Postmodern Hindu Law

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Abstract

This study, based on indological and legal scholarship, explores to what extent Hindu law, as a conceptual entity and a legal system, is visibly and invisibly present in contemporary Indian law-making. It is found that, defying many death wishes and contradicting pronouncements of its demise, Hindu law is alive and well in various postmodern manifestations. Both at the conceptual level and within processes of official law-making and policy formulation, postmodern Hindu concepts and rules retain a powerful voice in how India, in the 21st century, is seeking to achieve social and economic justice for over a billion people. Rejecting the agenda of hindutva and its opponents as too narrow and politically motivated, the present study presents a holistic view of Hindu legal systems and concepts and their contemporary and future relevance.

Chapter 1
The contemporary relevance of Hindu law

Hindu law has defied many death wishes, copious predictions of its gradual demise and almost complete displacement (e. g. Galanter 1972; 1989), and even proclamations of its death (Derrett 1978). It holds its position as a major legal system of the world, often despised and largely unrecognised, but massively present in the world of the new millennium. At least 800 million people, roughly a seventh of the world citizenry, remain governed by Hindu law in one form or another.

Despite its numerous traditional elements, Hindu law today must be seen as a postmodern phenomenon, displaying its much-noted internal dynamism and perennial capacity for flexibility and re-alignment in conjunction with the societies to and in which it applies. In India, it has become much more than a feeble post-colonial construct, waiting to be reformed away by a purportedly secular modern successor, the long-proposed Uniform Civil Code for all Indians. While that project now looks like a political football, 'shot into space'[1] - and thus out of bounds - by recent political and legal developments, on which this study has much to say, Hindu law prospers in India and elsewhere. In fact, at least in some areas it leads the way for sustainable and replicable legal developments within the wider context of India's much-discussed reconstruction of a "fractured modernity" (Corbridge and Harriss 2000: 238).

[1] In terms of traditional Hindu concepts, this is *antarīksha*, the space between earth and heaven, a kind of 'no man's land'.

The study of Hindu law has been neglected due to a combination of declining knowledge of its classical foundations and the pressures of modern political correctness, to the effect that studying Hindu law is often seen as a regressive activity, dangerous for minorities and, in particular, for women.[2] For many reasons, the label 'Hindu law' still conjures up images of frightful abuses such as 'sati', 'dowry murders', caste discrimination, untouchability, and other atrocities in the name of tradition and religion. Anything 'Hindu' is therefore quickly denigrated in many ways, not only by many followers of monotheistic religions, but also those who imagine and assert that a modern world, by which is often meant a Western-inspired world, can do without so-called primitive religious and cultural traditions.

However, such assertions are misguided and are being challenged by the recent history of Hindu law as it plays itself out within the wider framework of the post-Nehruvian Indian state. Arguments about the inherent political incorrectness and modern irrelevance of Hindu law have conveniently forgotten that the so-called modern traditions have their own roots in Western cultural and religious traditions.[3] So how could India be called upon to 'modernise', if that simply meant, at one level, shedding the social and cultural concepts that make up the fabric of the various hybrid Indian identities? How can hundreds of millions of Hindus be forced to abandon Hindu law? Western-led modernity, calling on all 'others' to assimilate to the supposedly higher, apparently secular and 'modern' value systems represented by the West, amounted to thinly-veiled pressure to abandon various indigenous traditions and convert to the supposedly universal idioms of modernity.[4] In other words, modernity expected and demanded unidirectional assimilation to alien cultural norms and models, and a stepping outside of one's own inherited traditions. It demanded de-Hinduisation, abandoning of customs, habits and traditions that are subsumed within culture. While modernity was, at one level, less concerned about religion, it expected the modern world citizen to be of a secular disposition, thus seeking to prescribe one particular perspective as appropriate for modernity. Not only Muslims worldwide have been reacting to such pressures by placatively demonstrating their presence and religious identity, asserting their specific socio-religious value systems, by force if necessary.

Hindu reactions to modernist Western assimilationist pressures may have been less vociferous in comparison, but appear no less evident if one cares to look and, importantly, if one knows enough about ancient Hindu culture and tradition in the first place to be able to see what is not immediately visible, but nevertheless present.[5] These reactions to the stresses of modernist challenges are not all violently and manifestly expressed. The constant readjustment of Hindu cultural responses to new situations has been practised for millennia, leading to subtle forms of cultural and

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[2] For example, the otherwise excellent introduction in the important collection of essays in honour of Lotika Sarkar (Dhanda and Parashar 1999) studiously ignores Hindu law. Other studies are more explicitly negative about the oppression by the two major religions of India (Sarkar and Sivaramayya 1994:1) and the discrimination against women by the personal laws (Parashar 1992).

[3] The concept of 'modernity' has of course many facets, and has been debated from many angles. The literature on modernity is huge, and there are many aspects of it. No attempt is made here to circumscribe its literary manifestations in any particular form. A good overview is presented by Ashcroft et al. (1998: 144-147). Galanter (1989: 15-36) presents a useful application of the key concepts to Indian laws.

[4] The debates on the universality of modernity and of human rights continues to be lively and there are no easy answers. For critical approaches see Renteln (1990) and Caney and Jones (2001).

[5] Outrightly secular studies, such as Burton Stein's (1998) excellent posthumous work on the history of India, not only fail to capture the all-pervasive Hindu elements in their field of study, but also avoid comments on law, which may not even figure in the index.

social change that require sensitive and intricate analysis. Political slogans against an assumed resurgence of Hindu-ness (*hindutva*) will not do. Their hidden agenda often is to deny Hindus the right, point blank, to express their points of view. This is where someone like myself, a classical indologist-turned-lawyer, has a professional obligation to say some of the things that others do not want to hear, and to write a book explaining the place of Hindu law today, when most lawyers wish that this law would just go away, making life easier for the professional - and (allegedly) for women - opening all doors to an imagined better, modern future.

The discourse on Hindu law as a factor in India's development process has become so fractured and insular that few connections are made today between legal and other social science research on post-colonial India.[6] This compartmentalisation works both ways. There is an enormously important and fascinating literature about the idea of India itself (Inden 1990; Khilnani 1997), its historical and political representations,[7] and its recent and current reinvention (Corbridge and Harriss 2000; Talbot 2000). But Hindu law and the entire legal framework of India curiously do not figure as central or even peripheral parameters of development and modernisation in such historical and political science debates. Conversely, the leading studies on Hindu law focus on their specific subject area and take virtually no notice of the wider environment within which legal developments have been taking place.[8] The results can be miserably inadequate, as scholarly subsidiarity may give rise to strange flowers, sprouting distortions that have a habit of becoming myths in their own right. Two cautionary examples will suffice. Graham Chapman (2000:17) paints a very readable, fascinating picture of ancient India:

> The first King of India was Manu Svayambhu (the self-born Manu) born directly from Brahma, the god of all, and (s)he was hermaphroditic. From him there sprang a line of descendants who gave the earth its name…But the most famous Manu was the tenth…

Such stories within stories, for that is what they are in their 'old' Puranic context, are then wrapped up for the contemporary reader by the assertion, at p. 18, that "[t]he name Bharat, which is used in India to identify itself…is said to derive from king Bharat, a descendant [sic] of the mythical king and law giver Manu Svayambhuva". Most readers will not notice that they are here being fed outrightly positivist assumptions about how Hindu law originated, in a kind of Napoleonic fashion, with a human law-maker for whom divine roots can be traced. Chapman is certainly right to conclude that "[a]s a name it therefore evokes explicit cultural and religious origins" (*id.*), but the legal message thus produced is as seriously distorted as the misrepresentations in many Hindu law books about the role of Manu, on which much more needs to be said.[9]

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[6] Peter Robb (1993:2) has noted that, "[a]s scholarship has inevitably become federal, with separate fields and knowledge, it has been necessary to adopt what might be called principles of subsidiarity".

[7] See in particular Brown (1990); Chatterjee (1997); Kulke and Rothermund (1998); Bayly (1999); Hardgrave and Kochanek (2000).

[8] Practising lawyers, in particular, seem to prefer books that are classed as 'ready reckoner' and just give the user 'the law', without any context and explanation. For a recent sample of such work, which is frustatingly inadequate for the purposes of legal practitioners, see Punj (2001).

[9] Derrett (1968b: 316) points out that "[t]he artificial revival of interest in India's cultural heritage from the last quarter of the nineteenth century stimulated a romantic interest in Manu; and it is from there that the continuing interest in the *śāstra* comes which we find in some cultured classes".

Current legal issues, too, contain many tripwires for scholarly subsidiarity. I have noted for many years that in relation to the infamous *Shah Bano* case of 1985 and its aftermath,[10] politically motivated analysis often does violence to legal facts, so that legal fact and politicised fiction do not match at all. Even the most experienced scholars may become a little too deeply involved in their own representations of India's legal realities, failing to check up on published primary sources. Thus, Corbridge and Harriss (2000: 115 and 179) allowed themselves to be misled by the politicised nonsense spread by earlier writers regarding the anti-women effects of the *Muslim Women (Protection of Rights on Divorce)* Act of 1986, when in fact the Act explicitly protects divorced Muslim wives.[11] Certain political arguments just do not make sense in the light of the actual legal position; they need to be revisited. It is quite evident that the voice of legal scholarship has been missing in the current debates on Indian developments.

