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ON *VYAVAHĀRA*

Introduction

In this paper, I navigate between Law and Indology and demonstrate how Indological studies continue to struggle with conceptualising law [1], while of course most lawyers struggle to make any sense of Indology – and, we need to be aware here, with the concept of 'law' itself. Working in an interdisciplinary arena, I move from a plurality-conscious critique of eurocentric jurisprudence/legal theory and its probably deliberate misunderstanding of the nature of Hindu law, earlier and today, to some comments on the nature of Hindu law and then finally produce what I hope will be a deeper analysis of the key concept of *vyavahāra* in Hindu law. I argue that most Indologists have understood, and continue to use, key concepts of Hindu law in a sociologically and legally inappropriate manner and see 'law' where our ancient texts speak about life more generally. It follows that as Indian Studies specialists we must rethink our use of these key concepts in daily life and practice and become still more plurality-conscious about the use of key terms in Sanskrit.

1. For a valiant fresh and very instructive effort see now Davis (2004).

The global distortion of Hindu law concepts

As a traditionally trained Indologist who has, for the past 25 years, worked in a law department as a teacher of Hindu law, Muslim law, family law and comparative legal theory, I have been confronted first hand, all the time, with scholarly contradictions about some rather basic concepts that we are dealing with in everyday life and in scholarship on law and more specifically on Hindu law. In particular, every year, I find myself emphasising to my first year legal theory students at SOAS that Sanskrit simply does not have a single word for law (which of course does not mean that ancient Hindus had no law) and that *dharma* means lots of different things, including something like 'law'. This works in the same way that *shari'a* has several different meanings in Islamic law and *li* and *fa* in Chinese law have their own nuanced and culture-specific connotations.

Thus one is making fundamental mistakes in understanding the nature of Hindu law if one were to search simply for what continental European lawyers still narrowly conceive of as 'law', meaning state-made rules, preferably in codified form. While this may work for French law and American law, recent comparative legal scholarship that is aware of global legal diversity has begun to realise that it may not be appropriate to classify Hindu law simply as a 'religious' legal system, frequently together with Islamic law and Jewish law [2]. The current resurgence of interest in 'law and religion' worldwide provides an important impetus to rethink this matter more comprehensively.

Regarding the long search for the Holy Grail of 'law', we know that this search primarily involves codes, as found in Sir Henry Maine's (1861) book on *Ancient Law* in relation to early and later Roman law codes, and of course the Code Napoleon of 1804 is a powerful symbol of what law should look like. In India itself, we are aware that Colebrooke and others argued early on that the *śāstric* texts were something like codes of law which they could manipulate through translations and reform. That particular early misconception, we know, served as a blunt tool of colonial governance. Ludo Rocher

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2. For a range of essays on this issue see Huxley (2002), including an article by myself on 'Hindu law as a "religious" system' (Menski, 2002).

(2002: 35) shows in this context how Colebrooke presented his translation of the *Dāyabhāga* as eminently useful as a guide for colonial judges on matters of Hindu law. Similarly, Sir William Jones dreamt of preparing a Roman-style digest (Rocher 2002: 36). We all know that those various attempts to use Sanskritic tradition as a basis for legal regulation collapsed miserably, but the lessons that should have been learnt from that failed endeavour have manifestly not been learnt.

Current global conceptualisations of law remain deeply influenced by such colonial thought patterns, mixed with positivist presuppositions about the nature of law and idealistic dreaming about a utopian world, but whose ideal world is this? Such potent combinations manifest themselves today as new civilising missions phrased in terms of human rights and good governance, even now 'War on Terror'. While 'law' is assumed to be on the right side in this global struggle, religion and culture are often perceived to be enemies, which impacts negatively on our particular fields of expertise. It goes further: while Europe and North America are 'good', Asia and Africa are somewhat 'bad' and cannot be trusted [3]. Indologists need to be aware of such negative mental chemistries in today's global context.

So let us have no illusions: Global legal theory remains almost totally in the grip of pretentious eurocentric conceptualisations of law, merely asserting and assuming uncritically that what 'we' think is law should also be the law of the world [4]. It is only a tiny mental jump in our confused brains from that imperialist general position to make other global claims about the nature of law. These dodgy presuppositions have fortunately saved Hindu law from the contempt with which African laws have been treated, since most African cultures as oral cultures had no written documents of their key concepts. In the view of formalistic eurocentric scholars, Africans therefore simply have no law and would do well to simply copy Western models. This mindset continues to impact on how evidence of African law is studied today, while nobody can so simplistically deny the presence of Hindu law in India and elsewhere in the world today. But there are many continuing and strongly worded

3. On 'dodgy' Asians in the UK, see Menski (2000).
4. For a critique of legal theory in the global context see Twining (2000).

attempts to argue that Hindu law as a religious law should be erased from the legal map of the 21st century (Dhagamwar 2003).

The fact that Hindu law studies can rely on ancient texts gave Europeans the chance to be Indologists. But this does not mean, even now, that we have understood the nature of Hindu law and its concepts properly. Most Sanskritists are 'historians without law', and these days you will hardly find any lawyers with Sanskrit. So the presence of ancient Sanskrit texts is a blessing in many ways, but their hasty classification as legal texts by earlier scholars indicates why we find so many misconceptions in Hindu law.

