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Exploring the Non-Deontic in Ancient Indian Legal Theory: A Hohfeldian Reassessment of Kauṭilya's *Arthaśāstra*

Abhik Majumdar[1]

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Abstract The 'deontic orientation' thesis—that is, the claim that ancient Indian legal theory is orientated or focussed towards duty to the exclusion of other jural operators—features prominently in the discourse of ancient Indian law. In contrast, contemporary legal systems tend to employ a variety of other jural operators also, including right, liberty, power, and so forth. Theorists like Wesley Hohfeld even assert that these operators are elemental, and hence not reducible to other operators. This disparity may be addressed from various evaluational and conceptual standpoints. I address instead a more basic question: is the disparity real? Does a scrutiny of legal treatises factually validate the deontic orientation thesis? I contend that the thesis is factually not sustainable, and that legal treatises of ancient India do display a sophisticated conception of non-deontic operators. To this end I undertake a scrutiny of Kauṭilya's *Arthaśāstra*, to determine the treatise's use of non-deontic operators, and whether it treats them as entities in their own standing as opposed to derivatives or outcomes of the deontic.

Keywords Legal Theory · Hohfeld · *Arthaśāstra* · Kauṭilya · Jural relations · Deontic logic

Introduction

Much has been said about what I term the 'deontic orientation' thesis, that is, the claim that the legal philosophy of ancient India is focussed or orientated towards duty to the exclusion of other jural operators.[1] That *dharma* bears deep associations

[1] By 'jural operators' I mean entities like right, duty, liberty, power, and so forth, which determine the character of a legal relation across persons. These have been variously been referred to as 'deontic operators'

✉ Abhik Majumdar
abhik.maj@gmail.com

[1] Department of Law, National Law University Odisha (NLUO), Sector 13 CDA, Cuttack, Odisha 753015, India

with the deontic cannot be seriously disputed. Jaimini's *Mīmāmsā Sūtra* (1.1.2) identifies as a signifier of *dharma* the concept of *codanā*, defined as 'Vedic injunctive statements' (Matilal 2002, p. 55) or 'command inducing action' (Junankar 1982, p. 54). Another instance pertains to *āśramas*.[2] Kane (1930, p. 2) references treatises like the Aitareya-Brahmaṇa and the Chāndogya-Upaniṣad to characterise *dharma* as 'the whole body of religious duties' and 'the peculiar duties of the *āśramas*'. These associations lead scholars like Davis (2010, p. 16) to infer that *dharma* 'establishes and is oriented toward privilege, duty, and obligation rather than rights and uniform principles.' Even within this construction, duty appears to predominate over other elements (some credence for this may be drawn from the very next line, which alludes to 'these duties' without mentioning privilege.) The strongly sacerdotal orientation of *Smṛti* texts, and particularly the emphasis they place on *varṇa* and *āśrama*, only reiterates the great significance they accord to duty. For these and other reasons, commentators are apt to characterise the legal philosophy of ancient India as featuring a duty-oriented focus.[3]

On the other hand, it is the practice of most contemporary legal systems to employ a variety of jural operators. Theorists like Wesley Hohfeld even contend these operators are elemental and irreducible,[4] that is, not amenable to be reduced to, or expressed in terms of, other operators. Which also indicates that each operator fulfils a unique function within the legal system, a function that other operators working singly or in conjunction cannot perform. Hence a claim-right cannot do the work of a liberty, nor can liberty be reduced to a combination of, say, rights, duties, and powers. Now if (as we may presume) these functions are vital to the legal process, it argues *ipso facto* that these operators are ubiquitous across most if not all legal systems: the absence of an operator within a system implies a vital function neglected, a function which, by definition, the other operators cannot fulfil.

It is easy to see how this transforms into an evaluational enquiry. If we surmise that a jural operator features in a legal system due to a *need* for the function it is designed to fulfil, then the presence of a range of operators argues for a nuanced, varied, and hence more sophisticated, conception of the functions the law needs to deal with. Conversely, if a legal system functions adequately on the basis of duty alone, then its needs must be simple. In such manner the differences between the two both provoke and inform narratives of what constitutes 'sophistication',

Footnote 1 continued
and 'jural correlatives'. However, the use of either term commits us to one or the other stated conceptual position, which is why I prefer the conceptual neutrality that the term 'jural operator' suggests.

[2] 'Order of life, stage of life' (Olivelle 2015, p. 88). For a detailed exegesis of the system and its evolution, see Olivelle (2004, pp. 7–28).

[3] See e.g. 'What becomes clear from a study of these two pervasive concepts (*i.e. varṇa* and *āśrama* in *smṛti* texts) is that Hindu law has an overwhelmingly deontological (duty-based ethics) focus.' Basu (2001, p. 1063).

[4] Hohfeld himself (1964, p. 64) describes them as 'the lowest common denominators of the law' and 'the lowest generic conceptions to which any and all "legal quantities" may be reduced.' Earlier (p. 35) he criticises in scathing terms the view that all jural operators are reducible to rights and duties: 'One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to "rights" and "duties," and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests….'animal sacrifice.

'modernity' (contested notions in respect of Indian law as in virtually all other fields), and so forth. The conceptual premises of this exercise are of course susceptible to challenge, and in several ways. One may contend that a legal system based on duty alone can be as sophisticated as any. Or that Hohfeld's operators are not as 'elemental' as he assumes they are, perhaps on the lines of Halpin's (1985) attempt at reducing to right and duty alone all other Hohfeldian operators.

Clearly, evaluational and conceptual exegeses both premise on the validity of the deontic orientation thesis. But are we justified in relying on it without further enquiry? Does a scrutiny of legal treatises reveal dissimilarities with contemporary treatments of jural operators? These questions carry considerable significance, since discourses of 'modernity' in the context of Indian law tend to pivot around observable characteristics and their implications.[5] And yet, to my knowledge little if any attempt has been made to empirically verify, through scrutiny of legal treatises, the validity of the deontic orientation thesis. In this paper I contend that the thesis is not sustainable. That is, the legal philosophy of ancient India not only features a sophisticated conception of non-deontic jural operators, but also employs them as entities in their own standing (I shall elaborate on this concept a little later).

Kauṭilya's *Arthaśāstra* lends itself naturally to this undertaking. Its treatment of the law is acknowledged to be more systematic and comprehensive[6] than most contemporaneous treatises.[7] Secondly, it places much more reliance on temporal considerations[8] than most other legal treatises of that era do, particularly the *smṛti*

[5] By way of an example, see Galanter's (1968, pp. 66–67) disquisition on the characteristics of pre-colonial Indian law, which Skuy (1998, p. 516) summarises as '[W]ritten records and professional pleaders; an appeal system with superior and inferior courts; *stare decisis* or a precedent system; and, the Rule of Law or a single set of legal principles.' (footnotes omitted) He also attributes to Galanter the use of the descriptor 'primitive', a term Galanter does not explicitly employ though he does contend (pp. 95–96): 'The word "modern" is used here to refer to a cluster of features which characterize, to a greater or lesser extent, the legal systems of the industrial societies of the past century.' Skuy's own critique of this position rests on the claim (p. 554) that 'England's criminal law was certainly not modern in any real sense prior to the last third of the nineteenth century ….'

[6] Olivelle and McClish (2015, p. 45) describes the *Arthaśāstra* as the 'first full extant legal code in South Asia.' Kane (1930, p. 99) declares it to be 'far in advance' of the *dharmasūtra*s of Gautama, Āpastamba and Baudhāyana.

[7] Much work has been undertaken on the relation between the *Arthaśāstra* and other legal texts including the Dharmaśāstras. Derrett (1965) examines the relationship between the *Arthaśāstra* and Dharmaśastras, particularly the *Manusmṛti*, and also the role in this regard of Ṛju-Vimala or Bhārucin and his commentary on the latter. Olivelle (2004) further explores connections between the two treatises. In this regard, the work of McClish (2014) exploring the connection between Manu's seventh chapter and the *Arthaśāstra*, also carries relevance.

[8] Kauṭilya (3.1.39) famously accorded *rājaśāsana* or royal edicts precedence over the other three 'feet' of dispute resolution he identified, viz. *dharma* (sacral law), *vyavahāra*, and *caritra*. Kangle (1969, III, pp. 223–224) contends that this applies strictly to the resolution of disputes and not to laws themselves: 'This, however, hardly means that the king can make fresh laws in supersession of those already prevalent in society' (1969, III, p. 223). He even states, 'There is in fact no evidence that the king has the power of legislation according to this text' (1969, III, p. 224). Regardless of whether or not he is correct, the maxim is significant for the relative importance it accords to the temporal over the sacerdotal. Olivelle and McClish (2015, p. 41) disagree and, instead, characterise the passage as a 'representing a taxonomy meant to comprehend and structure all of the various normative orders operating within society.'

texts[9]: Kangle (1969, III, p. 231) has much to say about the 'restricted and intolerantly Brahminical point of view' discernible in Manu and other *smṛti* writers imbuing a 'puritanical touch' to their works[10] besides restricting their scope. Does this suggest a greater level of 'sophistication'? Be that as it may, it is at least true that *varṇa*, *āśrama*, *dharma*, and *codanā*, notions associated with the deontic orientation thesis, play in the *Arthaśāstra* a role considerably diminished in comparison to, say, the *smṛti* texts. Thirdly, the treatise addresses in considerable detail issues we today would classify as private law. This is fortunate for us, because it is largely in the context of private law that Hohfeld evolved his schema.[11]

The Task Before Us

At the outset, we need to be clear what we are looking for. That is, what outcomes or, in contemporary management jargon, what deliverables I envisage from this exercise. Anything grandiose like seeking a proto-Hohfeldian schema in all its complexity would be about as realistically feasible as, say, Winnie-the-Pooh's heffalump traps. Let us then start from the notion of non-deontic and how it relates to the deontic. This may not seem a great mystery, since it can be observed that a deontic proposition easily rephrases into a non-deontic proposition and vice versa. But is this really the case? A closer scrutiny reveals that the observation holds true only up until a certain point, beyond which its validity erodes. That is, situations do exist where the two iterations do not convey precisely the same thing.