While 'law' has been treated as a separate field, as though it does not belong to the federation of social sciences, Hindu law is often not even classed as law. This happens partly because of its presumed death some time ago, but more so because of resurgent fears that the religious basis of Hindu law might one day be revived in India. Consequently, the view is taken that such roots need to be eradicated, either by scholarly cold-shouldering or by active argument against their relevance and vigilant opposition to anything 'Hindu' that rears its head. The confused debates about Indian secularism are elaborate testimony to such complex and often hidden agenda,[12] as well as demonstrating, for all to see, that we are neither able to define 'law' nor 'religion' in universally agreed ways.[13] But even in the postmodern context of debates, most scholars do not want to see such basic problems. Thus, the problematic nature of the nature of law itself, and our divergent and partisan understandings of it, are not built into analyses as they should be.

But all is not lost. A recent volume of legal essays from India tackles the methodological problems of legal scholarship in some detail and attempts to produce a postmodern, feminist approach to the study of law which allows for a variety of perspectives. Having noted that poststructuralism, too, allows for a diversity of meanings to exist, Archana Parashar argues in Dhanda and Parashar (1999: 11):

> So too the assertion that law is simply the law of the sovereign State misses the point that the law gets its meaning from the intersection of legal and various other social systems of meaning. Social conventions interact with legal norms in many different ways – sometimes to enforce and at other times to delegitimize the institutionalized norms. The task of legal analysts therefore must be to unravel how various levels of meaning are constituted institutionally. The single most important point for any legal theory therefore is the acceptance of the idea that meaning –

[10] This case is reported as *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945. For analysis of the subsequent case law see Menski (2001, chapter 4).

[11] In addition, there are many reported cases under this Act, which have been ignored. For details see *id.* Even experienced legal writers, who should know otherwise, such as Agnes (1997: 565), continue to spread gossip instead of reporting the legal position as it stands.

[12] A useful survey of the major literature on secularism is now found in Jahagirdar (2001), but that author, too, pushes his own agenda too far and does not produce a sufficiently clear account of the key issues.

[13] For law, Roger Cotterell (2000) now speaks of a methodology of 'perspectivism'. This would suggest that within legal scholarship itself, not only ideological partisanship but another kind of federalisation has been taking place, with similar consequences for the fragmentation of knowledge as observed by Peter Robb for the wider field of research (see note 6 above).

including legal meaning – is constructed rather than pre-existing and simply waiting to be discovered.

Parashar therefore continues at pp. 11-12:

> I wish to argue that law like any other institution of society is interconnected with other institutions. It is futile to expect law to deliver a revolution but at the same time it is not possible to disengage from the law. The task of legal scholars therefore, is to explicate the connections between the law and social, political and economic systems. If a particular kind of economy and a specific form of law are coexistent it does not help for legal theory to ignore the connections. But at the same time law scholars must guard against a mechanistic application of theories from other disciplines. The interdisciplinary study of law by lawyers must mean that they bring their knowledge of the doctrine and analyze it in the context of the knowledge of other disciplines. In doing so they carry the responsibility to try and realize the highest aspirations of their profession, i.e., to achieve social justice for all.

Such almost prescriptive suggestions are of direct relevance to the present study. If the aim is to understand why Hindu law has not died in India despite its more or less complete official abolition (and in fact re-appears in various jurisdictions all over the world as a global conglomeration of transnational Hindu communities develops)[14] then the relevance and implications of that subsisting Hindu elements of law for social justice cannot be ignored and must be examined. I am not prepared to accept the *a priori* ideological argument that traditional Hindu concepts are 'bad' and that modern law is 'good' for Hindus. Academic analysis needs to go beyond placative assertions concerning Hindu law and its position between tradition and modernity. Recent feminist scholarship from India, as cited above, now suggests that this analysis must eschew the positivist orientation of Indian legal scholarship,[15] and must transcend the shackles of doctrinal legal thinking.[16]

Taking account of such postmodern demands for an open-minded socio-legal analysis, I argue here that despite the never-ending debates about modernisation and secularism in India, Hindu law, as the dominant Indian personal law,[17] governing the social majorities of India's one billion plus people, has continued to play a key role in the development of the state legal apparatus and will continue to do so. It does not matter whether scholars like this or not. This is a fact, and a legal reality that cannot be ignored, particularly if we want to understand how and why India has been

[14] While research on this remains underdeveloped, some beginnings have been made. See Menski (1987; 1993a) and Baumann (1998).

[15] Parashar, in Dhanda and Parashar (1999: 2) clearly argues for a theory of law that encompasses inter-disciplinary understandings of law and, at p. 3, criticises that "[t]he state of contemporary Indian legal scholarship shows an overwhelming reliance on positivist ideas about the law".

[16] On legal positivism or the analytical school of jurisprudence, see in detail Cotterell (1989). In a most instructive essay on legal positivism and Indian democracy, S. P. Sathe (2001: 38) highlights that "[l]egal positivism is a theory which defines law as divorced from morality. It looks to the formal validity of law". While this is correct, no doubt, another aspect of legal positivist theory, which is somewhat more relevant here, is that it does not accept non-state laws as law because of its myopic reliance on the Austinian principle of law as the 'command of the sovereign'. On the plurality of positivist perspectives, see Menski (2000a: 100-105).

[17] The personal law system is not just a prominent feature in South Asian jurisdictions, but is virtually dominant all over Asia and Africa, thus representing an impressive alternative model to the uniformised legal regulation of the bureaucratic central state that Europeans are familiar with.

developing the way it has, and if we are serious about social justice. The Constitution of India and Hindu law are not as incompatible as lawyers posit; both interact with each other in many ways that this book cannot even begin to analyse. That Indian developments constantly confound the experts is already widely recognised.[18] I suggest that one of the main reasons for the experts' confusion is simply that they themselves do not know enough about Hindu traditions and Indian ways of life to take them seriously and incorporate them into their analyses. Hindu traditions are manifestly much more than folkloristic decorations,[19] and Hindu law is a demanding multi-disciplinary arena which seems to put researchers off.

To some extent, the reforms within the sphere of Hindu personal law have had a pioneer function, leading outwardly to accusations by Hindu traditionalists opposed to such reforms, claiming that the majority was made to suffer disproportionately in the name of secularism and modernising reforms, from which minorities (and especially the Muslims) were somehow exempted.[20] However, as this study shows, the reforms within Hindu law itself have allowed the cultivation of fields of experiments with modernity, with results that suggest to the Indian state that it would be suicidal to throw away indigenous traditions, just because they are 'traditional', 'religious', or 'Hindu'.[21] Some of the resulting experiences of 50 years of experiment have shown with utmost clarity that an unconditional commitment to what was meant by modernity is not suitable for India and her people. Modernity, in that respect, is also dead in India, a superseded axiom that has, however, left enormously important legacies.[22]

Today, it needs to be recognised by all concerned that Hindu law has survived the formalistic onslaught of modernist legal reformers for a number of good reasons. But what actually is Hindu law? First of all, it has always been much more than a fossilised book law that could be abolished by the stroke of a pen. It could not simply be reduced to redundancy in the Austinian fashion, so often practised during colonial

[18] For example, Hardgrave and Kochanek (2000: 2-3) provide a neatly argued summary of the development challenges posed in and by India.

[19] In an excellent study of popular Hinduism and society in India, Fuller (1992: 6) emphasises that "[t]he ethnographic record clearly shows that there are enduring structures within Hindu religion and Indian society, at both the institutional and ideological or symbolic levels".

[20] Prominent examples would be the abolition and criminalisation of polygamy in 1955 for Hindus, but not for Muslims, and the introduction of divorce on various fault grounds for Hindus by the same Act, but not for Christians. As I showed in detail recently (Menski 2001, chapters 2, 3 and 6), such arguments might have been correct in the 1960s or 1970s, but Indian legal developments during the 1990s have largely ironed out such divergencies between various personal laws in an attempt to construct more socially appropriate legal norms for minority communities, as well as harmonising all Indian personal laws as much as possible to achieve an alternative form of legal uniformity.

[21] I emphasise here the lessons learnt by the state, since the majority of Indians have either not consciously taken part in this learning process or, it could be argued, had no need for it, since state intervention, viewed from their position, would not bring any tangible benefits. The centrality of the state and its laws, which lawyers and politicians cultivate so avidly, appears much reduced for the common Indian citizen.

[22] For the purposes of the present argument, a commitment to modernity appears to have implied an assumption that whatever was traditional could be neatly superseded through a variety of reformative processes. To that extent modernity feeds on images closely linked to earlier thinking about 'development', which has also become obsolete now, because theory and practice manifestly did not match, and the results were not 'just' enough. I found the essays collected in Fry and O'Hagan (2000) useful for the wider debates, in which law is again absent as a voice. Roland Bleiker (2000: 227-241) contributed a fine essay to that volume, discussing the end of modernity. On modernity in relation to South Asian law, see also Galanter (1981).

rule that it taught postcolonial leadership to embrace legal positivism as a philosophy and top-down law-making as a magic tool of development.

In social reality, all that happened was that the official Indian law changed, while more and more of Hindu law somehow went underground and became unofficial law. The present study uncovers this semi-hidden underground existence of Hindu law, which is a methodological possibility only if we go away from positivist constructions of what law is. Since Hindu law has always been a reflection of the way of life of millions of very diverse people, the practical effects of formal legal reform need to be shown here in a different light than standard legal textbooks suggest. What was abolished by the formal law was manifestly only a fragment of the entire field and of the social reality of Hindu law. The conceptual framework and ideologies underpinning multiple ways of life, and hence the entire customary social edifice of Hindu culture, remained largely immune to the powerful wonder-drug of legal modernisation which had been administered in measured doses since well before 1947 and was again used during the 1950s and thereafter.