From a global comparative legal perspective, I can fully understand the temptations for scholars of Hindu law – and equally for those who today oppose the study of Hindu law on ideological grounds – to make macabre use of what I have called the skeleton of Manu in our global Indological cupboard (Menski 2003), namely Manu's so-called code of law, which remains a favourite and popular symbol of Hindu law that is clearly used and abused *ad nauseam*.

So, apparently driven by global market forces, even my most illustrious and dear colleagues like Patrick Olivelle publish wonderful books under the title of 'Law Codes of Āpastamba, Gautama…' (Olivelle, 2000) and so on. Wendy Doniger's (1991) paperback translation of the *Manusmṛti* dominates the global bookshelves under the title of *The Laws of Man*. Fortunately, such books are known to a lot of people, but have customers bought the right kind of knowledge? What image of Hindu law are we selling in the global market of religions and of laws?

I have been protesting vigorously that the very nature of Hindu law is being misrepresented by our efforts in the 20th century and today to keep Sanskrit and law together. But to many observers it seems that my comparative legal perspective on Hindu law's conceptual unwillingness to restrict the nature of law to codes is misguided. Many of you will be aware that Donald Davis (2004b) has written a rather hostile and polemical review of my book on Hindu law, questioning everything that I said, claiming in essence that I totally overcooked my goose. Perhaps Donald overstated his case, too. At least we are engaged in a continuing debate.

But I can not rest my case at all. This paper offers a chance to explain a few of my reservations to a specialist audience rather than the

global market. What I have been trying to convey is that the eurocentric domination of global jurisprudence with its focus on state-made codes of law has systematically and for a long time corrupted our methods of 'doing' classical Hindu law and therefore of understanding the meaning of our texts. The few Sanskrit-based specialists on Hindu law that exist in the world today know very well that Hindu law is historically and conceptually different from Western legal systems, and would accept my argument that all laws are culture-specific (Menski, 2006: xi). But somehow we feel and are under compulsion to fit Hindu law into those eurocentric straightjackets of what a proper legal system should be all about. So we imagine and perpetuate - despite doubts and challenges - the impression in our writing that Hindu law is just like any other law, that it has textual bases that can be treated as codes, and that it has old-established concepts of dispute settlement, for example, that are remarkably similar to formal courts as in any Western setting. This is how *vyavahāra* becomes just "Gerichtsverfahren" (Derrett et al, 1979) or simply 'legal business' or 'litigation' to almost everyone else.

I think what authors on Hindu law have been subconsciously doing here is to address a non-specialist eurocentric audience in terms that they thought would be understood by a wider readership. As Indologists, in danger of being dismissed as narrow specialists in an arcane field, we apparently try to assimilate the presentations of our specialist knowledge to the corrupted knowledge base of our audiences rather than asserting the uniqueness and culture-specific characteristics of Hindu law. We operate along assimilationist frameworks of mind, wanting to make life easier for our readers, in a sense, but end up misrepresenting Hindu law, not only centuries ago, but even today. The inevitable result of such assimilative scholarship are more confusions and deeper misconceptions, rather than a better appreciation of the nature of Hindu law in its own terms. But of course we cannot explain our specialist knowledge in Sanskrit, we have to use Western languages – but what do we do if those Western languages do not have the same terms for things that look so similar?

So as authors, first of all, we package our messages (or are told by our publishers to package our messages) in globally recognisable images. These are plain market forces, pure economics if you wish. When my Hindu law book was in production at OUP in Delhi in 2003,

its original cover picture had a wonderful image of a Manu-like old saint, the classic Indological law-maker figure. I vigorously insisted that this particular, admittedly well-chosen, cover image should not be on my book. To create an image of a Napoleonic Hindu sage would exactly resurrect Manu's skeleton and would contradict almost everything I am saying in that book. This also demonstrated that those who produced the book - and they were highly educated Indians - had not understood or taken account of its basic contents and message. So now, the image on the front cover is simply that there is such a thing as Hindu law today, which is both traditional and modern, and otherwise we leave the reader to imagine what this visual representation might mean rather than stipulating a particular essence or image of Hindu law.

Such struggles over the packaging of our scholarly messages today are of course not unique to Hindu law. All non-Western legal systems have been struggling to assert themselves against the global onslaught of supposedly uniform international understandings of law. They have to defend themselves against those many scholars who take the moral high ground by claiming that Western legal traditions are enlightened, rational, modern and therefore better than those religious *hocus pocus* systems that 'tradition' has preserved to our days. Remember that Hindu law is, for many scholars, deeply tainted by its classification as a religious legal system. Indological scholars, it seems to me, are too often neatly shielded from such simmering conflicts, cocooned in their specialist studies – until we find attempts to cut posts in Indology because our studies are no longer perceived to be relevant! As an academic Hindu lawyer, having been confronted with the coalface of comparative legal education for a long time, I have become somewhat supersensitive to these comparative pitfalls for the study of Hindu law today. I, too, constantly face the argument that Hindu legal studies are irrelevant in this day and age.

But this is not the right forum for a discussion of modernity and postmodernity, or the agonies of trying to pursue global comparative jurisprudence which Donald Davis (2004a) has now also incorporated into this work. However, any scholar working on Hindu law topics these days needs to be more aware of these wider conceptual struggles and highly politicised discourses about the nature of traditional Hindu law that have led to so many distortions.