Take non-deontic proposition (1) 'A has a right over B in respect of Θ' rephrased as deontic proposition (2) 'B owes A a duty in respect of Θ'. They both pertain to the same jural relation between A and B in respect of Θ. And they specify with sufficient clarity whom the duty devolves upon, and also the character of the duty. But (1) also makes A's standing clear. By recognising her as a right holder, the proposition invests in her all the characteristics conventionally associated with right holders, that is, all that they are entitled to as well as what they themselves are required to satisfy in order to secure their entitlement: she must of her own initiative take up the matter with the court, present her case, produce her own evidence, and so forth. In this manner we get to know that A's role in the juridical process clearly

[9] Olivelle and McClish (2015) is relevant here also. They observe (p. 33) that the *Nārada Smṛti* also carries a similar passage, but reformulated to identify *dharma*, *vyavahāra*, *caritra*. and *rājaśāsana* as the 'four feet' of *vyavahāra*! This double use of *vyavahāra* prompted an examination of the various senses in which this term can be and has been used, which in turn led the conclusion that Nārada's curious emendation was intended to accord *dharma* precedence over *vyavahāra* and *caritra*, and restrict the authority of *rājaśāsana*. They also (p. 45) characterise *vyavahāra* as 'a legal domain in force through the authority crafted by the systematic reflection of jurists on observed practices regarding commerce ….' For more on *vyavahāra*, see also Derrett (1953).

[10] Cf. '[T]he extant Manusmṛti … is in many matters carried away by puritanic zeal ….' Kane (1930, p. 97).

[11] Cf. 'Although Hohfeld used numerous examples…, one area to which he did not appear to pay attention was public law.' Bamforth (2001, p. 2).

extends beyond that of a passive beneficiary or consequence of B's duty.[12] On the other hand, (2) refers to A only tangentially, and says little about her standing in the matter. It does not specify if A is to be treated as a right holder in the conventional sense—and accorded an active role in the juridical process as right holders usually are—or as a mere passive beneficiary. Hence non-deontic proposition (1) tells something about the holder of the non-deontic operator that deontic proposition (2) does not: it treats A's right as an entity in its own standing, and not as a mere consequence or by-product of B's duty, while in (2), A's standing is not made clear. Which is why (1) may be treated as irreducible to the deontic, since such reduction or rephrasing will convey the proposition not in its entirety but in perceptibly attenuated form.

Whether a proposition treats the non-deontic operator as an entity in its own standing can be ascertained from the terms of reference it employs for the non-deontic operator and its holder. This characteristically includes addressing the holder of the operator directly (and not tangentially which deontic propositions tend to do); making her the subject of the proposition; specifying the conditions precedent under which the operator becomes applicable, the requirements the holder must satisfy, what she can expect, and so forth. Our quest then resolves into an exegesis of language, the *manner* in which the *Arthaśāstra* references non-deontic operators and their holders. This would entail examining on a case-by-case basis the specifics of each appropriate maxim. Parameters we may keep in mind include, for example, the referent it addresses directly; semantic considerations associated with the reference (particularly the verbs and adjectives used to reference operators and holders respectively); implications of the syntax employed, and other specifics.

Before we proceed we need to consider, and reject, another possibility. Is it appropriate to employ a quantitative approach to ascertain the orientation *Arthaśāstra*, that is, through statistically determining or proportion of deontic to non-deontic operators employed? Tempting as it appears, and regardless of whether or not it constitutes a worthwhile exercise in its own right, an undertaking of this nature is at best only peripherally relevant to us. Our concern is with whether the treatise contemplates a certain mode of thinking, that is, whether it recognises non-deontic operators as entities in their own standing. The frequency with which it does so is not important to us. This calls for a *qualitative* enquiry, not one of magnitude or degree.

[12] Students of contract law may recall cases like *Tweddle v. Atkinson* (1861) and *Beswick v Beswick* (1968), which held that the beneficiary of a contract has no right to claim her benefit if she is not a party to the contract. Admittedly the privity rule, as it is called, is no longer good law in UK after the Contracts (Rights of Third Parties) Act 1999. It is nevertheless significant to us because, apart from being good law elsewhere including in India, it also highlights the conceptual distinction between a right-holder and a beneficiary of another's duty, and also the fact that the two may not always be identical.

Background

Hohfeldian Jural Operators

Hohfeld is chiefly remembered today for his two matrices outlining correspondences between different jural operators. That he is remembered at all is interesting, for two reasons. First, he was very much a product of his time: his schema was by no means unique, but merely one among several other similar attempts (see e.g. Salmond 1902, pp. 218–236; Kocourek 1928). Claims have also been made that Hohfeld's work is not entirely original, but significantly derives from Salmond (see Dickey 1971). Yet while rival attempts now mostly languish in obscurity, Hohfeld's schema remains prominent in legal and academic discourses even a hundred years after it first appeared. Secondly, its prominence notwithstanding, it has attracted much criticism, some of which still remain unresolved.[13] Partly this must be attributed to Hohfeld's own reluctance to furnish exhaustive definitions (see e.g. Hohfeld 1964, p. 50). This poses the question why Hohfeld still remains relevant. Jamieson's (1980, pp. 338–339) observation becomes significant here:

> By identifying and explaining each conception in terms of its jural relations, he became, although himself unaware and even denying it, able to define each conception. This he did existentially…. By repudiating the reduction of the eight fundamental legal conceptions to any less than eight, Hohfeld avowed their independence. And by regarding his scheme to be capable of analysing and expressing all legal problems, he evinced his concern for completeness. In all these ways, Hohfeld's analytic jurisprudence recognised, however inexplicitly, the claims of consistency, completeness, and independence in logic at large.

Hohfeld identifies a total of eight jural operators, and groups them into two separate matrices. The first or *deontic* matrix is by far the more prominently referenced in the discourse of law and legal theory. It comprises the operators (claim-)right, duty, liberty (Hohfeld preferred the term 'privilege') and what is termed 'no-right'. The last is a term of Hohfeld's own coinage, and is used to fill what he perceived as a gap in legal jargon, namely a lack of terms to denote situations where a person possesses no claim on another person's performance or non-performance. They are arranged in the following manner:

Right Liberty
Duty No-Right

Vertical relations indicate what Hohfeld termed 'jural correlatives'. This indicates that if two persons A and B share a jural relationship, the presence of one operator in A necessarily implies the presence of its correlative operative in B. Hence if A possesses a right against B, then necessarily B owes a duty to A. Likewise, if A has

[13] For an excellent discussion on these controversies, see Kramer et al. (1999).

a no-right in respect of B, then B possesses a liberty in respect of A. Diagonals indicate 'jural opposites'. If two operators are diagonally connected, then the presence of one indicates the absence of the other. Hence if X possesses a duty to perform a particular act, she cannot at the same time possess a liberty not to perform it. Likewise, if Y possesses a no-right, then he cannot possess a right at the same time. Hohfeld's second matrix is at times referred to to as the *potestative* matrix after the Greek *potestas* or power (see e.g. Hansson 1996). It connects the operators power, liability, immunity, and disability (or disempowerment) in similar fashion.

What distinguishes these vertical and diagonal relationships is the necessary or inevitable character of their implications. Which means that if we are able to empirically assess the presence or absence of one attribute, the truth values of the other three in that matrix are automatically determined. If, say, Y is determined to have a duty towards X, then *ipso facto* the truth of 'X has a right' is established, as is the falsity of 'Y has a liberty' and 'X has a no-right'. This becomes useful in many situations, such as for instance when parsing complex statutory provisions, analysing intricate legal situations, and so forth.