Given the impossibility of distinguishing 'religion' from 'law', which the central Hindu concept of righteousness (*dharma*) recognised by idealistically expecting that everyone should be doing the right thing at any moment of life, how could modern Indian law aim or claim to abolish Hindu law? It seems that this ambition could develop only because *dharma* was in reductionist fashion defined as 'law',[23] and because modernity temptingly suggested that 'tradition' was amenable to straightforward legislative reform. In other words, it became possible for India's postcolonial leadership to dream of a better future by applying the magic remedies of modernity. As Derrett (1957: v) noted early on with evidently mixed feelings,

> …however repellent the "Code" may seem at first sight, it is the path to the goal, *viz.*, a Civil Code, and the deliberately-chosen path of a legislature which, however vaguely, realised that it was leading a uniquely complex nation towards a clearly-visualised if seldom-described Garden of Eden.

Something as complex as Hindu personal law could not be reformed away and ultimately abolished by statute, nor could its influence as a legal normative order that permeates the entire socio-legal Indian field simply be legislated away. Hindu law has always been a people's law, whether or not the state wished to see it that way. Despite enormous internal changes, Hindu law as a conceptual entity has remained an integral part of the living and lived experience of all Indians,[24] particularly of those very diverse people who might call themselves Hindus, or whom others refer to as Hindu.[25] Whether we approve of this or not is irrelevant. Indian laws in all their various manifestations are strongly rooted in Hindu concepts, just as English law is culture-specific, or French law is ideationally linked to certain foundational concepts such as

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[23] This is documented, for example, by how a leading judge of the Indian Supreme Court (Gajendragadkar 1963: 18) presented the subject of Hindu law during the 1960s, simply equating *dharma* and law.

[24] To the evident discomfort of modernists, but also many Pakistanis, in particular, this may well be said for the whole of South Asia in one form or another. Such a statement need not be read as an attempt to underwrite so-called Hindu hegemony, for it merely highlights the fact that Hindu concepts have manifestly remained interwoven and reflected (even if often in opposition) in virtually all forms of South Asian culture.

[25] The term 'Hindu' has remained ultimately undefinable and no purpose is served in offering what will be seen as essentialising attempts at circumscription. For the legal problems of defining 'Hindu' see Derrett (1966; 1979).

the image of Napoleon drafting the French Civil Code by candle light (Legrand 1996: 235). Just as we must recognise that English or French law are rooted in certain cultural concepts and are thus forever culture-specific,[26] although not unchanging, there is no escape from the fact that Indian legal systems and Hindu law are similarly rooted and have been equally subject to constant changes. But the universalising claims of modernity denied this, assuming the axiomatic inevitability of progression towards some purportedly global norms.[27]

Today, the concepts and rules of Hindu law are still in evidence wherever we care to look, provided we can see them in the first place, since Hindu law was never exclusively a book law that could be found in handy form and just taken off the shelf.[28] More or less informally, and indeed often invisibly, Hindu law continues to govern hundreds of millions of people, not only in India but wherever Hindus, as members of the huge transnational and global Hindu diaspora, have settled. Significantly, many Western lawyers vigorously refuse to accept this, primarily because their assumptions about 'law' differ from the internal categories applied by Hindu law. Positivist claims about the nature of law, which centre prominently on the blinkered assumption that only state law is properly 'law', have remained so strong that a Hindu living in Britain, for example, would simply be treated as governed by English law, while at best there might be elements of Hindu custom or 'cultural traditions', but not law, which could have some relevance for judging the actions of such an individual.[29] While positivist lawyers thus constantly marginalise non-Western laws and thereby also deflate the numbers of people potentially governed by Hindu law, the populations following Hindu law in one form or another are growing rather than declining, raising obvious concerns for the Indian government in terms of demography and the resulting pressures on implementation of social welfare norms and constitutional guarantees. Outside India, the occasionally expressed chagrin of foreign observers and even governments discloses that modernising projects and more or less official efforts to assimilate and thus de-Hinduise migrant populations have been frustrated by the more or less subconscious adherence of millions of such people to Hindu law principles, if not definite rules. Hindu law, wherever Hindus have

[26] Significantly, the important critique of Western legal claims to universality by Masaji Chiba (1986) challenges the hidden assumption that Western 'model jurisprudence' is somehow value-neutral and universally valid. Chiba's approach also implies a critique of modernity. At a different level of legal analysis, Roger Cotterrell (1989: 231-235) discusses the implications of employing either empirical legal theory or normative legal theory. This, too, is a critique of modernity, namely of the underlying assumption that we could really just know anything for sure when it comes to law and legal systems. More recently, Cotterrell (2000) reflects on postmodern legal theory, characterising various forms of subversive legal theorising as constructive, and encouraging the use of what he calls "Pandora's box" of jurisprudential techniques.

[27] Significantly, this is questioned with renewed vigour today in the specialist literature. Caney and Jones (2001: 31) argue that diversity cannot be ignored and that it is profoundly misleading to posit that a global civil society represents the pinnacle of human development (pp. 9-10, 21).

[28] The unduly formalistic focus on the *Manusmriti*, one particular ancient Hindu cultural text, which is constantly misrepresented as 'the Code of Manu' and is therefore often treated as the major source of Hindu law, underpins the false assumption that Hindu law is based on legal codifications and thus looks and develops like a continental European legal system. The continuing reluctance to move beyond such misleading myths and models has already been noted.

[29] In this respect, Poulter (1986) denied the status of 'law' to all ethnic minority customs in England, so that individuals carrying their personal laws with them to the UK would also be legally destatussed. This approach is vigorously criticised in more recent studies (Jones and Welhengama 2000).

settled, adapts to new scenarios, defies the selective myopia of doctrinal legal scholarship and reasserts the supremacy of law as a reflection of real life.[30]

Whether in the communally charged environment of India, or in the racism-plagued countries of Europe and North America, Hindus and their cultural and religious traditions are frequently challenged as backward and 'traditional'. The reaction, apart from widespread stoic silence of the common Hindu, has been a somewhat militant and defensive trend to stand up for Hinduism and all that it represents. There is certainly much evidence of a resurgence of *hindutva*, whatever that implies in particular contexts, and a hugely important political science literature has grown up around that question, with some comments in virtually all the major recent studies referred to above. The relevant point for the present study is that in its disdain for any Hindu phenomena, modernist and also much postmodernist political and legal scholarship overlooks and marginalises the place of Hindu, African, South East Asian and even East Asian laws in today's world. It appears that we do this at a huge cost, since the power centre of the world has recently been shifting towards Asia. Dismissing phenomena like the postmodern reconstruction of Hindu law, insisting that Indians and others should learn from the West, rather than vice versa, represents dangerous, self-destructive lingering in the tentacles of modernity. If it is indeed true that Hindu law now assumes a condition of postmodernity, sticking to the axioms of modernity has itself become backward and traditional. If that eludes even most Indian lawyers, this may be because they do not read enough, or read too much English law, and it is certainly a reflection of the positivism-fixation of Indian law and most of its specialist personnel.

There are so many types of Hindu law today, both traditional and modern, that this collective term itself tells us little about the subject of the present study. In a nutshell, I am trying to show here that certain traditional conceptual elements of Hindu law – though not others – have remained relevant and active in the development of Hindu statutory and case law during the post-Independence period, leading to a widely unexpected resuscitation and even growth of Hindu law in India during the reconstruction process of the 1980s and 1990s. Having thereby become integral and stronger components of a revitalising Hindu law, while facing the challenges of modernity, those same conceptual elements have shown their capacity for reconstruction into forms of postmodern Hindu law that have begun to emerge more clearly during the 1990s. Without essentialising Hinduness, therefore, the present study seeks to identify those traditional key elements in Hindu law which have been active motors for conceptual and practical socio-legal development and highlights their continuing relevance at the centre of postmodern trends in Hindu law today. Compared to classical indologists and those who studied earlier periods of Hindu historical and conceptual development, we are privileged today in that the implications of legal developments can be observed and analysed within their specific contemporary socio-economic and political context. Thus, while many still anticipated the death of Hindu law earlier (even if this was merely wishful thinking) or, as Derrett did in 1978, announced its demise, it has been possible to observe, particularly from an interdisciplinary socio-legal perspective, how ancient key concepts in their contemporary incarnation or *avatar* make themselves felt in the latest developments of Hindu law. I argue, therefore, that such traditional Hindu concepts have a place in

[30] See on this in detail Menski (2000b). The growing literature on the worldwide spread of Muslim law and the attention recently given to Islamic law as an alternative globalising force and movement (Glenn 2000: 47-50) also challenge and dispel the modernist assertion that non-Western legal traditions do not have the capacity to develop and modernise by recourse to their own internal methods.

today's law-making processes and remain critically relevant as tools for constructing India's postmodern legal system.

Chapter 2
Rising from the ashes: Postmodern Hindu law

The topic and problematic of Hindu law stems by and large from a post-colonial, post-modern discourse about the nature and direction of a supposedly tradition-bound legal system in India's modern democracy. The ongoing debates regarding traditional, colonial, modern and post-modern manifestations of Hindu law, however, has led us deeper into two interconnected jungles, namely conceptual debates about the nature of law generally, on the one hand, and more specific theories and conceptualisations of Hindu law, both classical and modern, on the other.