What, then, is Hindu law, and what is dharma*?*

My longstanding critique of inadvertent orientalism and eurocentricised misrepresentations of Hindu law and its concepts has routinely generated the response that Indologists know of these problems and are doing everything possible to overcome them. In a German Orientalist Congress a long time ago, I was told to stop complaining and was assured that Indologists were quite clear about the nature of Hindu law. I am afraid I have little evidence that this is so and simply stopped going to those conferences. Defensive assertions of scholarly enlightenment are simply not matched with clear text used by scholars and commentators all over the world. The frightfully distorted image of Manu's law crops up everywhere, and in the semi-educated common man's understanding (even in India, I found) Hindu law is as good as dead and mere history because British colonialism, according to some much-read authors such as Galanter (1989) and Cohn (1997), is supposed to have superseded Hindu law. In the common public perception, even among lawyers in India, Hindu law is an arcane subject, despite its massive practical relevance as a part of family law, and Indian law today is merely an inferior cousin of the common law family of laws in the world. Such iffy images remain prominent in abundance, confirming that my critique of misrepresentations of Hindu law remains as valid as ever. Hindu legal theory and Hindu family law are half-heartedly taught in most Indian law schools. While there are doubts that the former subject even exists (Jayakumar, 2004), the great experts in Hindu family law are all dead or retired now and new academic experts are not coming up fast enough.

In such an inauspicious climate, even in India, there are fortunately some sophisticated attempts by a few of our specialist colleagues to convey a more accurate picture. These are laudable, but still do not go deep enough in clearing up the confusions. I took Patrick Olivelle's Dharmasūtras as an example of such sophistication, which escapes the common reader, I think, because the misguiding lead images are so strong and persuasive. But the reader is let down by the Indological specialist as soon as we leave the field of Indology and cross over to the general law. Olivelle (2000: xvi) carefully states in his initial notes on the edition and translation:

> Some words pose a special challenge to the translator. The most obvious is *dharma* (see p. 13). Wherever possible I have translated it as Law(s). It is, however, impossible and unwise to be consistent: some nuances and meanings of the term cannot be rendered as Law. I have used other terms, such as righteous(ness) and duty, but to signal to the reader that we are dealing with this central term I have always placed *dharma* within parentheses whenever it is translated with any term other than Law(s).

I admire this careful navigation and sophisticated explanation of method. But Olivelle simply does not explain to the reader what is meant by 'Law' in English. Precisely here is the problem that I indicated above: We are abandoned at a crucial point when the critical link between Indological scholarship and wider global legal scholarship needs to be explained to the reader.

So, do lawyers know what they mean by 'law' or Olivelle's 'Law'? To assume that they do is just make-believe, because the evidence is that in a global framework of reference, legal scholarship has simply reached no agreement on what is meant by law (Menski, 2006: 32-3) and I believe there will never be global agreement about what is and what is not to be included within the term of 'law'. Olivelle's 'Law' with a capital letter simply baffles us, and even seems to indicate that 'Law' is something different from 'law' [5].

In a later section on the semantics and sources of dharma, Olivelle (2000: 14) focuses on the huge range of meanings that this term includes, but again does not provide any further answers how this relates to law:

> *Dharma* is undoubtedly the most central and ubiquitous concept in the whole of Indian civilization. It is central not only in the Brahmanical/ Hindu traditions, but also in the Buddhist and Jain. This very centrality, however, also made it possible for the concept to be given new twists and meanings at different times and by different groups, creating a dauntingly broad semantic range. Its very complexity may be the reason for the lack of a single comprehensive study of the term. It is also a challenging term to translate or even to define adequately.

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5. On playing with 'LAW', *'Law'* and 'law', see Allott (1980), a simplistic but intriguing and instructive effort to emphasise the internal and inherent plurality of law. More sophisticated attempts to understand the internally plural nature of law are found in Chiba (1986) and Menski (2006).

Each and every statement in this quote could be transposed to a global analysis of the term 'law', which is clearly carrying different meanings in specific and diverse intellectual and social contexts. We know today that law as a global phenomenon is always culture-specific (Menski, 2006: 26-37) and need to recognise that it manifests itself – which is like *dharma* then – in many different ways. It follows that key terms such as 'law' and *dharma* can have many different meanings depending on, roughly speaking, the respective social context. I shall argue further below that this, precisely, is the critically relevant issue when we come across the term *vyavahāra*. While Indologists are of course familiar with the notion that *dharma* can mean so many things, we have given one meaning to *vyavahāra*. At the same time, we tend to assume that lawyers are similarly attuned to the idea that 'law' is multi-faceted and context-specific. But such assumptions are not borne out in reality for most lawyers who desperately lack global plurality-consciousness and are fixated by black box images of law (Twining, 2000).