The *Arthaśāstra* and Its Treatment of Law

The *Arthaśāstra* is popularly ascribed to Kauṭilya,[14] also known as Cānakya and Viṣṇugupta, minister to the Maurya emperor Candragupta who reigned from 324 to 297 BCE. Not surprisingly, issues of date and authorship remain fiercely contested. Trautmann (1971, p. 8) agrees with Kangle (1969, II, p. 102) that the treatise was not a 'mere juxtaposition of the views of different authorities' but strongly suggested it was composed by a single author. However, he then marshals a variety of sources, including textual and archaeological evidence, to conclude that, single author or otherwise, the *Arthaśāstra* was a compilation from multiple sources dating to different time periods. He identifies (p. 184) as the most probable date of compilation 150 C.E. (a time well past the Mauryan era), but adds that Chapters 3 and 4 is likely to be much older, even older than the *Yājñavalkya Smṛti*. McClish identifies two phases, viz. an early prose '*prakaraṇa*' text, and a later significant redaction and expansion termed the '*adhyāya* redactation' (see McClish 2009, particularly pp. 43–57). In a later work (McClish 2012, p. 295) he asserts that the ascriptions to Cānakya and Kauṭilya found in the *Arthaśāstra* are not from the portions attributable to the *prakaraṇa* text. He concludes by stating (pp. 298–299) that the *prakaraṇa* text gives 'absolutely no evidence of ever having been connected with Cānakya or the Mauryas' and that little evidence exists to indicate that the *Arthaśāstra* was considered a Mauryan-era text prior to the second century C.E. Olivelle (2013, pp. 6–25) contends that the *Arthaśāstra* developed in three phases: (1) the sources Kauṭilya used; (2) Kauṭilya's own original composition, which he terms the Kautilya Recension; and (3) later modifications incorporated by a scholar familiar with the Dharmaśāstras, which he terms the Śāstric redaction. The

[14] Derrett (1973, p. 25), for instance, prefers to reference the *Arthaśāstra* as 'the treatise passing under the name of Kauṭilya'.

Recension he dates to somewhere between 50 and 125 C.E., and the Redaction between 175 and 300 C.E. (pp. 28–31). He also contends that the identification of Cānakya with Kauṭilya occurred subsequent to the redaction.[15]

Be that as it may, it is at least clear that the *Arthaśāstra* was intended as a manual of statecraft: as Kangle states (1969, III, p. 12), 'It is principally instructional in character. It is intended to teach a ruler how he should conduct himself in the various situations that are likely to arise in the course of his rule.' The treatise comprises a total of fifteen *adhikaraṇa*s or books devoted to particular aspects of statecraft such as disaster management, public administration, foreign policy, battle strategy, and even espionage. The books are divided into several chapters, each comprised of a collection of precepts or aphorisms either in prose *sūtra* form or as metered *ślokas*[16] (for the sake of convenience I employ 'maxim' to reference either type). I adhere to Kangle's book/chapter/maxim numbering system for referencing locations in the Sanskrit text of Vol. I as well as translations corresponding to them, both in Kangle's own close translation in Vol. II and also Olivelle's (2013) annotated translation. I rely principally on these two works. Shamasastry's much older translation is adverted to only occasionally, since it is freer in character and departs perceptibly from the original text in several places.

Book 4 ('The Suppression of Criminals') is of interest to legal scholars, but its focus offers little scope for non-deontic jural operators. Book 3, entitled 'Concerning Judges', covers a range of topics classifiable as private law in today's jargon. This includes civil procedure (filing lawsuits), the law of transactions, inheritance and partition, the law of marriage and divorce, default of debts, recission of sale and purchase, and so forth. Chapters 17–20 deal with issues such as 'forcible seizure' (*i.e.* robbery, theft etc.), verbal injury, and physical injury (which in most contemporary legal systems carry both civil and penal liability); and even gambling and betting, which in present times are addressed exclusively under penal law.

It must be kept in mind that present-day distinctions between civil law and criminal law garnered little recognition back then; the monetary fines and even corporal punishment routinely prescribed for disputes between individuals (*i.e.* what we would classify as private-law wrongs) lends credence to this. A wife attracts a twelve-*paṇa* fine if she leaves home when her husband is asleep or intoxicated (3.3.23). And if she converses with a man in a 'suspicious place', she may be given five strokes with the whip (3.3.27–28), which she may avoid by paying a *paṇa* per stroke (3.3.29). A twelve-*paṇa* fine is incurred if a person damages the walls of a neighbour's house, and doubled if the damage is inflicted by 'spoiling it with urine or dung' (3.8.22). Clearly these instances cannot be characterised as legal rights, not

[15] Olivelle (2013, p. 33) also references Trautmann (1971, pp. 1–67) in contending that the connection between Cānakya and Kauṭilya 'is not made until texts dating to or after the Gupta period.' I am open to be corrected on this, but the attribution seems surprising since the pages cited appear to address the identity and historicity of Cānakya alone. After concluding that Cānakya was in all likelihood was a historical figure, all Trautmann says (p. 67) about Kauṭilya and the authorship of the *Arthaśāstra* is that it is '[q]uite another matter'.

[16] Cf. 'The work is in prose interspersed with a few verses.' Kane (1930, p. 91).

the least because the maxims do not disclose any redress or remedy[17] for the wrong caused to the victim.[18] Maxim 3.2.40 constitutes a partial counter-example: according to it, a husband marrying bigamously in violation of stipulated preconditions is liable to a twenty-four *paṇa* fine, and also required to make over to his (first) wife her 'dowry, the woman's property[19] and half (that) as compensation'. While it does stipulate a remedy, its language is clearly duty-oriented in character.

Another thing we need to keep in mind is that the *Arthaśāstra* does not explicitly indicate correlations between jural operators, a cornerstone of Hohfeld's schema. It may be tempting here to invoke Maine's (1894, p. 169) famous conjecture about society progressing from status to contract, and then raise conjectures about Hohfeld's schema being grounded in the transactional, and thus featuring a level of correlation that eludes operators that emerge from the law of status. Admittedly most non-deontic operators discernible in the *Arthaśāstra* do pertain to relations within the family.[20] Yet the reasoning is suspect. While it is possible to conjecture that duty can exist independently of any correlative,[21] the very nature of non-deontic operators precludes such a possibility. If X has a legally enforceable right, there has to necessarily exist some other entity against whom that right is enforceable; likewise, Y's liberty is meaningful in a juridical sense only if it defeats someone else's claim to the contrary (and thereby investing the latter with a correlative no-right). Thus we may validly argue, for example, that though correlations are present in the law of status, their existence is not as sharply apparent as they are in the transactional sphere. Beyond this I prefer not to engage with this conjecture any further, since a proper exposition lies well beyond the scope of this paper. In any case, a lack of express recognition is not fatal to our project as long as we are able to establish in the *Arthaśāstra* the use of non-deontic operators as entities in their own standing.

[17] I use 'remedy' in the restricted sense in which it is understood in the parlance of legal practice, *i.e.* in terms of means of enforcing rights or obtaining redress for infringement of rights at civil law. In this sense it may include damages and equitable remedies such as quantum meruit, injunction, declaration, or decree of specific performance, but not fines or other penalties. See Garner (2009, pp. 1392, 1407) and Martin (2002, pp. 422–423).

[18] The maxim *ubi jus ibi remedium*, which underscores the deep association between right and remedy, is usually one of the first things one learns at law school.

[19] We shall examine the meaning of the terms 'dowry' and 'woman's property' at a later stage.

[20] Instances include sons' claims to their widowed mother's *strīdhana* (3.2.28–29); abandoned wives' liberty to remarry (3.4.31–36); and circumstances negating successors' claims to inherited property (3.5.30). Exceptions to this do exist, including powers of pre-emption (3.9.1–2) and rescission of sale (3.15.5)—clearly transactional in character—but they are comparatively fewer in number.

[21] For example, Austin (1885, p. 89) correlates duty with command rather than right, and then proceeds to distinguish (1885, pp. 401–402) between relative duties (*i.e.* those corresponding to rights) and absolute duties (those in respect of whom no corresponding rights exist).

The Deontic Matrix—Claim-Right

Claim-Right and *Adhikāra*

Resemblances between right and *adhikāra* have attracted some measure of academic attention (see e.g. Bilimoria 1993). But what does the term signify, precisely? Derrett (1977, p. 21), writing about a later period in time, characterises it as applying 'equally to a right to do something, to manipulate something, or to supervise something.' Olivelle (2015, p. 18) defines it as an 'entitlement, right (especiallly eligibility to perform particular rites or enjoined activities), qualification, authority.' Lariviere (1988, p. 359) locates *adhikāra* within 'Vedic religious life', acknowledging that in this context it is usually understood in terms of 'qualification, 'eligibility', 'right', or 'authority' in the sense of possessing the right to perform a particular sacrifice. After examining several instances of this term—specifically maxim 1.1.3.19 [*sic* 1.13.19] of the *Arthaśāstra* which he interprets (pp. 359–360) as denoting responsibility rather than authority or right—he concludes (pp. 363–364) that its usage suggested both a privilege and an obligation. For instance, a person who possesses an *adhikāra* to perform a certain ritual enjoys not only the privilege of doing so, but also an obligation to do so, which also means that 'There was nothing optional about any ritual for which one was an *adhikārin*.'

Hohfeld himself (1964, pp. 36–38) has much to say about the term 'right' being used indiscriminately to denote not only claim-rights in the strict sense, but also privilege, power, and immunity. It would seem that then-prevalent usages attribute to *adhikāra* a similarly broad catena of jural operators. This means that, just as Hohfeld could not rely on the term 'right' for identifying his fundamental legal conceptions, we cannot rely on instances of '*adhikāra*' either for our purpose of identifying claim-rights and other non-deontic operators within the *Arthaśāstra*.