In my view, the main problem that arises in connection with understanding Hindu law, and its transition beyond tradition and modernity, has been the persistent attempt – by insiders as well as outsiders - to deny that this important legal system actually has its own conceptual methods of growth and development, and thus the mechanisms and capacity for internal modernisation. Apart from denying that Hindu law could make any meaningful contribution to legal science as a whole, two prominent distortions about the subject have prevailed for too long and need to be analysed here. Many observers suggest - and public opinion largely presumes - that Hindu law looks and functions like a Western-style legal system. Portraying an impression of codified roots, found in ancient texts that were presented as legal codes, Indian legal scholarship embraced the idea that eventually, modernising reforms could simply be

introduced and implemented through a 'rule of law' model. From this perspective, Hindu law simply needed to modernise and secularise, and would thus become a variant of an imagined universalistic legal system. Such assumptions were reinforced by certain religiously motivated beliefs, in particular a monotheistic focus in this distortion process, going back to the notion of a divinely revealed tradition that is allegedly God-given and unchangeable. None of these approaches allows the internal diversity of Hindu law to speak for itself and none brings out fully the culture-specific intellectual contributions that Hindu legal science has made over time.

The present study takes the perspective that 'law' is much more than state law and thus explicitly rejects the usefulness of legal positivism as an analytical tool for understanding the inherent conceptual and actual complexity of Hindu law. As a result, it is argued that the perceived decline and virtual abolition of Hindu law is nothing but an elaborately constructed myth that has served certain purposes and modernist agenda – and continues to do so with much persuasion - but could ultimately not defeat the socio-legal realities of the now probably close to 800 million Hindus in India. The key argument, to the effect that Hindu law is alive and well at several conceptual levels, is developed in more detail in this chapter, leading towards a discussion of modern India's creative use of Hindu concepts in seeking to construct a justice-focused legal system that does not need the crutches of a foreign legal order,[31] but remains open to modification and reform as and when circumstances suggest it.

2.1 The perceived decline of Hindu law and its contemporary reincarnation

The frequently stated Hindu belief that Hindu law as an eternal ordering system (*sanātanadharma*) is rooted in religion and ultimately based on some form of divine revelation has led to scholarly assumptions that as a religious law, Hindu law could be modernised, secularised and ultimately deconstructed as a thing of the past. In reality, as a chthonic legal system,[32] Hindu law is much closer to African laws and informal East Asian laws than to the monotheistic legal traditions coming from the Middle East. A desire to be grouped with 'advanced' legal systems on the one hand, and scholarly inability to present the roots of Hindu law within their culture-specific environment have combined to lead the general public astray when it comes to grasping the essence of Hindu law. Alas, the mere attempt to deal with essentials has been so severely criticised as a scholarly method that much writing now waffles over inessentials without a secure understanding of more fundamental foundations of the subject at hand. A critical analysis of the state of scholarship in Hindu law therefore points to numerous deficiencies of understanding which seriously impede the scope for contemporary analysis. While in a field like political science it would be unlikely for scholars to advocate the removal of their subject, frequent calls for the abolition of

[31] Many Indian judges have used this symbol from time to time. For an early example, see *Rattan Lal v. Vardesh Chander* (1976) 2 SCC 103, at pp. 114-115, cited in Derrett (1977: xv).

[32] On the concept of chthonic laws, see in detail Glenn (2000). These are laws that relate closely to nature and the earth, rather than a particular personalised or divine law-maker. They are a form of natural law, and closely link the social sphere and the environment, reflected in much respect for nature's phenomena and even worship of fire, water, the earth, trees. They are thus often treated as 'primitive' when in fact, in their developed forms, they represent sophisticated holistic systems of thought and practice.

Hindu law, and declarations of its death, have been matched by lawyers' persistent efforts to deny that the subject may have any practical relevance at all in today's world.

It is somewhat sad and surprising that very few academic, let alone practising lawyers, even in India today, seem to be interested in studying, researching and teaching classical Hindu law.[33] Learning in this field has definitely declined worldwide to a point nearing extinction. This not only reflects problems of scholarship on account of antiquity and the inaccessibility of such concepts from the ancient and complex language of Sanskrit but also signifies the assumed large-scale irrelevance of classical Hindu law for most of the commercial litigation that keeps Indian corporate lawyers in bread. It tells us a number of other things, too. Above all, it is a reflection of the frustratingly complex nature of the traditional Hindu legal system and its tools and concepts, which have led in turn to its formal marginalisation and a mixed, tainted reputation among the litigating public. For most observers, such negative tendencies appear to have had the effect that Hindu law has been abandoned, perhaps to be reformed out of existence, or modified and secularised in such a way that it could be made conducive to modern legal practice, or indeed to wither away in the kind of natural process of development that 'modernists' are prone to imagine.

The major reasons for such aversions to studying and dealing with Hindu law have long been known. One suspects that well before British colonial officers, many well-meaning Hindu *pandits* despaired at the ocean of *shastric* diversity and threw in the *dhoti* in resignation. The East India Company officials certainly could not handle this mess on their own. Starting off with imperfect assumptions about the nature of law, and having sought the wrong kind of expert help by asking misconceived questions of their Native Law Officers, as the *pandits* in their service were called, the British engendered a complex process of distortion. The morass of Hindu law only got deeper and eventually the "monstrous hybridity" of Anglo-Hindu law was produced.[34] By 1864, when the Hindu *pandits*, who had acted as Native Law Officers, were simply abolished as an institution,[35] their mischief had become famous in its own right,[36] but by then it was too late. The road to the emergence of Anglo-Hindu law as a case-based system of law had been paved, and further distortions inevitably followed.[37]

It appears that after 1864, the British desperately attempted to curtail the use of *śāstric* law. It is evident that they could not make sense of the textual basis, nor of the holistic structure and methodologies of Hindu law (Desai 1998: 65). The impact of the emerging judge-made law and its precedent-focused methodology was eventually experienced as oppressive and was characterised by "unprecedented rigidity" (Desai

[33] Baxi (1986b: 2-3) complained that Indian legal researchers "are heavily preoccupied with normative law and doctrinal research". A couple of years ago, a number of authors attempted to revive the study of Hindu law. These efforts have not been sustained and have remained fragmentary. For details see Narang (1988), Singh (1990), Dhavan (1992) and Purohit (1994). Jois (1990) and Bhattacharjee (1994) represent more consolidated attempts to come to grips with the subject, but have many shortcomings.

[34] Derrett (1968b: 298) recounts the history of that perception. Derrett (1978: xii) emphasises that "[i]ndeed the Anglo-Hindu law of the family is a travesty of the traditional Hindu law and has long been recognised as such". On the ambivalent function of the Privy Council as the motor for unifying legal developments, see Derrett (1957: 4-5).

[35] It appears that the descendants and successors of this elite class of learned men turned to studying English law as the dominant medium of legal education at the time, rather than *dharma*.

[36] On the parallel complaints about Muslim Law Officers in Bengal and the reactions of their British employers to the diversity of expert opinions and their apparent unreliability, Malik (1994) provides fascinating detail based on the study of original sources.

[37] Leading Indian authors such as Desai (1998: 62-66) have tended to be more polite about the British involvement in Hindu law and the resulting distortions.

1998: 66), further contributing to the 'bogus' nature of the entire legal construct. Ultimately, the mess became so bad that the only salvation for Hindu law was sought in its unification into a civil code, uniform for all Hindus, which Derrett (1957: v), as cited in chapter 1 above, poignantly described at the time as an imagined path to the Garden of Eden.[38]

The British judges during colonial times had also sought to restrict the practical relevance of customs as a source of the official law, despite solemn promises and pious pronouncements to the contrary.[39] Given that the underlying concepts of Hindu law could not just be abolished by new legislation or court precedent, and since custom continued to rear its head, there was no 'final solution' to the place of Hindu law. Whoever dealt with Hindu law issues since that era struggled in much political quicksand. The reformed modern Hindu law of the 1950s finally seemed to emerge as a beacon of light for a better, secular future, in which so-called 'religious' norms might eventually become a legal irrelevance.

Unsurprisingly, given the negative image attached to Hindu law throughout much of its history, there have been few attempts to explain that legal system and to provide a remedy for increasing ignorance among lawyers. Professor Derrett's *Religion, law and the state in India* (1968b) is a priceless, timeless treasure in this field. Earlier, Derrett (1957) had commented in detail on the Hindu law reforms of the 1950s. These also motivated Sunderlal T. Desai to write a general introduction to Hindu law, first published in 1958, which is still found in the most recent edition of Mulla's *Principles of Hindu law* (Desai 1998: 1-68). This is probably the most widely available treatise on Hindu law today, albeit prone to many criticisms. Derrett's famous *Introduction to modern Hindu law* (1963b) and his *A critique of modern Hindu law* (1970) have remained unsurpassed, awaiting an update for decades. Similarly, Professor Lingat's excellent study of Hindu law (1973) has long been in need of some critical comment. The present enquiry hopes to fill some of the growing gaps left by these earlier leading studies in the light of recent legal developments.

In updating these earlier works, this study demonstrates that Hindu law, as a conceptual system infusing the entirety of Indian law, as a practically applicable form of Hindu personal law regulation, and in its formal as well as informal manifestations, has risen from the ashes of its supposed death.[40] Despite many pronouncements to the contrary, it has not declined at all in importance. Both in terms of theory and practice, Hindu law is actually experiencing a marked resurgence and revival today, as the formalistic experiments of Western-style legal regulation in India have been running into difficulties that were, to a large extent, entirely predictable.

To take only one most evident example, namely the failed project to introduce a Uniform Civil Code for well over a billion people of very different backgrounds, this

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[38] See also *ibid.*: 66: "The only remedy was comprehensive legislation in the form of a uniform code".

[39] For the official position, the case of *Moottoo Ramalinga* is always cited as the leading authority. In this case, *Collector of Madura v. Moottoo Ramalinga* (1868) 12 MIA 397, it was held that under the Hindu system of law, clear proof of usage will outweigh the written text of the law. However, in practical reality, proof of such customs was made so difficult that only a few customs were able to be recognised within the official law. Dissent in this area was silenced, as Derrett (1961) showed with reference to J. H. Nelson, a socially aware British administrator and judge, who came to South India in 1861.