On *dharma*, Olivelle (2000: 15) observes further "a dissonance between the theologically correct definition and epistemology of *dharma* and the reality of the rules of *dharma* encoded in the Dharmasūtras". So here we enter the debate on law and society, the theme of our panel, which of course again encompasses the global legal dimension as well as a more narrow discussion of Sanskritic law and society. The debate pursued by Olivelle (2000: 15) enters into familiar discussions about customary laws and the extent of their acceptance in view of textual rules. This is a never ending debate, which we cannot pursue here. It is important, though, that we should consider in this paper whether any textual rule could ever be strictly prescriptive and totally binding on all Hindus. In this context, Olivelle (2000: 16) incautiously uses the term "vedic prescriptions" while suggesting correctly later in the same sentence that such rules, according to Āpastamba, functioned as a check or a negative criterion: customs of a region or a group are authoritative for those belonging to that region or group provided they are not in conflict with explicit vedic prescriptions.

At the same time, as Olivelle notes, there are many transgressions of *dharma* and thus there is a need for constant debate and negotiation about such issues – we are edging towards a consideration of the cen-

tral importance of *vyavahāra* as a tool and method of negotiating what is *dharma* and what is *adharma*, a process that will never end.

What Indologists do not seem to realise is that current global legal debates about the nature of law are also beginning to discover that 'law' is never a given and also has to be constantly negotiated. Perhaps we could proudly say that *dharma* specialists knew this a long time ago. But do lawyers see eye to eye with this fluidity of rules? How comfortable are they with the suggestion that anything that is prescribed by a specific law does not just automatically result in total obedience to such prescription? The Austrian Eugen Ehrlich (1936), at the beginning of the 20th century, coined the term 'living law' for this phenomenon, but his insightful theory is not studied by most lawyers. Relying on such fruitful models, socio-legal scholars understand today a bit better that law and society are so interlinked and so internally diverse that all of our key concepts remain open to constant re-negotiation; nothing is rigidly fixed in black boxes. But most lawyers are not trained to develop such socio-legal perspectives and find this difficult to handle (Cownie, 2004).

It may well be that Indologists are better prepared for this kind of plurality-conscious discourse than lawyers, but we seem to be afraid to portray the inherent plurality-consciousness of Hindu law for fear of being dismissed as not properly legal. I argue that the ancient discussions about the nature of *dharma* predate current so-called postmodern debates of the relativity of perspectives and the constant need for plurality-conscious application of any rules that we may find. Olivelle (2000: 18) has beautifully encapsulated this in his concluding comments:

> The expert tradition of Dharma during the centuries immediately preceding the common era appears to have been vibrant and dynamic as shown by the numerous contradictory opinions of experts recorded in the extant Dharmasūtras. Such diversity of opinion belies the common assumption that ancient Indian society was uniform and stifling under an orthodoxy imposed by Brahmins. If even the experts recorded in these normative texts disagree so vehemently, the reality on the ground must have been even more chaotic and exhilarating.

The 'common assumption' referred to here is of course a reference to the many misguided preconceptions of scholars and others who sim-

ply assume that textual rules are 'the law' and are binding. That nothing can be further from the truth and from social reality is evident from how Olivelle analyses his normative texts[6], and relates them to society.

However, the realisation that both *dharma* and 'law' or Olivelle's 'Law' are internally plural to an almost limitless extent is not coming through clearly enough as yet from the scholarly discussions that we find either in studies on Hindu law or of general legal theory. I indicated earlier that Indologists seem to be afraid of being shot down by lawyers as fuzzy pluralists or 'cultural relativists' for whom anything goes. But the problem lies mainly, I suggest, with the insufficient globality consciousness of legal theorists and lawyers generally, who tend to be parochial plumbers of their respective legal system. I will not give examples of deficiency from the legal theory literature here. Let us rather look for a moment at what Wendy Doniger and Ludo Rocher are making of the same issue.

For Doniger, the title of 'The Laws of Manu' is not so problematic, since (as stated in the Acknowledgements) Brian K. Smith "had the idea of translating *everything* (even *dharma*)" and she could rely on her brother, a lawyer, for advice on legal terminology. Do I sense here that the advice of an American lawyer carries the same underlying problems as Colebrooke's assumptions about the nature of ancient texts in the early 19th century?

Dharma of course comes up in Doniger's introduction when she writes that the Manusmṛti is about *dharma*, "which subsumes the English concepts of 'religion', 'duty', 'law', 'right', 'justice', 'practice', and 'principle'" (Doniger, 1991: xvii). There is no further comment here about the nature of law. I have searched for further enlightenment on those pages, and found little. The subsequent discussion seems to indicate an understanding that the Manusmṛti functions like "any sort of legal code" (Doniger, 1991: lv). But is this not a huge contradiction, specifically in view of the immediately preceding discussion about the 'escape clauses' of *āpaddharma* and her finding of "an astonishingly subjective standard of moral conduct" (Doniger, 1991: liv)? On the one hand we are told that nothing is fixed and all depends on

6. Skilful use of the word 'normative' here evidently avoids the pitfalls of discussing what is meant by 'law'.

situation-specificity, and on the other hand we are encouraged to think about this text as a normal (whatever that means) legal code.