Then again, take Lubin's (2017, p. 6) construction of *adhikāra* as legal right, which premises upon maxim 3.13.22 of the *Arthaśāstra* (we shall revert to it later). A closer look at the maxim, however, reveals no incidence of the term '*adhikāra*'; instead, it features the term '*dāyāda*' or 'heir, son or relative who inherits a share of an estate' (Olivelle 2015, p. 185) to identify the right-holder. If Lubin claims only that claim-rights were generally recognised in the discourse of ancient Indian law, then he is undoubtedly correct. But such a claim is too weak to meaningfully augment our objectives; it only merely reiterates what we ourselves encounter later on in this paper. On the other hand, if his claim is specific to the term '*adhikāra*', then it does not appear to be borne out by the instance he cites. Similarly, his observations (2017, p. 8, n 19) about the *Arthaśāstra*'s (3.12) 'nuanced treatment' of property rights may be entirely valid as such: yet at the same time their significance is minimal since the language used here is predominantly deontic in character. In short, conceptions of *adhikāra* are simply not specific enough for our purposes.

Fortunately for us, there exist incidences within the *Arthaśāstra* that indicate much more clearly the presence of claim-rights, particularly through the use of

specific verbs.[22] Instances conform to either of two main phenotypes. The more prominent involves issues concerning property. These include when a woman is entitled to her property; when her sons may claim the property she has forfeited; the share of a deceased's property that devolves onto the sons of a predeceased brother, and so forth. Claim-rights belonging to this category seldom emanate from (or look to remedy) any injury inflicted on the right-holder. They pertain rather to certain forms of distributive justice. The other phenotype is specifically intended to remedy legal wrongs or injury, and the magnitude of individual instances depends on the extent of the injury they are intended to rectify. I refer to them as 'right as entitlement' and 'right as remedy' respectively.

Right as Entitlement

Claim-rights belonging to the 'entitlement' phenotype are by far the more frequently employed in Book 3. This is largely due to the great detail with which the book treats the law of property and allied issues. An interesting feature about the *Arthaśāstra* is the attention it pays to women's property, particularly entitlements occasioned by marriage. Kauṭilya identifies *vṛtti* (maintenance amount) and *ābandhya* (ornaments) as constituting *strīdhana* (woman's property) (3.2.14). At 3.2.19,[23] he stipulates that a widow who is *dharmakāmā* or 'desirous of leading a life of peity' 'shall forthwith receive' the endowment (*i.e.* maintenance amount),[24] ornaments, and the remainder of the *śulka*, *i.e.* 'bride price' (Olivelle 2013, p. 183) or 'dowry'(Kangle 1969, II, p. 198).[25]

The maxim is significant to us in two respects. First, clearly it does not instruct *others* to provide her what it stipulates, as a deontic injunction might have done. Instead it directly addresses the prospective claimant, thereby affirming her status as someone *entitled* to what is due to her, as distinct from a mere passive recipient. The use of the active voice only underscores this.

Secondly, the discourse of law features many examples of 'may' being interpreted to mean 'shall', that is, entail an imperation rather than an optative statement (see e.g. Peterson 2006). *Alcock, Ashdown and Co. v. The Chief Revenue Authority* (1923) is a classic instance. Here the Privy Council was required to interpret Section 51(1) of the Indian Income Tax Act 1922, under which a Chief Revenue Authority 'may' refer a matter to the High Court if it involves certain questions of interpretation. The Council held (para 18) that the 'may' denotes an obligation and not a mere discretion: 'In their Lordships' view … there does lie a

[22] An apt illustration is brought out in Lubin's (2017, pp. 4–5) discussion on property rights of a later era. He observes that for the fourth-century lawmaker Śabara, transfer of title through gift requires an explicit act of receiving in addition to an act of renunciation or relinquishment (*tyāga*); while the twelfth-century Jīmūtavāhana argued that the act of giving ('*dā-*') was in itself adequate to accomplish the transfer.

[23] *Mṛte bhartari dharmakāmā tadānīmeva sthāpyābharaṇaṃ śulkaśeṣaṃ ca labheta* (3.2.19).

[24] Kangle (1969, II, p. 198, n 19) here references other maxims such as 3.3.12, 3.4.16, and 3.2.15 which indicate maintenance was to be given in the form of a one-time endowment.

[25] It is not clear why Kangle translates *śulka* as 'dowry'. He himself (1969, II, p. 198, n 19) points out that it was a sum to be made over to the bride's parents. He then speculates on possibilities such as the parents being required to hold it in trust for the bride.

duty upon the Chief Revenue Authority to state a case for the opinion of the Court ….' This holds true of Sanskrit too, where the optative 'may' is often used to convey commands and imperations, which the use of the optative *labheta* (= 'may obtain') in 3.2.19 exemplifies. Several similar instances may be identified. The very next maxim 3.2.20[26] obligates the widow to return these if she remarries: here again the root *dā-* or 'to give' finds expression in the optative form *dāpyeta* (here of course it denotes an obligation rather than an entitlement).[27] A widow desiring to start a family becomes entitled to what was given to her by her father-in-law and husband (3.2.21).[28] Then while a widow having sons is required upon remarriage to give up her *strīdhana* (3.2.28),[29] the sons are given a right to receive it (3.2.29).[30] All these cases utilise the optative form but, as can be easily inferred from their contexts, they signify imperations rather than discretions. Incidentally, translators like Kangle (1969, II, pp. 98–99) and Olivelle (2013, pp. 183–184) also tend to use imperatives such as 'shall' and 'should' in rendering the optatives used in the above instances, which lends credence to our view that whether an optative conveys a discretion or an imperation is easily discernible from the context.

Chapter 5, which deals with partition of inheritance, makes frequent use of the root *hṛ-*. Kangle (see e.g. 1969, II, p. 209) construes it as receiving, but others differ. Olivelle (see e.g. 2013, p. 190) renders it as 'be taken'. Interestingly for our purposes, Apte (1959, p. 1748) extends '*hara*' to include 'claiming, entitled to'. Maxim 3.5.9,[31] which lists out the successors of a sonless man, employs the term *hareyuḥ*, the third person plural optative of '*hṛ-*' (as does 3.2.29 referenced above). The same term is found in 3.5.13,[32] which specifies that if a predeceased brother leaves behind several sons, all the sons together shall be entitled to only a single share. Maxim 3.5.28[33] comprises a form of escheat; it uses the singular optative '*haret*' to stipulate that the king 'shall take' property to which no successors exist. Maxim 3.13.22[34] mentioned earlier represents an interesting variation: to identify the heirs to a slave and to indicate a claim-right, it uses not the root *dā-* but a derivative noun *dāyāda* or 'heir, son or relative who inherits a share of an estate' (Olivelle 2015, p. 185), from *dāya* or 'inheritance, paternal estate' (Olivelle 2015, p. 184).

[26] *Labdhvā vā vindamānā savṛddhikamubhayaṃ dāpyeta* (3.2.20).

[27] To be precise, here the root *dā-* ('to give') is followed by the *ṇic karmaṇi* which forms a causal base (hence 'cause to be given'), and then the optative *vidhiliṅga*, thereby yielding 'may cause to be given'.

[28] *Kuṭumbakāmā tu śvaśurapatidattaṁ niveśakāle labheta* (3.2.21).

[29] *Putravatī vindamānā strīdhanaṁ jīyeta* (3.2.28).

[30] *Tattu strīdhanaṁ putrā hareyuḥ* (3.2.29).

[31] *Dravyamaputrasya sodaryā bhrātaraḥ sahajīvino vā hareyuḥ kanyāśca* (3.5.9).

[32] *Apitṛkā bahavoapi ca bhrātaro bhrātṛputrāśca piturekamaṁśaṁ hareyuḥ* (3.5.13).

[33] *Adāyādakaṁ rājā haret strīvṛttipretakāryavarjaṁ, anyatra shrotriyadravyāt* (3.5.28).

[34] *Dāsadravasya gñātayo dāyādāḥ, teṣāmabhāve svāmī* (3.12.22).

Right as Remedy

Incidences conforming to this second phenotype are admittedly few in number. They also feature a prominent deontic orientation, almost if not actually too prominent to satisfy our thesis. Nevertheless a brief overview is called for, if only for the sake of completeness. Maxim 3.9.27[35] (in the chapter on immovable property) stipulates that if one person's using a reservoir, channel, or a 'field under water' causes damage to another's crops, then the first is obligated to compensate the second according to the damage caused. In the case of one person's cattle eating another's crops (3.10.25),[36] then 'he' (*i.e.* the *dharmastha* or judge)[37] is required to make the cattle owner pay damages amounting to twice the loss suffered by the crop-owner. The second example is interesting, because it addresses (and also imposes an obligation on) not the tortfeasor directly but on the headman, both judge and enforcer at the village level. It is thus not duty-oriented in the conventional sense.