[40] Traditional Hindu law has been presumed more or less dead since British colonial times. More recently, Derrett's last major study of Hindu law, *Death of a marriage law. Epitaph for the rishis* (1978: vii) claimed that, "for practical purposes, Hindu law died on the 27 May 1976", when the President of India gave his assent to the *Marriage Laws (Amendment) Act* of 1976, which fully de-Hinduised, so it was argued, the laws of marriage and divorce as applied to Hindus in India..

certainly meant aiming too high from the start. Hindu law itself was certainly not totally uniformised by the four hotly disputed major enactments of the 1950s.[41] Nor does India have a Uniform Civil Code today, as envisaged by Article 44 of the Indian Constitution and its curious wording that "[t]he state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India".

This manifest failure of the ideology of uniformity also confirms respect for the realisation that no state system of legal regulation would be strong enough to effectively determine from above how such masses of people should conduct their day-to-day affairs. The ancient axiom that various patterns of socio-legal self-regulation would be required to maintain order has remained strong. South Asian legal history shows clearly that, first of all, from ancient times Hindu law never developed the aspiration to 'rule' from above in positivist legal fashion. Instead, it sought to rule from within.[42] Furthermore, the marked indigenous preference for a 'soft' state has been continued in the 19th and 20th centuries, under colonial rule as well as in modern, post-independence India.[43] Any postcolonial project of imposing a strong state on India as a whole would eventually find itself stranded on the rocks of insufficient reach and negative public reaction (Baxi 1986a).

This is not just a more or less direct result of the size of the Indian polity or of some assumed lack of development, as posited by much academic and journalistic writing. A deeper analysis yields a systemic, multi-faceted truth inherent in Hindu law as a conceptual system: law is and always remains more than a human construct, it is so multi-dimensional that no state could ever claim absolute legal control.[44] Legal regulation from above, in the positivist Austinian sense, may be formally prominent, but there are deeper layers of legal regulation which any ruling power would ignore at its peril. Hindu law and its underlying philosophy, so much is clear, do not simply accept the wonderful fiction that the state's 'rule of law' can solve all human problems. In Hindu conceptualisations, law is eternally and intrinsically linked with other spheres of life. In fact, Hindu law does not envisage state law as an independent, separate entity, which is most impressively documented and confirmed by the absence of a parallel term for 'law' in the Sanskrit language and the dominance of the wider term *dharma*, which is most definitely not just 'law' or 'religion'.

Thus, to argue that the ancient Indians did not have 'law' would be plain nonsense. If indeed all human societies have law (Moore 1978), why should ancient Hindu societies be any different? The simple answer is that the ancient Hindus conceived of law differently from Western cultures. Hindu law, as is widely acknowledged, represents a culture-specific form of natural law. In that sense, too, it is an ancient chthonic legal system. At the same time, as a holistic legal system it emphasises and instrumentalises the intricate connection between different interlinking elements of the whole experience of human life. Hindu law thus falls firmly within the theoretical

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[41] These were ultimately promulgated in place of a comprehensive Code and leave many areas to be dealt with by ancient rules, which are still from time to time cited and discussed in Indian courts today. The four enactments are the *Hindu Marriage Act* of 1955 and three Acts of 1956, the *Hindu Succession Act*, the *Hindu Adoptions and Maintenance Act*, and the *Hindu Minority and Guardianship Act*.

[42] Being primarily based on *dharma*, an idealised self-controlled order system, and not on state law as an external force, Hindu law does not have the same conceptual foundations as Western legal systems with their reliance on what we now call 'rule of law'. This does not mean that the concept of state law is unknown to Hindus; the critical point is simply that this form of law is not treated as dominant within Hindu conceptualisations of law-making.

[43] On the concept of the 'segmentary state', which is more of a political image, see Stein (1997).

[44] Desai (1998: 2) cryptically notes that "[m]any of the important points of Hindu law are not to be found in the law reports" but does not explain the consequences of his statement.

parameters of the historical school of jurisprudence, which treats legal rules as organically grown socially-tested normative orders and therefore does not accept legal positivism, encapsulated in the claim of the state to be able to determine and enforce rules in an authoritarian fashion. In the socio-legal model proposed by leading theorists like von Savigny, Ehrlich and many others, which clearly underlies Hindu legal concepts, any form of state law is seen as a social bargaining chip, not 'the law' as an absolute normative order.

Without disclosing this in so many words, and thus purportedly not making any contribution to legal theory,[45] ancient Hindus were fully aware of such presumably 'modern' theories of legal science, practising what the historical school of jurisprudence later preached, thousands of years before the theoretical founders of that school. Today, the descendants and successors of those ancient Hindus still maintain their own culture-specific, indigenous concepts of law – and still do not lay them on the table explicitly, thus maintaining a generic silence that expert observers have been only too aware of, but tend not to highlight.[46] Everyone knows that Hindu concepts are not borrowed from Western models and have their own indigenous roots, yet nobody seems willing to observe this.[47] So much for cultural continuity, that tenacious, deep-rooted conceptual enemy of modernisation and its advocacy of the cutting of roots.[48] Proof that the debates on Hindu law are deeply embedded in the post-colonial, postmodern discourses on the meaning and nature of the state, legal development, and law itself, will be presented throughout this book.

In contrast to the view taken in the leading practitioners' textbook (Desai 1998) and much other writing, my understanding of classical Hindu law from its Vedic beginnings is not impressed with globally dominant, Austinian notions of state-made law, or Western 'model jurisprudence' in Chiba's (1986) sense. Nor would I simply subscribe to the religiously motivated and ideologically loaded assumption of the basic 'revelation' of Hindu law from some divine authority of which many Hindu authors are so fond.[49] All of these powerful concepts and notions do not make sense

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[45] The debate on whether non-Western legal systems can make any real contribution to global legal theory has led to outright denials of this possibility, especially for African laws. For details see Menski (2000a: chapter 5).

[46] Professor Derrett has consistently argued that there is a prominent Hindu technique which consists of communication through purposeful silence. This has had the effect that what is known and taken for granted is not explicitly stated, so that some observers of Hindu law have been misled or have tended to become partly myopic of their subject.

[47] Derrett (1978: x) observes in passing that "[t]he public image of Hindu law is, thus, more important than one would think". The fact that Hindu concepts are now occasionally asserted more openly is then at once simplistically misrepresented and dismissed as evidence of *hindutva*, that dreaded fundamentalist phenomenon. Thus, it seems indeed wiser for Hindus to remain silent and to pretend diplomatically that Hindu law relates to and perhaps even borrows from Western concepts. For this reason, I am critical of Desai's (1998) learned exposition of Hindu law with its frequent references to European thoughts and models, which do not allow the indigenous evidence to speak for itself.

[48] Significantly, Derrett (1978) observed that an appropriate form of modernity would be one in which traditional concepts are updated and revised, without losing the essence of tradition and replacing it with the essence of modernity. Is this not what is meant today by postmodernity? Derrett, having asserted that "[t]here is no such thing as conscious rejection of traditional Hindu values" (p. viii), argues more specifically that modern Hindu men have definite problems updating themselves as to the needs of their women, who merely want "their personal worth and dignity to be respected" (p. ix). Significantly, continues Derrett, the women "deny that Sita is their model, yet they do not aim to have the casual relationships which they despise in Western woman" (*id*.).

[49] Many samples could be cited. A fairly typical specimen is Panchamukhi (1999: 207), asserting that the Vedas are eternal and "repeated without any distortion since they always existed in the *buddhi* of the Lord", thus presenting a theistic, positivist underpinning of Hindu law. At p. 215, it is claimed that Western scholars have distorted knowledge of the Vedas and are basically not qualified to comment.

by themselves as essential ingredients in the diachronical analysis of Hindu law. There is still something beyond that, which is shrouded in purposeful silence. Partly, this silence reflects the fact that what is beyond Hindu law is not 'legal' in the strict sense, and hence ignored by most analysts. But in my view the study of Hindu law cannot survive without cross-disciplinary engagement and interdisciplinary effort. It would be impossible, otherwise, to understand the roots of Hindu law.

Hindus have manifestly disagreed, since very early times, about the nature of the divine at the helm of the Hindu universe; there is no commonly accepted, let alone doctrinally prescribed, identifiable Hindu God as the author of 'divine legislation', despite the assertions of many writers. While this is nothing to be ashamed about, most writers are only too aware that Hindu culture is being challenged (or are indeed themselves challenging it) as primitive, polytheistic and devoid of firmly documented ancient roots. Nor have Hindus ever placed the state at the top of their legal hierarchy, even if it may have seemed otherwise to many observers, who did not notice that the ancient sources did not always talk about key concepts like *dharma* because they were well-known and in constant operation.[50] Again, this is not a reason to develop inferiority or superiority complexes, but such politicising has obviously not remained without influence on the perception and discussion of Hindu law.

In fact, Hindus can legitimately question any image of anyone 'at the helm' and still define themselves as faithful practitioners. While centralising concepts such as a God-in-charge are integral and essential to Islam or Christianity, for example, the tempting image of divine revelation has tended to give a sense of immutability to the undoubtedly ancient roots of Hindu law. To me, this looks too much like a cheap imitation of the 'revealed' religions, mixed with a good dose of legal positivism. This is not a legitimate interpretation of the ancient Hindu concept of *śruti* or *shruti*, relating to knowledge that was 'heard' by ancient sages. These oral texts are unquestionably old, in fact so ancient that they are ultimately of undefinable origin.[51] But Hindu textbook writers more or less subtly reconstruct this into concepts that most common Hindus do not share, constructing a scholarly version of Hindu law that only exists for the purposes of a specialist field of knowledge. Some introduce the notion of ancient human law-givers,[52] while most writers assert that the Vedas are a form of divine legislation.[53] Does this mean that Hindu law is, like Muslim law, a

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[50] The most instructive examples for such misreadings arise from interpretations of the Hindu literature on *artha*, the acquisition of wealth and power. While texts like the famous *Arthashastra* appear to emphasise acquisition of such goods as the supreme goal, the internal Hindu perspective takes it for granted, and thus does not see any need to state the fact that *dharma* remains a higher entity.