Subsequent comments do not help much to clarify the nature of 'law' or of Hindu law. Fascinatingly, Doniger (1991: lvi) comes very close to realising that Hindu law also has natural law characteristics, but she thinks only about *dharma* here as nature, not *ṛta* or *satya* (see Menski, 2003: 86-93). Doniger (1991: lvii) then notes that "*dharma* may sometimes be rendered as 'law' either in the sense of the law of gravity (*dharma* as nature) or in the sense of the law against slander (*dharma* as culture)". A little later, having reiterated the relativity of *dharma* (Doniger, 1991: lvii), she returns to the nature of the text as a legal code and confuses us further by suggesting (p. lviii) that:

> Some of it, therefore, is a legal code, and some of it is a moral exhortation; many people have memorized the moral exhortation, while generally only experts have known the code. In fact, there are several different (and not necessarily incompatible) codes, any one of which may be invoked to justify a particular verse and none of which can explain 'the system' as a whole. It is really not a code at all…

How one can then maintain the misleading title of 'The Laws of Manu' has always been a riddle to me. While "Hindus themselves have always taken Manu seriously in *theory*" (Doniger, 1991: lix), where does this leave the many assertions that traditional Hindu law and much of Hindu practice is based on this 'code'? And of course the British translated *dharmaśāstra* as 'laws' in order to manipulate and rule, though "[o]ne could not actually run a country using Manu alone" (Doniger, 1991: lx). The final comment (at p. lxi) confirms for me an impression of remarkable vagueness about what is meant by law:

> Indeed, only a small part of Manu (Chapter 8 and a part of chapter 9, which are generally regarded as late additions to the work) deals with what we could law. The rest is a code of a very different sort, an encyclopedic organization of human knowledge according to certain ideal goals, a religious worldview. But as a document capable of actually adjudicating the day-to-day decisions human beings have to make about such important subjects as food and sex, it could not be, and did not (if we read it carefully) claim to be, the law.

So here we are, the *Manusmṛti* is indeed at best guidance even in the view of its translator, but is sold to us and to an unsuspecting world as *The laws of Manu* and thus as traditional Hindu law, without explaining what is meant by 'law'. I could not test whether the most recent translator of this text (Olivelle, 2005) has thrown any more light on this matter.

A little later than Doniger, Rocher (2002: 3) places the *Dāyabhāga* appropriately into "a long tradition of Sanskrit texts concerned with legal matters", but also does not provide clear answers on what is meant by law, leaving a lot of fuzzy boundaries. Of course, he takes *dharma* appropriately as "a Sanskrit term for which there is no Western equivalent, since it encompasses any kind of injunctions, legal or other, that govern the life of a Hindu" *(id.)*. Discussing individual texts, Rocher (2002: 4) then suggests that compared to the *dharma-sūtras*, the *dharma-śāstras* "treat the legal aspects of dharma more independently and more systematically", repeats what we know, namely that books 8 and 9 of the Manusmṛti "are devoted uniquely to law" *(id.)* and says the same about the second book of the Yājnavalkyasmṛti. He then falls in line with Lariviere's (1989) assessment to the effect that "Nārada's is the only *dharma-śāstra* entirely devoted to law and the administration of justice" *(id.)*.

In various places [7], I have protested about the suggestion that some of these ancient texts should be read explicitly as law texts, almost written by lawyers for the use of lawyers. Professor Derrett evidently liked that image, too. Such assumptions would of course raise critical questions about how we view the authors of our texts and how we assess their status as 'jurists', a topic beyond the focus of the present theme, because we need to come closer to *vyavahāra*. Thankfully, this is exactly what Rocher (2002: 4) does next, and his passage is crucial for the present discussion:

> What is understood as "law" in the West is expressed in Sanskrit by the terms *vivāda* and *vyavahāra*, the former corresponding to substantive law, the latter to legal procedure. Of the three preserved *dharma-śāstras*, Manu and Yājnavalkya deal with procedure in the context of the first chapter of

7. See especially Menski (2003) and several book reviews.

> substantive law, Nārada in a separate introductory section. Verses relevant to procedure describe the organization of the various levels of law courts, and the different types of judges – the king *(rājā)* is always the supreme justice – and their qualifications. They go on to determine who can sue whom and in what form, and lay down the rules on how persons who are sued ought to present their defense. Large sections of the texts are devoted to different kinds of evidence and the criteria to which they should answer. "Human" forms of evidence include witnesses, written documents, and limitation; oaths and various forms of ordeals constitute the "divine" means of proof. The sections devoted to procedure end with rules on how to decide the case and on how to enforce the decision.

I have huge problems in accepting that 'law' as understood in the West should be reflected in the terms suggested here. Unlike me, Rocher is a Western-trained lawyer, and thus has imbibed through this education (which I consciously refused to undergo) a particular understanding of the nature of law, clearly akin to what Lingat (1973) perceived law to be from the perspective of the continental civil law tradition, and a little different from what Derrett as a trained common lawyer would imagine law to be.

In line 8 of the above quote, I also query particularly the suggestion that the texts could lay down "the rules" on how do deal with certain matters, assuming (probably subconsciously) a technique of codifying fixity borrowed from civil law thought. That the texts suggest certain ways of doing things is entirely plausible and unproblematic, but if we imagine that these texts laid down any rules in stone, we are most probably on the wrong track.

I shall not say much here about *vivāda* as 'law'. This looks like Hart's (1961) 'primary rules', rules of law that are substantive and regulate the interactions between people in society. Rocher (2002: 4) suggests that "[f]rom Manu onwards, substantive law *(vivāda)* is uniformly divided into eighteen – a traditionally significant number in ancient India – sections: there are eighteen *vivāda-padas*, 'heads of litigation'". However, the translation of *vivāda* here as 'litigation' seems messy and confusing. Was this term not supposed to mean 'law', while *vyavahāra* was 'litigation' or 'legal procedure'? Again, I detect pollutions of clarity when it comes to making critical distinctions about different aspects of 'law'.