The Deontic Matrix—Liberty

Liberty as Negation of the Proscribed

Hohfeldian liberty and duty are connected in singular manner. The one is not the jural opposite of the other, but rather the opposite of the *negative* of the other.[38] For example, the opposite of a liberty to enter a room is not a duty to enter, but a duty *not* to enter. For this reason, it is more appropriate to treat liberty as negating the proscribed and not the prescribed.

Liberties in the *Arthaśāstra* conform to a more diverse range of phenotypes than claim-rights do. In some places it stipulates that an act performed under specified circumstances does not constitute an offence (*adoṣa*). Kauṭilya uses this mode to permit a woman to use her *strīdhana* for maintaining her sons and daughters-in-law, and the husband to use it in the face of robbers, diseases, famines, and other dangers,

[35] *Ādhāraparivāhakedāropabhogaiḥ parakṣetrakṛṣṭabījahiṁsāyāṁ yathopaghātaṁ mūlyaṁ dadyūḥ* (3.9.27).

[36] *Sasyabhakṣaṇe sasyopaghātaṁ niṣpattitaḥ parisaṁkhyāya dviguṇaṁ dāpayeta* (3.10.25).

[37] The text of the *sūtra* does not explicitly specify whom it addresses. Neither do Kangle's (1969, II, p. 224) or Olivelle's (2013, p. 200) translations identify the subject. Olivelle, however, does reference his own note to 3.5.26, where (2013, p. 596) he expresses agreement with Kangle that the unspecified subject (of 3.5.26) is probably the *dharmastha* or judge. This conclusion appears curious, since the contexts of 3.5.26 and 3.10.25 do not appear similar. And all the more so given that maxims proximate to the latter, such as 3.10.16 and 3.10.18, expressly reference the *grāmika*, *i.e.* 'superintendent of a village (Olivelle 2015, p. 158) or 'village headman' (Olivelle 2013, p. 200; Kangle 1969: II, pp. 223–224, in respect of 3.10.16 and 3.10. 18 respectively).

[38] Cf. 'Such an assertion is in reality a *denial* of duty *not* to do the thing in question.' (Williams 1956, p. 1136).

and so on (3.2.16).[39] Another instance is found in 3.4.9,[40] which discusses the precept of other teachers that a woman may, in the face of her husband's cruelty, to take shelter in the house of a kinsman of the husband, a *sukhāvasthā*,[41] the village headman and so forth. A variant is seen in 3.4.13,[42] which invokes the term *apratiṣiddham*[43] to permit a woman to go to a kinsman's house in cases of death, illness, calamity or childbed. Interestingly, the next maxim 3.4.14 stipulates a twelve-*paṇa* fine for the husband if he impedes her going, thereby protecting the wife's liberty with if not explicitly a claim-right, then at least certainly a duty imposed on the husband.

Liberties conferred through *adoṣa* are interesting also for the insights they yield into class hierarchies prevalent back then. The term is used in 3.13.3[44] to permit among *mlecchas* (Olivelle (2015, p. 323) renders it 'foreigner, often with the pejorative connotation of a barbarian') the sale or pledging of their own offspring. Then for the womenfolk of the communities such as dancers, minstrels, fishermen and others 'who give free rein to their wives' (Olivelle 2013, p. 188) or 'who give freedom to their women' (Kangle 1969, II, p. 206), accompanying a man on the road amounts to *adoṣa* (3.4.22).[45] Curiously, Shamasastry's translation (1929, p. 179) differs substantially: 'It is no offence for women to fall into the company of actors, players, singers…, or persons of any kind who usually travel with their women.' It is not clear from the Sanskrit original whether it addresses women in general, or only the women of the communities mentioned. Consequently, to that extent both renditions may claim validity. However, Shamasastry's 'who usually travel with their women' is certainly inaccurate. The operative term in the original is *prasṛṣṭastrīkāṇāṁ* or 'of those pertaining to liberated women', from *prasṛṣṭa* or 'let loose, dismissed, set free' (Monier-Williams 1899, p. 698), which makes Olivelle's and Kangle's renditions so much the more faithful. Olivelle's 'accompaniment', Kangle's 'accompanying', and Shamasastry's 'fall into the company of' seem surprising: surely the original *anusaraṇam* more appropriately translates as 'following, going after, tracking' (Monier-Williams 1899, p. 41)?

[39] *Tadātmaputrasnuṣābharmaṇī pravāsāprativiḍhāne ca bhāryāyā bhoktuṁadoṣaḥ, pratirodhakavyādhidurbhikṣabhayapratīkāre dharmakārye ca patyuḥ, saṁbhūya vā dampatyormithunaṁ prajātayoḥ* (3.2.16).

[40] *'Pativiprakārāt patigñātisukhāvasthagrāmikānvādhibhikṣukīgñātikulānāmanyatamamapuruṣaṁ gantumadoṣaḥ' ityācāryāḥ* (3.4.9).

[41] Olivelle renders '*sukhāvasthā*' as 'guardian' (2015, p. 427) or 'custodian' (2013, p. 188). Kangle (1969, II, p. 205, n 9) terms it a 'sort of trustee for the wife's happiness.'

[42] *Pretavyādhivyasanagarbhanimittamapratiṣiddhameva gñātikulagamanaṁ* (3.4.13).

[43] '[N]ot at all forbidden' (Kangle 1969, II, p. 206) or 'no prohibition at all' (Olivelle 2013, p. 188)—from *pratiṣiddha* = 'of or relating to what is forbidden' (Olivelle 2015, p. 274).

[44] *Mlecchānāmadoṣaḥ prajāṁ vikretumādhātuṁ vā* (3.13.3).

[45] *Tālāvacaracāraṇamatsyabandhakalubdhakagopālakaśaiṇḍikānāmanyeṣāṁ ca prasṛṣṭastrīkāṇāṁ pathyanusaraṇamadoṣaḥ* (3.4.22).

Liberty as Optative

The second phenotype involves the same optative mood we saw being used for claim-rights. Here the mood is used to convey not commands or imperations but discretions conferred on the holder, as the context makes clear. For instance, in certain circumstances (such as the wife being barren, or produces only dead offspring, or only daughters),[46] a man desiring a son may remarry (3.2.39).[47] To denote this, the optative *vindeta* (='may marry') is used. Some instances involve liberty conferred at the discretion of another agency. Maxim 3.4.30[48] stipulates that if a family's fortunes have declined, then a '*sukhāvasthairvimuktā*', or wife released by her custodians, may marry (*i.e.* remarry) according to her desires. Shamasastry's rendition of *vimuktā* as 'deserted' (1929, p. 180) is inappropriate; certainly 'released' or (better still) 'freed' come much closer. In any case, there is no dispute about the operative term *vindeta*. As in the previous example, it instantiates the optative. Maxim 3.4.35 operates in similar vein. It applies in the context of unconsummated 'pious marriages'[49] where the husband has gone away (3.4.31–36), and how much time the 'maiden wife' must wait before she is allowed to remarry. Once the time period elapses, 3.4.35[50] states that the wife 'discharged by the Justices … may remarry as she wishes' (Olivelle 2013, p. 189) or 'remarry as she desires, with the permission of the judges' (Kangle 1969, II, p. 207)[51] The optative finds explicit usage in the phrase *dharmasthairvisṛṣṭā vindeta* (= *dharmasthaiḥ visṛṣṭā* or 'created by judges', *vindeta* 'may marry').

A curious variant employs the optative mood to suggest the imperative, but in order to convey a liberty rather than a command. For instance, if a royal servant (*rājapuruṣa*) goes away for prolonged durations, then 3.4.29[52] states that his wife shall not 'incur censure' (Olivelle 2013, p. 189) or 'incur blame' (Kangle 1969, II, p. 207) for begetting a child from another man of the same *varṇa*. Perhaps '*may* not obtain censure' approximates more closely the original '*nāpavādaṁ labheta*', but certainly the imperative 'shall' conveys what is clearly the sense of the precept. And yet the consequence of the imperative is that the wife may freely beget a child, which is in the nature of a liberty and not a duty. This is possible because the imperation is directed not at the actor herself but at the *consequences* of her action. And just as a positive imperation would have implied sanctions and hence a duty ('she *shall* incur adverse consequences if she Θ', suggesting a duty to Θ'), a negative imperation ('she *shall not* incur censure if she Θ') implies the *absence* of sanctions and, consequently, the liberty to Θ.

[46] The circumstances are specified in 3.4.38.

[47] *Tataḥ putrārthī dvitīyāṁ vindeta* (3.2.39).

[48] *Kuṭumbarddhilope vā sukhāvasthairvimuktā yatheṣṭaṁ vindeta, jīvitārthamāpadatā vā* (3.4.30).

[49] Cf. 3.2.10, also 3.3.19.

[50] *Tataḥ paraṁ dharmasthairvisṛṣṭā yatheṣṭaṁ vindeta* (3.4.35).

[51] According to Kangle (1969, II, p. 207, n 35), '[W]e may conclude that the permission of the judges is necessary if a virgin wife in the first four forms of marriage wishes to marry again.'