[51] The standard Sanskrit-English dictionary of Monier-Williams, first published in 1899 (Indian reprint 1976, p. 1101) gives the general meaning of *śruti*, uncontaminated by legal politicking, as follows:

> hearing, listening…the ear, organ or power of hearing…that which is heard or perceived with the ear, sound, noise…that which has been heard or communicated from the beginning, sacred knowledge orally transmitted by the Brāhmans from generation to generation, the Veda (i.e. sacred eternal sounds or words as eternally heard by certain holy sages called *Rishis*, and so differing from *smriti* or what is only remembered and handed down in writing by human authors…

[52] For example, Kesari (1998: 1) merely refers to the Vedic seers as "the earlier law givers".

[53] Desai's classic text (1998: 3) states that it was "an article of belief with the ancient Hindu, that his law was revelation, immutable and eternal. Shruti which strictly means the Vedas…was the fountainhead of his law. It was supreme to the early Hindu like the Decalogue to the later Christian". At p. 4, we find the subtle assertion that "[t]he Shruti was accepted as the original utterings of the great power". Mayne's Treatise on Hindu law and usage (Kuppuswami 1986: 14) takes the view that "[t]he Shruti (that which has been heard) is in theory the primary and paramount source of Hindu Law and is believed to be the language of divine Revelation". Paras Diwan (1979: 27) argues that the Vedas "contain the divine revelation", based very much on his own characteristically authoritative representation of Hindu legal history:

legal system based on direct divine command? Kuppuswami (1986: 14), following the carefully phrased assertion of divine revelation, rushes to state that "[t]he Shruti, however, has little, or no legal value", thus making a careful distinction between religious theory and legal practice that other authors do not maintain.[54]

Unlike Islam with its core doctrinal belief in Allah's special position, Hinduism and Hindu law are neither premised on a monotheistic core belief nor on the resultant systemic need to obey God's law to the letter. Islamisation of the law, as a forensic process of seeking to ascertain what God meant - most impressively recorded through Pakistani case law during the 1980s and 1990s - may be a political strategy as much as a religious need. For Hindu law, such systemic need never arose, since the religiously elevated position of the Vedas was not seriously transposed into processes of Hinduisation.[55] This is so not only because it was impractical, but because Hindu law developed a more relativistic understanding of law than Islamic law could ever have done.

Such relativisms, however, are not immediately evident from the way in which textbook writers portray the origins and history of Hindu law. Having imagined positivistic forms of law-making in the first place, whether through ancient people or even God, they continue along imagined paths, constructing a text-focused presentation of Hindu law which captures only a minute slice of Hindu social reality. Most critically for our present analysis, directly arising from such legocentric foundations, we must highlight the distortion of what Hindu law actually is through persistent glorification of a mystical primeval man called Manu, portrayed as the human law-giver *par excellence*.[56] This has been followed by the contemporary acquisition of law-maker status by self-appointed, saffron-clad spokespersons of Hinduism who claim legal authority in the most illegitimate of ways, supported in their mischief by film-makers who glorify ancient sages as the source of legal guidance. More is to be said about this further below.

It should be made quite clear here that classical Hindu law was not brought down from heaven one day and remained the same ever since.[57] The concept of

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> Hindu law is considered to be divine law, a revealed law. The theory is that some of the Hindu sages had attained great [sic] spiritual heights, so much so that they could be in direct communication with God. At some such time the sacred law was revealed to them by God Himself. This revelation is contained in *Srutis* or *Vedas*.

The same statement, wrongly suggesting a monotheistic pattern of law-making, is still found in later editions. Diwan and Diwan (1993: 27-28) has only removed the spelling error, but retains the assertions about God's personal attention to revelation of the sacred law. Chadha (1974: 2) similarly states that Shrutis or Vedas "are believed to contain the very words of God, and are, as stated above, regarded as of supreme authority by all law givers".

[54] Similar claims of limited legal relevance are made about the Qur'an, giving rise to much anguish among Muslims. For Islamic law, the conundrum seems to be resolved when one takes it that the Qur'an is God's word, but thereby the basis and primary source of law, not the law itself. Thus, divine legislation as an image can be maintained, but its practical application is quite a different matter, as much recent writing discusses in detail (see e.g. Menski 2000a, chapter 4).

[55] Here we may note that Sanskritisation rather than Hinduisation has been the relevant key concept, with quite different social and legal agenda.

[56] Numerous quotes could be adduced here to demonstrate the tenacious strength of that myth. Leading legal luminaries perpetuate it all the time and seem unaware of its distorting effects. Thus, Desai (1998: 18 et al.) refers to "the original law-giver" as though India had at one point possessed a Napoleonic code. In *Kamal Kumar Basu v. Kalyani Basu*, AIR 1988 Cal 111, A. M. Bhattacharjee J (as he then was), at p. 114, refers to "Manu, our ancient law-giver".

[57] Hindus must also learn to accept that the very same argument does not even work for Islamic law, which is constantly misrepresented to them, and in fact often *by* them, as a solidly uniform legal system. In reality, the internal diversity of Muslim understandings of law almost matches that of

sanātanadharma or Hindu understandings of 'eternal order' does not necessarily contradict this, since there can be dynamics within an ancient system, which do not change the system itself, only its external manifestations. This is another aspect of the famed 'unity in diversity' of Hinduism, which has always been an organically grown, immensely complex attempt to understand the intricacies of the world and to maintain and promote a sense of order in the human sphere, always in relation to the wider environment, to which it is subject. It is for that reason, too, that neither the entry nor exit points of 'Hindu' existence can be unambiguously defined.[58] Hinduness has never been just a matter of belief. As in other religions and ways of life, it is a consequence of viewing oneself, with more or less firm commitment, within a particular ideational framework. If enough people do so, as has manifestly occurred in the present case, then the result is the emergence of a culture-specific legal system.

It amounts to self-defeating scholarship, therefore, to deny the existence of Hinduness or Hindu law and the pervasive presence of culture-specific Hindu elements. Explaining this legal system should not become a matter of either attacking or defending Hindu law, as we see in current scholarly politics. As one of the few surviving active scholars of Hindu law, it is my duty to explore its concepts and manifestations in view of its evident relevance to today's world, and not only in the subcontinent. What is wrong with scholarship that delves into the depths of topics that others may consider politically incorrect? I have never accepted that 'dangerous' topics like *sati* should not be studied, just because some scholars think that knowledge of atrocities is in itself dangerous.[59] If that were a rule of thumb, then all legal studies would be defunct.

In such a politicised environment, how should one define and examine Hindu law? A wider legal readership, especially all those young lawyers in India who think they have studied enough Hindu law to be equipped for practice (until they actually start and find they know virtually nothing), will hopefully gain some helpful and critical insights for reading and interpreting the remarkable developments in postmodern Hindu law today in the light of legal history. It is certainly not sufficient now to study one or two of the old standard textbooks on Hindu law, such as Mayne's *Treatise on Hindu law and usage* (12th edition, edited by Kuppuswami, 1986) or Mulla's equally famous compilation on *Hindu law* (17th edition, now edited by Satyajeet A. Desai, 1998), assuming that this prepares the diligent student for practice, let alone for debates on the nature, concepts and rules of Hindu law. The field of Hindu law continues to be in a confused state, as several famous writers have consistently told us. Nobody should assume that what 'authoritative' handbooks are presenting, or indeed what the law courts are declaring or relevant statutes appear to suggest, is simply 'the law' itself. The unwary student will be entangled in this sticky web and may never emerge as a competent legal adviser when it comes to Hindu law.

The present study therefore seeks to clarify our mangled conceptual understanding of Hindu law, and aims to analyse its historical development and postmodern manifestation. An avowedly interdisciplinary approach and the attempt to eschew simplistic, hollow legalistic statements, locating instead the social reality of the law -

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pluralist Hindu conceptualisations. Both legal systems have had to rely on human processes of law-finding to survive and prosper in rapidly changing socio-cultural environments over many centuries and to develop their normative orders in harmony with what their respective societies considered to be in line with *dharma* or *sharia* (see in detail Menski 2000a, chapter 4).

[58] On legal attempts to do so see e.g. Diwan and Diwan (1993: 1-10).

[59] In a review article on *sati* (Menski 1998), I defended the scholar's right to research in more depth what the subjects of that scholarship, in this case Hindu women, seem to know but might not express vis-à-vis outsiders.

however perceived - should make this useful reading for anyone wishing to know about the Hindu personal law system today,[60] as well as the postmodern Indian law that has emerged within and beyond this 'Hindu' framework.

2.2 The key arguments

This study highlights and analyses major elements of progressive change in the genesis of postmodern Hindu law in India, thus raising a number of issues for detailed debate. First of all, despite the presence of a constitutionally founded system in India that looks like a fine specimen of the Western 'rule of law' model, with its powerful Constitution of 1950 and all the legal paraphernalia of a strong state, Indian law has, particularly during the 1980s and 1990s, developed along very different lines than was expected by many legal observers. Significantly, this ties in with what experts in other areas of Indian studies, be they historians or political scientists, have asserted in their recent authoritative analyses. For example, Sunil Khilnani (1997: 10-11) has commented with particular reference to various economic interest groups that "[c]ompeting ambitions collided to create this lopsided pattern of economic modernity followed after 1947…no single vision triumphed". Corbridge and Harriss (2000: xviii and xix) circumscribe the entire process of Indian post-colonial development as an ongoing struggle, not a planned process and show in detail how various stages of that continuous process may be identified.

