudranalaya.
- Halbfass, Wilhelm. 1983. ‘Kumārīla on Ahimsā and Dharma.’ In *Studies in Kumārīla and Śāṅkara*, 1–26. Studien zur Indologie und Iranistik, 9. Reinbek: Verlag für Orientalistische Fachpublikationen.
- Jha, Gaṅgānātha. 1932–39. *Manu-Smṛiti with the "Manubhāṣya" of Medhātithi*. Edited with the help of several manuscripts.
- Joshi, Laxmanshastrī, et al. 1937–2005. *Dharmakośa*. 5 vols in 22 parts. Wai: Prājña Pāṭhaśālā Maṇḍala.
- Kangle, R. P. 1972. *The Kauṭīlīya Arthasāstra*. Bombay: University of Bombay.
- Lubin, Timothy. 2007. ‘Punishment and Expiation: Overlapping Domains in Brahmanical Law.’ *Indologica Taurinensia* 33: 93–122.
- Mandlik, V. N. 1886. *Mānava-Dharma Śāstra with the Commentaries of Medhātithi, Sarvajñanārāyaṇa, Kullūka, Rāghavānanda, Nandana, and Rāmachandra*. 2 vols. Bombay: Ganpat Krishnaji's Press.
- Olivelle, Patrick. 2000. *Dharmasūtras: The Law Codes of Āpastamba, Gautama, Baudhāyana, and Vasiṣṭha*. Delhi: Motilal Banarsidass.
- Olivelle, Patrick. 2005. *Manu's Code of Law: A Critical Edition and Translation of the Mānava-Dharmaśāstra*, with the editorial assistance of Suman Olivelle. New York: Oxford University Press.

- Olivelle, Patrick. 2009. *The Law Code of Viṣṇu: A Critical Edition and Annotated Translation of the Vaiṣṇava-Dharmaśāstra*. Harvard Oriental Series, 73. Cambridge, Mass.: Harvard University Press.
- Olivelle, Patrick. 2011. 'Penance and Punishment: Marking the Body in Criminal Law and Social Ideology of Ancient India.' *Journal of Hindu Studies* 4.1: 23–41.
- Olivelle, Patrick. 2012. 'Patañjali and the Beginnings of Dharmaśāstra: An Alternative Social History of Early Dharmasūtra Production.' In *Aux abords de la clairière: Études indiennes et comparées en l'honneur de Charles Malamoud*, ed. Silvia D'Intino and Caterina Guenzi, 117–33. Turnhout: Brepols.
- Olivelle, Patrick. 2013. *King, Governance, and Law in Ancient India: Kauṭilya's Arthaśāstra*. New York: Oxford University Press.
- Olivelle, Patrick. 2019. *Yajñavalkya: A Treatise on Dharma*. Murty Classical Library of India, 20. Cambridge, Mass.: Harvard University Press.
- Olivelle, Patrick. 2021a. 'Searchable Electronic Edition of the *Manubhāṣya* commentary of *Medhātithi* on the *Mānava-dharmaśāstra*, transcribed, edited, formatted, and color-coded.' <https://sites.utexas.edu/sanskrit/resources/dharmasastra/medhatithi/>.
- Olivelle, Patrick. 2021b. 'Searchable Electronic Edition of the *Prāyaścittādhyāya* of the *Aparārka* commentary, on the *Yājñavalkya-dharmaśāstra*, transcribed, edited, formatted, and color-coded.' <https://sites.utexas.edu/sanskrit/resources/dharmasastra/apararka/>