[52] *Savarṇataśca prajātā nāpvādaṁ labheta* (3.4.29).

Other Phenotypes of Liberty

There exist several examples of liberty which conform to other phenotypes. A wife possesses the liberty to abandon a husband under certain circumstances, such as when the husband becomes 'degraded',[53] or has committed treason against the king, and so on (3.2.48).[54] Olivelle (2013, p. 185) and Kangle (1969, II, p. 200) render it as 'may be abandoned'; the original uses *tyājya* or 'to be left or abandoned or quitted' (Monier-Williams 1899, p. 457). In either case, it is clear that the precept is not intended to be mandatory, but only confers on the wife a discretion. Maxim 3.13.9[55] offers a modicum of protection to persons pledged to serve others. It stipulates that compelling them to perform certain acts against their will—including picking up corpses, dung, urine etc.; (for female pledges) forcing them to give baths to naked persons; and inflicting corporal punishment—is *mokṣakaram*,[56] *i.e.* 'freeing' (Olivelle 2013, p. 208) or 'shall result in freedom' (Kangle 1969, II, p. 236).

Maxim 3.9.8[57] embodies a liberty relating to the consequences of an auction sale. According to Kangle (1969, II, p. 219) it states: 'If the (bidder) does not come (to take possession), the owner whose property was auctioned may sell (again) after seven days'; Olivelle's (2013, p. 197) 'After seven days have passed and he does not turn up, the person offering the property for sale may sell it' corresponds closely to this. Shamasastry's (1929, p. 191) rendition appears clearly discrepant: 'If no real owner comes forward even on the expiration of seven nights, the bidder may take possession of the property.'

The Deontic Matrix—No-Right

Of all Hohfeld's jural operators, possibly the most contentious is that of no-right. It is a neologism of Hohfeld's own coinage, intended to denote not a concept in prevalent use in the discourse of law, but a concept intended to fill a *void* in this discourse. And for good measure, a void that the discourse does not even acknowledge: Hohfeld himself (1964, p. 39) justified his coinage on grounds of 'there being no single term available to express the latter conception (*i.e.* no-right).' He chose not to provide a definition for the concept. What we can glean from his sparse exposition on the matter is that the term 'no-right' implies precisely what its name suggests, that is, the absence of a (claim-)right. A practical example may involve B possessing a liberty to enter A's land, and hence no duty to stay away

[53] According to Kangle (1969, II, p. 200, n 48) it is not clear whether this refers to drunkenness or licentiousness or some other sin.

[54] *Nicatvaṁ paradeśaṁ vā prasthito rājakilbiṣī |*
Prāṇābhihantā patitastyājyaḥ klīboapi vā patiḥ || (3.2.48).

[55] *Pretaviṇmūtrocchiṣṭagrāhaṇamāhitasya nagnasnāpanaṁ daṇḍapreṣaṇamatikramaṇaṁ ca strīṇāṁ mūlyanāśakaram, dhātrīparicārikārdhasītikopacārikāṇāṁ ca mokṣakaram* (3.13.9).

[56] From *mokṣa* = 'emancipation, liberation' (Monier-Williams 1899, p. 835).

[57] *Saptarātrādūrdhvamanabhisarataḥ pratikruṣṭo vikrīṇīta* (3.9.8).

from the latter. A cannot then demand B stay away, since she possesses no claim-right over B. A's situation is what a no-right denotes.

How may we establish that a recently-coined concept applies meaningfully to a legal code a couple of thousand years old? This is actually simpler than it appears. Hohfeld undertook the coinage because he felt the need to describe a situation that existed, but for which no suitable descriptor could be found. Hence it is only the signifier that is a recent innovation; Hohfeld's presumption is that the signified itself has existed for much longer. So our task whittles down to simply identifying maxims instantiating what no-right denotes or signifies. But even this curtailed task must be negotiated with caution. It is not enough that we determine merely the presence of a void (which itself indicates the absence rather than presence of a jural operator). In addition, we must establish this void as an entity in its own standing, or at least demonstrate that the language of the maxim treats the void in such terms.

The example of conditional right is instructive here. It involves a situation where an individual acquires a claim-right if and only if she fulfils a certain pre-determined criterion, such as a will entitling X to a share once she marries. The claim-right that X acquires on fulfilment of the criterion correlates to a duty imposed on the executor to provide her her share. But as long as X does not marry, the executor is free (*i.e.* enjoys a liberty) not to do so. Which in turn, according to the Hohfeldian schema, correlates to a no-right imposed on X. That means that a conditional claim-right is not a monolithic or homogeneous entity, but comprises three distinct elements: (1) the fulfilling criterion; (2) a claim-right acquired when the criterion is fulfilled; and crucially for us, (3) a no-right enjoyed by the person as long as she does not fulfil the criterion. In other words, any instance of a conditional right necessarily involves a no-right.

The incidences of no-right found in the *Arthaśāstra* obtain from a precisely inverse of the circumstance outlined above. They entail situations where the fulfilment of specified parameters renders a claim-right nullified, forfeited, or otherwise taken away from its holder. Hence the parameters act as a *disqualification* to the claim-right.

No-Right as Negation of Entitlement

No-rights conforming to this first phenotype relate largely to the law of succession. The right to inherit property is not in the nature of a claim on property *simpliciter*. It is rather a claim *to* the acquisition of property, a claim pertaining to the *process* of succession, as opposed to rights over property *already* acquired. It thus amounts to a pure claim-right as opposed to the 'bundle of rights' that a title to property is understood to be. This entitlement is what a no-right negates. It truncates or nullifies the holder's claim to succession *before* the property devolves upon her, that is, before she becomes the owner of the property.

We had noted earlier that 3.13.22 uses *dāyāda* to identify a right-holder. Maxim 3.6.8[58] uses its inverse *adāyādā* to hold that sisters are not entitled to inherit except a share of bell-metal dishes, and ornaments from their mother's personal

[58] *Adāyādā bhaginyaḥ, mātuḥ parivāpād bhuktakāṁsyābharaṇabhāginyaḥ* (3.6.8).

belongings. It only stands to reason that if the use of a particular term identifies a claim-right holder, then the use of its precise inverse indicates inverse of a claim-right, *i.e.* a no-right. Hence we may infer that the use of *adāyādā* in 3.6.8 is appropriately characterised as a no-right, and not any other jural operator. Similarly, 3.5.30[59] specifies certain categories of persons—outcasts, sons born to outcasts, idiots, the impotent, the leprous, and the like—to whom it denies shares in inherited property to which they would have been entitled otherwise. This it achieves by bestowing on them the appellation *anaṁśa*, *i.e.* 'of or relating to an individual who does not receive a share at the partition of ancestral property' (Olivelle 2015, p. 21) —from *aṁśa* or 'portion, part'.

The group of maxims located at 3.6.8 onwards feature several more incidences; Kangle terms them as addressing 'special shares', as opposed to shares devolving in the regular course of succession.[60] The eldest son devoid of 'manly qualities' (Olivelle 2013, p. 192; Kangle 1969, II, p. 212, n 9),[61] is entitled to only a third of his share; and the one given up his religious duties only a fourth (3.6.9).[62] And one 'follow(ing) a licentious lifestyle' (Olivelle 2013, p. 192) or 'behav(ing) wantonly' (Kangle 1969, II, p. 213) forfeits the whole of his share (3.6.10).[63] In contrast to the previous examples, here the law operates not through appellations but through the optative mood. But even this optative features vital differences across the two examples. The curtailment in 3.6.9 takes the form of an affirmation, that is, an affirmation of a reduced entitlement. Which is possibly why it features the same affirmative *labheta* as we saw in maxims that confer claim-rights. On the other hand the forfeiture in 3.6.10 is effected through the use of the passive voice in *jīyeta* or 'may be deprived' (from the root *jyā-* = 'to overpower, oppress, deprive any one' (Monier-Williams 1899, p. 426)).[64]

No-Right as Forfeiture of Title

The second phenotype pertains to the forfeiture or negation of titles already acquired. They apply at a stage where the right-holder has already become the owner of the property, and function to deprive him[65] of his ownership rights. A classic example is 3.9.32,[66] which holds that a person owning a water-work and not making use of it in five years, loses ownership of it. It also uses the passive voice in the term *lupyeta* or 'may be taken away' from from the root *lup-* = 'to take away,

[59] *Patitaḥ patitājjātaḥ klībaścānaṁśāḥ, jaḍonmattāndhakuṣṭhinaśca* (3.5.30).

[60] See Kangle's comments at (1969, II, p. 212, n 8–10), In any case, the character or size of the shares is not a concern for us.

[61] According to Kangle (1969, II, 212, n 9) this refers to the capacity to earn, manage household etc. rather than potency.

[62] *Mānuṣahīno jyeṣṭhastṛtīyamaṁśaṁ jyeṣṭhāṁśallbheta, chaturthamanyāyvṛttiḥ, nivṛttadharmakāryo vā* (3.6.9).

[63] *Kamācāraḥ sarve jīyeta* (3.6.10).

[64] See also at *ibid*. the definition of *jīyate* (*i.e.* passive, present tense, third person singular) as 'to be oppressed or treated badly, to be deprived of property'.