Specifically in the legal field, I demonstrate here that the recent emergence of post-modern Hindu law constitutes an important, interrelated element of the socio-economically and politically sensitive legal reconstruction of the nation. This has, and will continue to have, far-reaching consequences not only for India as a whole and for Indian Hindus, but also for our understanding of what postmodern social, political and legal change generally may be about. Apart from important lessons about 'law' itself, India's legal development therefore also carries messages for the world as a whole in terms of whether certain developments can or cannot be sustained.[61] In this regard, an important emerging literature talks about the decline of the state and argues, as van Creveld (1999: 365) has done, that with very few exceptions, "all over the world the news for the welfare state has been almost uniformly bad".

In the wider context of the role of the state in modern Indian law, I therefore continue the debate begun in my earlier study of the gradual readjustment and ultimate withdrawal of the Indian welfare state's ambitions to provide various services in exchange for loyal citizenship (Menski 2001). My specific argument here is that the reduction of the Indian welfare state follows certain patterns that are familiar from ancient Hindu legal models in terms of the peripherality of the state and its control mechanisms for the maintenance of order in society. Apart from a gradual localisation of justice and the consequent loss of direct interventionist ambitions of the central state, much else has been happening during the past few decades, leading to the concept of the "shadow state" now espoused by Corbridge and Harriss (2000: 168). This is really a rephrasing of earlier understandings of the 'fragmented' or

[60] A personal law system is not just a prominent feature in Indian law or in South Asian jurisdictions, but is virtually dominant all over Asia and Africa, thus representing an impressive alternative model to the uniformised legal regulation of the bureaucratic central state that Europeans are familiar with.

[61] Hardgrave and Kochanek (2000: 2-3) discuss this aspect well. Significantly, in the literature on the state in modern India, it is similarly argued that Indian developments will inform global debates. Giddens (2000: 167) briefly refers to intense debates on this issue in Asia.

'segmentary' state (Ingalls 1954; Stein 1997). The withdrawal or peripheralisation of the central state is not only observable through a detailed analysis from a politicial science perspective, but is also neatly reflected in the law as produced by statutes and court decisions. It has been taking place at three levels, in terms of principles and underlying concepts which infuse the entirety of the Indian legal system, more specifically at the level of the Hindu personal law in its various manifestations, and thirdly in the forever contested, hugely important grey zone between official law and unofficial law, which researchers either dismiss or dare not traverse.[62]

Secondly, I argue that this change in the use of law in postmodern India did not come about merely in reaction to some traditional sentimentalities such as a re-invented *hindutva*, as some commentators far too quickly assume, but was of necessity designed for the sustainable development of the whole nation, an entity that now encompasses more than a billion people. It is therefore more the result of an age-old, ongoing rational process of reconsideration of policies than a pandering to so-called irrational sentiments in a certain historic period, or a romantic return to ancient ideals in an age of disillusionment with the promises of modernity. Viewed from such a perspective, the reinvention of postmodern Hindu law has been a self-saving project, which the initially overambitious modern Indian state had to undertake to retain its own legitimacy, rather than representing simply an emotional shift of emphasis towards religion and 'tradition'.

I argue, therefore, that postmodern Hindu law and its internal processes of change should not be discussed merely in the context of debates about religion versus secularism.[63] The topic cannot be properly understood in isolation from Indian socio-economic and political developments, such as more explicit focus on gender issues (Dhanda and Parashar 1999), the shifting relations between centre and periphery, or similarly between elites and masses in the context of contested modernities, as noted by Corbridge and Harriss (2000: 139). Such legal reconstruction processes, as one can observe from all over India, form an integral part of a much larger and necessarily complex national picture of development that is in fact remarkably cerebral and conceptually coherent, despite the size and diversity of the country and its legal systems and the many different pulls of ideologies and strongly held views.

Saying this, I am aware of the argument by other observers that India's recent developments represent the failings of a modernising mission and in particular the failure of the Nehruvian design for India (Corbridge and Harrisss, 2000: 237). But failure in one respect may represent a gain in another field. How can anyone measure such gains or failures on an absolute scale? Relying on the explicitly legal evidence of judicial pronouncements and the intricate wordings of certain statutes, such as the *Muslim Women (Protection of Rights on Divorce) Act* of 1986,[64] I argue that there

[62] Derrett (1978: ix) notes that the important class-based analysis of divorced Hindu wives by Rama Mehta (1975) "very naturally" passes over the agricultural classes, "because they are governed largely by custom and traditional mores and unsuitable to her sociological techniques of investigation along with the élite" (*id.*). Earlier, Derrett (1963a: 169) had quite clearly concluded that "the law of customary divorces is a world to itself".

[63] The contested and confused nature of those debates is evident, for example, from reading Tharamangalam (1995).

[64] This Act followed on from the famous *Shah Bano* case (*Mohammed Ahmed Khan v. Shah Bano*, AIR 1985 SC 945) and has been systematically and persistently misinterpreted by political analysts, to the effect that the Indian state has callously let down divorced Muslim wives as well as violating the guiding principles of secular governance. Such scholarly representations are far removed from the legal facts, since this Act avidly protects the interests of divorced Muslim wives, as the title says and has been used to force Muslim husbands back into uniformity, but within the framework of a separate Act for them – since that is what the Muslim leadership wanted. The state may have conceded on form, but

appears to be a considered method behind some legal measures that have been widely perceived as failings; that such Acts reflect a planned reorientation of Indian policies and laws, designed in light of socio-economic realities which no state mechanisms could have undone. Far from failure, this is the kind of sustainability-conscious forward planning that development experts hold up as an ideal.

Such findings corroborate what Corbridge and Harriss (2000: 92) concluded with particular reference to the 1980s when they wrote that "the founding myths of India as a modern state did start to be called into question". These scholars have gone on to argue that an outwardly resurgent Hindu nationalism, in particular, led to a "profound rethinking of state-society relations within India's intellectual and public policy establishments" (Corbridge and Harriss, 2000: 193). But there is indeed much more to this than a resurgence of Hindu nationalism, as the aforementioned authors also recognise.

Our specific task here is to analyse those processes of change that could be seen as 'legal' inputs. We know now that India's national scheme for sustainable development has had to be revised in the light of problems of implementation that anyone with less strongly developed modernist myopia could have predicted. Especially after the crises of Indira Gandhi's Emergency in 1975-77 and the resulting catharsis, with its deepening doubts over the legitimacy of state law, the Indian law-making machinery has had to be ever more conscious of not turning into an anti-citizen movement, without sufficient control mechanisms and effective accountability, in which the ruling classes and the rich and powerful would be free to suppress disadvantaged groups and individuals at liberty.[65] On this, Kaviraj (1999: 22) has observed in the specific context of Indian reservation policies that the historical result of such *laissez-faire* approaches sanctioned by the state "was not a gradual creation of a liberal-individualist civil society of equal citizens, but a contra-citizenship process". Despite – maybe because of ? - the wonderful but idealistic assumptions of legal and policy planners, things went wrong all over the place in the Republic of India, and various remedies had to be found.[66]

The deep crisis of legitimacy that marred the project of the postcolonial modernist Indian state is by no means over. In fact I would assert that state-made law, in a Hindu conceptual context, must forever be struggling for legitimacy, since the idealised Hindu model contiues to be that of self-controlled order in which the state remains as dormant as a giant snake that is best left alone. But it appears,[67] at least in comparison with the early decades of the Indian Republic, that independent India has more

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not on substance, as the growing case law under section 3 of the Act demonstrates. The Indian state has here purposefully used an Act that applies formally only to Muslims to reinforce a new social welfare policy from which ultimately all divorced Indian women and their children would benefit. No divorcing husband in India today can merely cast away an unwanted wife and equally unwanted children without violating the state's social welfare law and making himself liable for maintenance claims (for details see Menski 2001, chapter 4).

[65] See Corbridge and Harriss (2000: 205), cited further below. In the context of political economy, Bardhan (1984) provides an insightful analysis of the impact of élitist self-interest.

[66] Abundant complaints are, in particular, voiced over the excesses of police powers and the plain abuse of positions of power in all kinds of situations (Dhagamwar 1992). On atrocities against women, see Agnes (1997). On the problem of police violence generally and relevant cases, see Ahuja (1997, chapter 2). On women's sense of being an oppressed minority, a whole bookshelf of writing could be cited.

[67] I venture to suggest that this is merely an appearance in view of common historic myopia and lack of research. If we had the resources to research in more depth how the state, in earlier periods of Hindu legal history, was involved in matters relating to 'the people', we would find abundant evidence of re-invented wheels, too. For such indications see Smith and Derrett (1975).

recently experienced significant shifts of emphasis towards a more people-centred and less cavalier view of governance. As the manifest failings of the paper promises of the Constitution emerged for all to see, especially in some of the early cases brought under public interest litigation,[68] a rethinking of the relationship between law and citizenry had to come about to retain at least a semblance of rule of law.[69] The result, visible with greater clarity today and shown in the present study through a number of instructive examples and case studies, has been a return, so to speak, to an earlier phase of legal regulation, whereby more attention is paid to socio-cultural norms and the self-regulatory potential of society than to top-down legal regulation by the modern state. The courts simply cannot deal with all complaints that might legitimately be brought before them, so self-control mechanisms within society need to be strengthened. To portray this partial withdrawal of the state and its organs as 'postmodernity' might actually be a play with words. The technique of taking people's law more seriously could hardly be declared modern, given the evidence from ancient Hindu law and other traditional legal systems that do not centre on direct state intervention, but rely largely on internal mechanisms of self-contolled ordering. Justice-consciousness is not a new phenomenon at all; what has been changing are the ways in which justice is perceived and put into practice.