The various topics of law listed under such headings are indeed all matters of what Hart would call 'primary rules', so are 'legal' subjects in a substantive sense, while *vyavahāra* is clearly related to procedure and thus denotes what Hart (1961) would call 'secondary rules', or rules about rules. While *vivāda* may therefore well be 'law' in a Western sense of substantive rules, we must note that even Western substantive rules of law do not necessarily appear in codified form. There are many types of substantive rules, including for example customary rules of an oral tradition. I note that Derrett (1968: 148) makes this important distinction when he writes: "The relationship between positive law with its scriptural origins and the originally unwritten law which we call 'custom' was subtle and complicated." Of course Derrett was also a eurocentric lawyer. I would simply note that customs are also substantive law, even if this may not be recognised by a formal legal system, as happens to Hindu law in the UK and North America today (Menski, 1993).

Apart from the critical distinction between 'official law' and 'unofficial law' (Chiba, 1986), I am acutely conscious of the need to counter assumptions in our minds that all legal rules are fixed entities, when in fact rules are constantly negotiable. What precisely is a 'positive law' may be subject to much discussion by legal theorists, but for the ancient Hindus the distinction highlighted by Derrett was perhaps not so important, since both types of law were an aspect of *dharma*.

That appears to be precisely the reason why classical Sanskrit texts say so much more about *vyavahāra* than about *vivāda*. The classical texts as a form of guidance are concerned to assist in operationalising *dharma*, not designed to lay down the law. If Rocher is right to suggest that *vivāda* is the actual substantive law, then *dharma* is certainly never just 'law' in the same sense, but rather the ideal form of behaviour that every individual (or at least every good Hindu?) should always aim for, an idealistic and holistic notion of 'law' in a wider cosmic sense, rather than just an actual factual set of rules or norms. The ancient texts are evidently deeply conscious of the need for the constant negotiation of *dharma*, resolution of *dharma* dilemmas (Datta, 1979) or the application of "escape clauses" (Doniger, 1991) and do not take law simply as a fixed or given entity. *Dharma* is there to be lived and struggled with. Rather than laying down the law, the

purpose of the ancient texts is thus primarily to offer guidance for negotiating *dharma* and thereby protecting *ṛta* [8], not to lay down fixed rules like a Napoleonic code.

How, then, do we need to understand vyavahāra*?*

The above outlined the plurality-conscious wider conceptual framework within which we need to analyse the meanings of all the key terms of Hindu law. Focusing now finally on *vyavahāra*, I am conscious that if eurocentric assumptions continue to associate *dharma* too easily and simplistically with 'law', then *vyavahāra* may similarly formally, but in my view inappropriately, be perceived as formal 'litigation', even 'legal business' (Derrett, 1968: 17) or 'court law' (Derrett, 1968: 191), or something like 'legal procedure' (Larivière, 1989 II: ix) in a formal sense, imagining all the time formal courts and judges in special dress. I am suggesting here that these are largely flights of fancy.

Before we come to specific textual sources, I would suggest that *vyavahāra* is essentially in general, first of all, a set of methods of settling doubts about *dharma*. The basis image of removal of a thorn is well known (Menski, 2003: 114). As such it is of necessity a process and not a rule or norm that can be fixed in stone or in code form. But I think that the way in which Indological scholarship since the early days has looked at *vyavahāra* has used, if not actually created, an image of *vyavahāra* as a structured formal system of law that can be put in words that can then be used as a procedural code to be applied in the legal business of settling disputes and deciding cases.

While I accept that this train of thought is not entirely misguided, it seems to overlook many aspects of *vyavahāra* within the informal and even very personal spheres of settling doubts about *dharma* that we fail to notice if we think only of formal litigation and of kings and judges. It also underrates and virtually ignores what I called the *ṛta/dharma* complex (Menski, 2003). Eurocentric (including modern Indian) predilections to think about law in formal terms have thus led

8. On this aspect see Menski (2003: 86-93).

to lamentable disregard for the critical importance of informal dispute settlement among Hindus since ancient times and even today. It may also partly explain why we know so little about the day-to-day legal life of Indians today.

While fashionable scholarly literature worldwide now talks about ADR (Alternative Dispute Resolution) as a new phenomenon associated with Western sophistication, there is hardly any Indian voice in this discussion because we Indologists have been so impressed with the formalities of the ancient system that we have not cared to look deep enough into our textual evidence, being blinded all the time by imagined images of courtrooms, kings and judges. Derrett (1968: 148ff.) lamented this deficiency particularly in relation to the role of custom, and only Donald Davis (2004a) has recently picked up this challenge in a very interesting manner but restricted to Kerala and a particular time frame. Much work remains to be done to understand how 'custom' and 'law' interact, and how text and custom interlinked in the plural socio-cultural realities of traditional India. Davis (2004a: 13) makes a useful distinction between theoretical and practical jurisprudence, but does not deal at all with the concept of *vyavahāra*.