[65] Given the context, the masculine pronoun is appropriate.

[66] *Pāñcavarṣoparatakarmaṇaḥ setubandhasya svāmyaṁ lupyeta, anyatrāpadbhyaḥ* (3.9.32).

suppress' (Monier-Williams 1899, p. 904).[67] The implication of this precept is interesting. Presumably in the larger public interest, it makes ownership of the water-work contingent to keeping in use. Hence as long as the owner fulfils his duty to use the water-work, he retains his title. And if he fails in his duty, his title is transformed into a no-right. Another instance is 3.13.6,[68] which states that if a person pledged to another tries to run away then, in certain circumstances, he 'shall be forfeit' (Kangle 1969, II, p. 236): Kangle (1969, II, p. 236, n 6) further interprets it to mean that he ceases to be a pledge and becomes a *dāsa* (slave) instead. This transforms into a no-right his title over his own self or personhood. Incidentally, Olivelle (2013, p. 208) uses the term 'succumb'. In his endnotes (2013, p. 613) he acknowledges that 'Kangle is right in taking the verb *sīdet* to indicate the person is reduced to slavery.'

A sub-category within this pertains to debts barred by time and other considerations. These are properly classifiable as no-rights and not immunities, since what they negate are specifically claims rather than powers (matters would have been different in case of a mortgage or pledge rather than a debt *simpliciter*). According to 3.11.13,[69] barring specified exceptional circumstances a debt 'not taken notice of for ten years' is termed *apratigrāhyam*, *i.e.* 'cannot be recovered' (Olivelle 2013, p. 202) or 'shall be irrecoverable' (Kangle 1969, II, p. 227).

No-Right as Void

It takes much sophistication for a body of laws to recognise an act or incidence as void but not as such punishable, prohibited, or otherwise illegal. Maxim 3.11.21[70] uses the term *asādhyam* to stipulate that debts contracted between spouses, or between a father and son, or between coparcener brothers are 'irrecoverable (through a court of law)' (Kangle 1969, II, p. 228) or 'cannot be legally recovered' (Olivelle 2013, p. 203). Distinctions between this instance and 3.11.13 discussed above carry much significance. The latter involves transactions that yield claim-rights in the natural course of things, but which claim-rights transform into no-rights once ten years elapse. Here on the other hand, the transactions concerned are void ab initio. That is, the law treats them as null and void right from their very inception, and hence at no point in time do they confer upon the creditor any claim-right to recover their money. Which means that, for instance, a son is legally free to lend money to his father but, upon doing so, the father acquires no duty to return the money. Hence he (the father) enjoys the liberty not to pay his son back, which according to Hohfeld's first matrix corresponds to a no-right that the son possesses.

[67] See also at *ibid*. the definition of *lupyate* (*i.e.* passive, present tense, third person singular) as 'to be wasted…; to be broken or destroyed'.

[68] *Sakrīdātmādhātā niṣpatitaḥ sīdet, dviranyenāhitakaḥ, sakṛdubhau paraviṣayābhimukhau* (3.13.6).

[69] *Daśavarṣopekṣitamṛṇamapratigrāhyam, anyatra bālavṛddhavyādhitavyasaniproṣitadeśatyāgarājyavibhramebhyaḥ* (3.11.13).

[70] *Dampatyoḥ pitāputrayoḥ bhrāṭṛṇāṁ cāvibhaktānāṁ parasparakṛtamṛṇamasādhyam* (3.11.21).

Maxim 3.13.4, which voids slavery for an Ārya, comprises another illustration.[71] Here again, putative purchasers acquire no claim-right over an Ārya slave even if they have paid the seller, and so are invested with no-rights instead. The maxim must be read in the light of 3.13.1, which penalises both selling and keeping as pledge an Ārya. And hence such transactions are both void *and* punishable, in contrast to the previous example.

A possible third example pertains to 3.11.16,[72] which characterises surety given by a minor as *asāram*—'sapless, without strength or value' (Monier-Williams 1899, p. 120) or 'void in law' (Kangle 1969, II, p. 227). However, Olivelle (2013, p. 607) contends that this follows a misreading of the text, and that it is more appropriate to read maxims 16 and 17 together, *i.e.* treat them as a 'single syntactic unit'. According to this reading, moreover, *asāra* is more appropriately construed as a reference to an indigent person[73] and not the void character of surety furnished (hence a noun rather than an adjective). Compelling as Olivelle's arguments clearly are, in the absence of further primary evidence it is difficult to arrive at a conclusion either way. But if for the the sake of argument we assume the validity of Kangle's interpretation, then 3.11.16 certainly does constitute a most interesting incidence of no-right as void.

The Potestative Matrix

Hohfeldian legal power must be distinguished from power in a larger sense. It is more restrictive than the latter. Moreover, Hohfeld himself preferred not to coin exhaustive definitions of his conceptions. As he said in the context of power, 'Too close an analysis might seem metaphysical rather than useful; so that what is here presented is intended only as an approximate explanation, sufficient for all practical purposes.' (Hohfeld 1964, p. 50) Be that as it may, beyond making occasional references to the ability to effect change in legal relations (Hohfeld 1964, p. 51) it clarifies only up to a certain point what exactly he means by a legal power. After all, surely, even the exercise of a legal right implies a change in legal relations? Fortunately Hohfeld does at a later stage distinguish between legal right and legal power, assigning to them the terms 'affirmative claim' and 'affirmative control' respectively (Hohfeld 1964, p. 60). A claim is enforceable only through judicial intervention; A may recover the money she has lent B only if a law court gives a verdict in her favour. Contrast this with an example of power, say one where B mortgages her house with A instead of merely borrowing money from her. Here if B defaults on repayments A need not approach the courts for relief; she may instead

[71] Kangle's (1969, II, p. 235) and Olivelle's (2013, p. 208) translations employ respectively phrases 'there shall be' and 'it is not an offence'. But the original contains no verb; its presence is implied rather than express. Kangle (1969, II, p. 235, n 4) also suggests the provision voids slavery for minor Āryas only; for major Āryas such a fate is 'implicit in the Chapter.'

[72] *Asāraṁ bālapratibhāvyam* (3.11.16).

[73] Elsewhere, Olivelle defines (2015, p. 71) *asār* in three different ways: (1) a logically unsound plaint or defence; (2) articles of lower value (in which respect he references 4.2.16—cf. Kangle 1969, II, p. 260); and (3) relating to a pauper or insolvent person.

foreclose the mortgage at her discretion entirely. Hence a useful distinction between claim and control, and hence right and power, is whether the operator in question envisages judicial intervention. If not, then we may safely contend that the legal relation under scrutiny involves a legal power and not merely a legal right. Consequently, in our exegesis of legal power in the *Arthaśāstra*, we need to look for instances where the holder is able to effect a change in legal relations, *without* requiring the intervention of law courts.

Power *Simpliciter*

The *Arthaśāstra* does not offer many examples of Hohfeldian power. One example we have already encountered is 3.4.30, according to which when a family's affluence disappears and the husband is absent, the wife may remarry if she is released by her custodians. Here we analyse it as an instantiation of power and not liberty. We undertake this by examining its functioning, that is, the manner in which her obligation not to remarry transforms to a liberty to commit precisely that. This clearly amounts to a change in legal relations. There is nothing in the maxim either to suggest that the *sukhāvasthā*s must necessarily grant the wife her freedom, which implies that they are conferred a discretion rather than obligation. And hence the change in legal relations is effected by facts specifically 'under the volitional control of one or more human beings', as Hohfeld's (1964, p. 51) characterisation of power stipulates.

Another instance of power is found in Kauṭilya's exegesis of rescission of sale, part of the *Arthaśāstra*'s elaborate treatment of transactional law. Traders, agriculturists, and cowherds are permitted to retract (*i.e.* rescind) sale transactions within one, three, and five days respectively (3.15.5).[74] The maxim does not feature a verb, but merely specifies time periods within which, by implication, these option have to be exercised. We may classify them as powers, because once the sale is completed the buyer acquires a title to the property sold, which title, upon rescission, converts into a no-right. Maxim 3.15.7[75] adds an interesting qualification in respect of perishable goods; it permits rescission provided they 'shall not be sold elsewhere', attracting fines if transgressed.

Maxim 3.16.3[76] exemplifies how obscure the *Arthaśāstra* can be at times. It pertains to a different form of rescission, one that concerns a person first promising to gift 'his whole property, his sons and wife or himself' and then revoking his promise. While this clearly involves a legal power, the identity of the holder is uncertain, and depends on how one interprets the single term *prayacchet* or 'may sustain' deriving from the optative third person singular of the root *yam-* = 'to sustain, hold, hold up, support' (Monier-Williams 1899, p. 845). The problem here is that it lends itself equally plausibly to more than one construction, in fact so plausibly that Kangle and Shamasastry translate it in altogether disparate manners. Kangle (1969, II, p. 244) renders it as 'the (judge) shall allow it' (*i.e.* the rescission).

[74] *Vaidehakānāmekarātramanuśayaḥ, karṣakāṇāṁ trirātraṁ, gorakṣakāṇāṁ pañcarātraṁ* (3.15.5).