Monier-Williams (1976: 1034 col. 1) clearly tells us that this term first of all means a lot of different things in the nature of "doing, performing, action, practice, conduct, behaviour." That is also the meaning of the same word in Hindi today, and it is exclusively used in that sense, and not linked to litigation, unless I missed something. For example, Chaturvedi and Tiwari (1975: 728) list "behaviour; dealings; treatment; transaction; practice; usage; use; application", with no hint of 'legal business' at all. *Vyavahāra* is thus the general negotiation of obligations of any kind, and in its Hindi form seems to indicate the desirability of a trouble-free style of life, navigating the waters of life by avoiding dangerous rocks, thorns and other trouble. Envisaging *vyavahāra* in Hindi, we certainly do not need to think immediately about litigation and courts, as legocentric social science and Indological scholarship has far too rashly assumed.

Of course, Monier-Williams (1976: 1034 col. 2) enters also "legal procedure, contest at law…, litigation, lawsuit, legal process". There are also many derivatives listed in the same dictionary which convey either the general or the more specific legal sense, so they clearly co-exist.

But in the Indological literature, the formal legal sense of *vyavahāra* has become entirely dominant, and I argue strongly that this is quite wrong and misleading. It is noteworthy that Derrett (1968: 148-9) discusses the familiar verses that list the four feet of all dispute resolution (note that I am not using the word 'litigation' here, while Derrett uses "litigation") as *dharma, vyavahāra, caritra* and *rājaśāsana*. Derrett (1968: 149) translates the second *vyavahāra* as "practice", which then very closely overlaps with caritra as "actual usage in the sense of custom". Are we playing with words here, as lawyers always do? I did not find this discussion clear enough, though it gives a lot of helpful detail on how *vyavahāra* may possibly be perceived also as a form of dispute settlement in which there is recourse to śāstric texts (Derrett, 1968: 149).

Lariviere (1989, II: 5) of course also notices the two occurrences of *vyavahāra* in the same verse of the Nāradasmṛti and suggests rightly that they "must be translated slightly differently. The first one is the technical term for legal procedure, and the second is the more general usage, i.e. a dispute at law". Great, but the second explanation is still specifically identified as a 'legal' dispute, when I would suggest that it is rather the all too common manifestation of insecurity or doubt over *dharma*. It seems that Lariviere relied for his interpretation to a large extent on Kane (1973, III: 260) who asserted that "[w]hen a litigation is fought out in Court by citing witnesses, the decision is said to be by vyavahāra" and gave further examples to indicate and confirm his positivistic and formalistic frame of mind in interpreting this ancient verse and its meaning in relation to practical application.

I was never convinced that this was the right approach, but it seems to me now that we should blame Kane, rather than American scholars, for these falsely formalised interpretations. Notably, Davis (2004a: 2 n.4) indicates mild criticism of Kane's "apologetic project" in this field. In what sense was Kane apologetic? It appears that such legocentric Indian Indological scholarship has misdirected the excessively formal and juridical interpretation of the concept of *vyavahāra*, rather than Western legal positivism. Or, more precisely, we may still blame Western concepts of positivism for such misrepresentations, but they occurred through the intervention of eager Indian scholars of law like Kane who, despite writing about Hindu law, did not manage to

convey its spirit as a largely self-regulating system of law and thought rather rashly about a formalistic legal system, perhaps indeed acting as an apologist.

How do we progress from here rather than just criticising past failures or inadequate representations? I have been wondering for many years about what has happened to the examination of individual conscience *(ātmanastushti)* as the most basic, most informal and generally invisible form of removing doubts about what is the right thing to do in terms of *dharma* [9]. The relevant verses are well known and have been often discussed, but with quite different conclusions. Typically, for Lingat (1973: 6), coming from a traditional civil law background, 'inner contentment' was clearly not acceptable as a legal phenomenon. Doniger (1991: liv) helpfully presents a number of textual sources that emphasise the critical role of the individual in finding the right solutions. But she seems sidetracked by her discussion of 'emergency escape clauses' and notices only "an astonishingly subjective standard of moral conduct" *(id.)*. More recently, I have tried to argue that the primary forum for dispute settlement, and thus removal of doubt, is in fact the individual human brain (Menski, 2003: 125-7), which Indologists have systematically overlooked as an important locus of action (Menski, 1984). I think one can say generally today that our specialist Indological literature has constantly overlooked and underrated Hindu social reality. With reference to the present debate, it has equally persistently overstated the importance of formal methods of dispute settlement in relation to *vyavahāra*.

If we apply this reasoning to the verse about the four steps of *vyavahāra*, then the first step, namely *dharma*, would be a process whereby the individual solves this doubt by himself or herself, clearly an invisible form of dispute settlement, a mental process. This is pure self-controlled ordering, Hindu style, and lawyers, see Lingat above, would not easily recognise this as 'legal'. The stage of *vyavahāra* as the second step would then be when the individual is not able to handle the matter for himself or herself and needs to seek guidance from

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9. Davis (2004) now emphasises the importance of *ācāra*. I fully agree with the argument that undue emphasis on *dharma* as 'law' has led to misunderstandings about other concepts in Hindu law (Davis, 2004: 145).

others, not straightaway in a formal legal forum of course, but rather by seeking guidance from family, peers, friends, really anyone else who may contribute to this still informal form of removal of the thorn or doubt. This becomes a visible, probably audible, socio-legal process, a consultation about *dharma*, which may still simply be a silent observation.