[75] *Ātipātikānāṁ paṇyānām 'anyatrāvikreyam' ityavarodhenānuśayo deyaḥ* (3.15.7).

[76] *Sarvasvaṁ putradāramātmānaṁ vā pradāyānuśayinaḥ prayacchet* (3.16.3).

Olivelle (2013, pp. 213–214) concurs with Kangle. He merely uses the phrase 'he should give permission', without clarifying who the 'he' indicates. But then he references his note on 3.5.26 (Olivelle 2013, p. 596), where he expresses his agreement with Kangle that the 'he' indicates the *dharmastha* or Justice. On the other hand Shamasastry (1929, p. 213) holds that the person who rescinds 'shall bring the same for the consideration of rescissors', thereby suggesting the 'he' indicates the rescissor.

We may identify two separate points of distinction here. The first pertains to the question whom the term *prayacchet* addresses. Shamasastry is clear it references the 'recissors' (incidentally the use of the plural is surprising given that the term itself clearly conforms to the singular); on the other hand Kangle and Olivelle parenthetically attribute it to the judge, the former even commenting explicitly (1969, II, p. 244, n 3) that 'the subject seems to be the judge, rather than the receiver.' Secondly and much more crucially, the question arises whether the optative conveys a *discretion* indicated by Shamasastry's 'bring… for the consideration of'; an *imperation* (Kangle's 'shall'); or a normative statement (Olivelle's 'should'). Their jurisprudential implications differ just as considerably. Shamasastry's discretion suggests that affirmative control, and hence the power to change the legal position of the promisee, rests with the rescissors. Kangle's and Olivelle's interpretations suggest that, unlike the role of *sukhāvasthā*s and judges in 3.4.30 and 3.4.35 respectively, here the judge is not conferred a discretion but is *obligated* to permit rescission. Thus effectively 'affirmative control' remains with the promisee, and it is thus he who possesses power in regard to the revocation. The problem is, both interpretations appear equally plausible. In the absence of further data, attempting to resolve the issue with any degree of accuracy becomes infeasible.

Power and Pre-emption

An interesting situation involves pre-emption, *i.e.* 'The right to buy before others' (Garner 2009, p. 1297) or 'The right of first refusal to purchase land in the event that the grantor of the right should decide to sell' (Martin 2002, p. 375). This is in the nature of a claim-right coupled with a power. The bearer does not enjoy a liberty to sell to third parties, which places her under a duty, and hence confers a claim-right on the holder. But the holder may also choose not to buy, thereby setting the bearer free to sell to anyone she chooses. This capacity to change the bearer's legal position (*i.e.* from duty to liberty) is nothing but a legal power. Maxim 3.9.1[77] confers on kinsmen, neighbours, and creditors—in that order—the right to buy landed property. Only if they decline does it become open to be sold to an outsider (3.9.2).[78] The term used in 3.9.1 is *abhyābhaveyuḥ*, the optative third person plural of *abhyābhū-*, *i.e.* 'to have prior right (e.g., to buy a property for sale)' (Olivelle 2015, p. 55). Even though Olivelle translates it as a right, it is more appropriately classified as a power, since the exercise of the option alters the bearer's legal

[77] *Jñātisāmantadhanikāḥ krameṇa bhūmiparigrahān kretumabhyābhaveyuḥ* (3.9.1).

[78] *Tatoanye bāhyāḥ* (3.9.2).

position. In a different context Kangle (1969, II, p. 164, n 26 in regard to 2.28.26) translates it as 'to have the right to', distinguishing it from *abhyāvahet* (deriving from *abhyāvaha-*, which he translates as 'to be responsible for, to be liable for' and Olivelle (2015, p. 55) as 'to be liable').

Liability

The *Arthaśāstra* features few instances of liability treated as a discrete operator in its own standing. Possibly the closest instance is 3.13.6 discussed earlier, which concerns pledged persons forfeiting themselves if they attempt to run away. We had referred to this maxim earlier in our discussion on no-right. But how does this no-right come about? Does it happen automatically? That is, will pledgee B be compelled to accept the pledged A as a slave even against his (B's) will? Or does A's decampment confer on B only an option to acquire ownership, an option B may exercise at will? The second, clearly the more likely possibility, equally clearly confers on B a power, since it enables B to alter A's legal position. However, the maxim's referent is not B or his power but, directly, and explicitly, A and his forfeiture. Or to be precise, A's *liability* to forfeiture correlative to B's power. In this manner it may be contended that the maxim treats liability as a discrete operator in its own standing, and not a passive consequence of power.

Concluding Remarks

Our objective here in this paper is twofold: *one*, to demonstrate the presence in the *Arthaśāstra* of non-deontic operators; and *two*, to demonstrate that the treatise treats them as entities in their own standing. The first is manifest, given the numerous instantiations we were able to locate in the text. An unanticipated insight we garner is that it contemplates multiple forms or phenotypes of certain non-deontic operators. Liberty, for example, corresponds to negation of the proscribed, the optative, and some other forms also. This is significant because referencing the same operator in such diverse ways makes it so much the more difficult to reduce its employment to the deontic. Which reinforces our conjecture about non-deontic orientation or focus.

This leads us to the second objective. Does the treatise indeed treat these operators as entities in their own standing? A brief look at some instantiations is appropriate here. Take for example 3.2.19, where the optative *labheta* is used to confer on a widow an entitlement to certain properties. The maxim references the holder directly, and establishes her as its subject. It also specifies conditions precedent (*i.e.* desiring a life of piety) that the subject must fulfil in order to claim her entitlement. Furthermore, the maintenance amount, ornaments etc. mentioned acquire their legal significance through reference to her, *i.e. qua* the subjects of her entitlement as opposed to property that the other heirs are obligated to confer on her. Can an equivalent deontic proposition convey so much information? For one, such a proposition can reference the subject-matter only in terms of the bearer's duty, and thereby fail to clarify if she stands in the position of a right-holder or merely a

beneficiary. This and other features lead us to infer that the proposition in 3.2.19 is clearly non-deontic in character.

Let us now come to liberty. Even if we assume for the purpose of argument that *adoṣa* and *nāpavādaṁ labheta* in 3.2.16 and 3.4.29 stray towards the deontic through their references to obligations (albeit in the negative), surely *vindeta* in 3.2.39 and 3.4.30 stands free of this possible shortcoming? It uses affirmative language, and directly addresses the subject of the proposition while eschewing any reference to the deontic.

Another unanticipated discovery is that incidences corresponding to the Hohfeldian no-right also find representation in Kauṭilya's schema, and that too conforming to at least two different phenotypes. This may appear surprising, since no-right is a coinage of Hohfeld's own, and is hence barely a century old. Hohfeld's neologism is only a signifier denoting a certain circumstances, which existed but was not recognised as such, and for that reason remained unnamed. The incidences discovered in the *Arthaśāstra* correspond to this existing circumstance. If anything, it affirms the ubiquity of Hohfeld's conceptions, since it indicates that the circumstance Hohfeld identified in 1913 predates him by a few thousand years. Furthermore, here the non-deontic characteristic of the maxims involved becomes even more apparent. For example, through the use of the term *adāyādā,* 3.6.8 directly references the holder. And in doing so, it attributes to her a legal operator, which can only be a no-right since its inverse has been used to confer a claim right (see 3.13.22). It does not couch itself in deontic language either by stating, for instance, that the other heirs are under no duty to confer the holder the subject-matter specified. And this fashion it entails the conferment of a no-right at least a few thousand years before the latter was even acknowledged to be a jural operator!

This is not to say that Hohfeld's schema in its fullest extent can be discerned within the *Arthaśāstra*. I was unable to find clear examples of either immunity or disability. To which we may respond in two ways. First, such lack of examples within the *Arthaśāstra* does not necessarily imply that these operators were unknown in the legal discourse of the era; after all the treatise neither is nor claims to be exhaustive of the laws in force back then. Secondly, and more to the point, seeking exact correspondence with Hohfeldian operators was never our purpose.

I make no claims either about whether Hohfeld's non-deontic operators are truly as elemental as he considers them to be. Or whether legal systems, 'modern' or otherwise, can base on duty alone and still remain feasible. These issues lie beyond the scope of our remit. Our objective was to ascertain if the *Arthaśāstra* is deontically oriented or focussed. It is manifest from our exegesis that the *Arthaśāstra*'s treatment of non-deontic operators is varied and nuanced. Representing in terms of, or reducing to, duty alone its complexities is certainly most impractical if not outright infeasible. Moreover, and just as clearly, it treats other operators as entities in their own standing. Which in turn indicates in the strongest terms that non-deontic operators were not unknown in the legal discourse of ancient India. Their usage in the *Arthaśāstra* also bespeaks high levels of sophistication, as is exemplified by the multiple phenotypes encountered in respect of certain operators. Hence claims about ancient Indian jurisprudence's putative deontic

orientation or focus lose much authority, and reduce instead to non-specific conjectures at best.

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Compliance with Ethical Standards

Conflict of interest The corresponding author states that there is no conflict of interest.

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