We see here that my interpretation differs significantly from that of Kane and Lariviere in that I do not see a 'dispute at law' or some form of legal proceeding, but still a process of dispute settlement, albeit informal, personal and probably not very public, even still invisible. From all we know about South Asian forms of dispute settlement today, when it comes to intensely private matters, one does not rush to a court of law to wash one's dirty linen in public. This ancient truth has been forgotten or ignored by our scholarly colleagues who thought too quickly and too much about formal law and too little about informal real life.

The third stage, *caritra*, is then indeed making sense as "the usages of a country, village or family" (Kane, 1973, III: 260), in other words, recourse to custom, whether formally recorded or not [10]. And only if that fails should a dispute or matter of doubt go to a ruler figure, a *rājā*, who does not have to be a king, he could also be the head of a family or clan, or the manager of a joint family, anyone in charge of a smaller entity (Menski, 2003: 113). Even then, recourse to textual sources as a basis for ascertaining *dharma* need not be necessary, since this ruler figure would have discretion to advise a solution based on his own common sense and a holistic assessment of all the facts and circumstances of a particular case [11].

The most important message and meaning of this critically important verse is thus that Hindus should not take recourse to more formal modes of dispute settlement unless they have failed to solve the matter among themselves. Even the fourth stage is not necessarily becoming a public dispute, a hearing in open court with judges and all the para-

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10. Earlier I suggested 'proof of custom' (Menski, 2003: 119), but again this does not need to be in written form.

11. A good ruler figure uses brain and common sense rather than consulting books or experts, as Smith and Derrett (1975) have shown.

phernalia of formal law. Texts like the Nāradasmṛti are, then, to be read as a kind of *āpaddharma* of litigation in Doniger's sense: If you have to go to formal dispute resolution, this is what you might wish to do.

We also need to be aware in this discussion that traditional Hindu law did not operate a formal system of precedent, and that every case scenario was to be treated as an entity in its own right, in my view mainly in order to fine-tune the situation-specific expectations of *dharma*. The whole internal structure of Hindu law, as I tried to show in 2003, is clearly not conducive to formalisation and codification, but to situation-specific adjustments. However, Indian as well as Western scholars have imported their own legocentric concepts and assumptions into the analysis of the ancient Sanskrit texts, leading to the creation of formal legal images that are deeply misleading, to say the least.

Conclusions

If ancient Hindu law, as I have argued, is based on a recognition that 'law' is not just some secular human phenomenon but exists somewhere above and beyond man, and is thus a form of natural law, as well as a system of rules existing among people in a society, and perhaps also rules made by whatever state we may find, then this realisation also needs to be applied in the dealings between people. It is for that reason, I suggest, that a central concept like *vyavahāra* cannot be simply conceptualised as a purely secular form of negotiating law, *dharma* or *ācāra* between Hindus.

What has happened in our specialist literature, however, is that we have been led to believe, evidently wrongly, that *vyavahāra* almost always means something like formal 'litigation'. Such legocentric presuppositions not only cut out the invisible *ṛta/dharma* complex, but also ignore the fact that in ancient Hindu society, as much as among Hindus today, informal methods of dispute settlement were much more prominent in practice than formal court proceedings and full-scale litigation.

A necessary re-reading of the relevant ancient texts therefore suggests, in my view, that what we learn about *vyavahāra* is not a prescriptive model, or a set of rules for how to do legal business. In a

chapter on Hindu law in a recent comparative legal study, I suggested that "positivist assumptions about a movement from *dharma* to law collapse as soon as we remember that *vyavahāra* can mean anything from a mental process of sorting out a doubt to a full-fledged formal court hearing before the king as final arbiter" (Menski, 2006: 228). Rather, then, these texts should be read as guidance for the *kaliyuga* in how to deal with doubts over righteousness and appropriate forms of behaviour for Hindus in all life situations. To imagine all the time courts, judges and formal judicial scenarios definitely goes too far and conveys a distorted image of how ancient Hindu law operated in socio-cultural reality, tilted in favour of formal litigation. This, I argue, was definitely not the message of the ancient texts on *vyavahāra*.

We thus need a fresh look at how we translate Sanskrit into English that reflects the intended messages. As an example, this is what Jolly (1977: 5) made of Nāradasmṛti 1.2:

> The practice of duty having died out among mankind, lawsuits *(vyavahāra)* have been introduced; and the king has been appointed to decide lawsuits, because he has authority to punish.

What we might read instead to reflect the results of the present paper might be something like:

> Observance of *dharma* having ceased among the people, settlement of disputes has become necessary [12]. The final arbiter of disputes is the ruler, made to bear the punishing rod.

I can see that this particular verse still leaves much room for imagining courts and judges, but a more detailed contextualised study of the concept of *vyavahāra* wherever it occurs in the texts will in my view strengthen the finding of this paper that formal dispute settlement processes were not really welcomed by ancient Hindu law. The relevant texts therefore need to be understood in their wider culture-specific context as advising against formal litigation, while at the same time trying to give advice on how to do handle it if necessary.

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12. Lariviere (1989, II: 3) likewise suggests "came into being".

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