Thirdly, therefore, closely related to the first two points, it is my observation that the nature of the earlier postcolonial Indian scheme for sustainable development, which was in fact an intricate compromise between tradition and modernity rather than outright modernism (see to this effect also Corbridge and Harriss, 2000: xviii), has changed significantly during the 1990s in particular. Within this field of legal movement, the direction of change *within* Hindu personal law regulation towards self-control and local dispute resolution has now become much more obvious to the trained eye, and this aspect needs to be analysed here in detail. The emerging postmodern Indian approach to legal regulation, not only in family law, though more than in other fields, clearly relies less on state intervention, and certainly less on financial involvement of the state in the realm of interfamilial relationships.[70] Questions arise immediately as to whether this endangers supposedly hard-won advances in gender justice and minority rights.

This quite dramatic reorientation, analysed in some depth in a recent study of reported cases from the higher courts of India (Menski 2001) was not expected, certainly not in this openly retraditionalised form, by most observers a few decades earlier. Some problems were anticipated by seasoned experts such as Professor Derrett, who apparently had his finger on India's pulse all the time and could to some extent predict what would happen next in the law, especially as he approached retirement and no longer needed protective escorts to enter certain High Courts (see Derrett 1970: vii). The learned master of Hindu law indicated early on, for example, that when it came to divorce law in India, some time after he had retired, there would

[68] For details on cases see especially Ahuja (1997). Shocking cases like *Rudul Sah v. State of Bihar*, AIR 1983 SC 1086 disclosed, for example, the illegal detention of a prisoner for over 14 years despite his acquittal.

[69] Mr. Justice Krishna Iyer (as he then was) noted pointedly in *Fertilizer Corporation Kamagar Union (Regd.) Sindri v. Union of India*, AIR 1981 SC 344, that if the judges did not listen to the common man on the street, there could be no social justice. Thus, it was held, "[w]e have no doubt that in competition between courts and streets as dispenser of justice, the rule of law must win the aggrieved person for the law court and wean him from the lawless street" (p. 355).

[70] Related to this is the observation by Corbridge and Harriss (2000: 166) that "spending has been switched away from the social sector since 1990".

be focal concern on the potential predicaments of divorced wives.[71] Acute awareness of the problems caused to divorced Hindu women is particularly evident from his last major study (Derrett 1978). Nobody took much notice of such warnings at the time, but a careful re-reading of Derrett's work today yields several such sage predictions about a reorientation of legal concern towards social welfare issues for millions of people rather than the earlier, more élitist emphasis on fine points of constitutional law, which characterised most post-Independence legal writing in India.

Fourthly, these important recent legal developments in India indicate, through certain aspects of the general legal system,[72] as well as in the field of Hindu law and personal law regulation generally, a more or less open admission of the 'limits of law' (on this see in detail Allott 1980). This phrase refers in our present context to more or less explicit recognition by the modern state that it alone, ultimately, cannot regulate everything its subjects and citizens do in their daily lives. However, the gradually emerging strategy of greater official reliance on self-controlled order among the citizens of India has primarily been read as evidence of lawlessness. If the writ of the criminal law does not run into every village, and age-old official laws like the *Indian Penal Code* of 1860 are still subverted by social attitudes and lynch justice (Dhagamwar 1992: 314), what is the point of guaranteeing Indian citizens basic rights such as the right to life in Article 21 of the Constitution?

If the state is not able to assert its own presence, so that fieldwork often uncovers massive ignorance of official legal provisions designed for the benefit of citizens,[73] it is not surprising that many observers should complain that the reach of state law is deficient and tenuous. On the other hand, it has been argued that if a weak, incompetent postcolonial state is unwilling to transcend 'traditional' concepts, law-making merely strengthens the state's power (Agnes 1997). From a certain perspective, underpinned by the ambition of modern state law to be universally known to the people whose lives it purports to regulate, such observations constitute a valid critique of the modern state's inefficiency. However, was it in fact ever the ambition of the postcolonial Indian state to control all areas of its citizens' lives once and for all? The evidence points towards an intricate compromise between 'strong' modern state control and various techniques of the traditional 'soft state'. The Hindu law on marriage, in particular, confirms the unwillingness and/or inability of the modern state to exercise full control over the social sphere.

In view of remembered patterns from earlier stages of legal development in India, it appears that it was never really a fully-fledged ambition of the modern Indian state to achieve unconditional control. The question who represents 'the state' arose at various key stages in the development of India, immediately after Independence as well as more recently in the post-liberalisation period of negotiated transition. Such struggles over state definition illuminate why, early on, Dr. Ambedkar ultimately resigned in despair and disgust when his outrightly modernist project was not approved by a majority big enough to carry the policies of the day. His views were not represented, as purely as he wanted, by 'the state'. The result was a messy legal

[71] The words chosen to express this concern are such that they are easily overlooked. Derrett (1957: 99) argued that paying regard to custom and practice may appear as "distinctly conservative steps. They accord with *shastric* notions as well as with tradition, which fears to allow a wife to be cast out upon the world without a stable future before her". This reflects precisely the social welfare concern that has become so central to postmodern Hindu law.

[72] A key example here would be the emergence of 'public interest litigation', on which see in detail Ahuja (1997) as well as Menski et al. (2000) for an overview and research bibliography.

[73] Dhagamwar (1987) produced abundant evidence of this problem with regard to rules of family law. See also Dhagamwar (1992) on criminal law matters.

compromise that needed to work its way through the system. Today we can observe in more depth that this simmering conflict between 'tradition' and 'modernity' has taken quite a different form than in the early days of the Indian Republic and that the scales have been tipped towards social control rather than legal domination. On the other hand, I found it instructive that Corbridge and Harriss (2000: 205) should write of the Indian state as an entity arrogating powers to itself and thus becoming an instrument of control and suppression, to a point where,

> [i]n large parts of north India the state presents itself to poor men and women not as a patron or guardian, but in the guise of a brutalising police force and a corrupt administration. The state then becomes something to be resisted or at least avoided, and not something that is turned to for justice or as a source of empowerment.

Significantly, such comments are made by the learned authors mainly for north India, pointing to a fact frequently evident from reported cases, namely that the temptations to abuse power and to avoid a proper balance of rights and duties of those who are 'in charge' is often seriously disrupted in those parts of the country where the supposedly superior Aryan Hindus hold sway. Much more will have to be said on the north-south divides in Indian law.

The present study is not designed to explore in depth either the theoretical jurisprudential aspects of such legal conflicts, nor indeed the heavily contested debate over whether people's law is on the same footing as law made by the state. We also have no space here to delve into the more specifically political implications of such a restructuring for the postmodern Indian state as a whole.[74] The point about change and its direction is made, that must suffice here in broad outline. Others in related specialist fields, such as Indian political science, have already demonstrated their ability to discuss the implications of such legal changes for their own area of expertise. For the purposes of the present study, it has been necessary to restrict the analytical focus to the critical role played in this reforming process, within modernity and the process of modernisation itself, by various Hindu aspects of law and by indigenous South Asian cultural and legal concepts.

It is my contention, fifthly, that this particular methodological and analytical approach, which will probably be somewhat distasteful to many of those who wish to deny any contemporary and future relevance to Hindu legal concepts,[75] offers a plausible way of reading the colourful picture and richly embroidered tapestry of postmodern Hindu personal law and the ongoing restructuring of the entire legal system in India today.[76] I shall have to assert here, for the moment, that such evidence of purposeful reconstruction of Hindu family laws and of socio-legal regulation among the various communities supposedly governed by Hindu law suggests the immense legal relevance of the officially 'non-legal' realm for the improvement of social justice. This is hardly surprising, because law-making is, within a socio-legal context at any rate, primarily concerned with regulating people's lives. To achieve constructive results within the social realm, however, such legal regulation cannot just

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[74] On this see the excellent overview by Corbridge and Harriss (2000) and the analysis produced in Khilnani (1997).

[75] In this respect, I am impressed with the concept of 'overlapping consensus' as developed by John Rawls and discussed by Caney and Jones (2001: 34-37) with reference to accommodating apparently different and contradictory doctrines and approaches in terms of human rights.

[76] At the same time, this approach matches remarkably well with the methodological suggestions made by Archana Parashar in Dhanda and Parashar (1999: 1-12).

be top-down dictation of rules; society and its localised politics must be given a voice. Thus, if we add to our usual conceptual and analytical legal tools a willingness to look in depth at the role of Hindu law models, and to re-examine those models and their place and potential in the reconstruction of Indian and Hindu laws, we are opening many doors for a deeper understanding of the postmodern Indian legal system and the place of Hindu personal law within it. In other words, to drop the positivist blinkers of doctrinal legal scholarship and challenge the mysogynist myths surrounding traditional Hindu law, is definitely to be better equipped for the present task.

A critical example should be given here to illustrate such blinkers and their effects on various debates about Hindu law. While some Hindu men, as we saw, are elevated as law-makers beyond all proportions through positivistic constructs,[77] negative myths about the position of Hindu women are constantly repeated, and thus reinforced, by the very people who purport to challenge them, which is hardly a constructive approach in itself. For example, Rani Jethmalani (1995: 14) asserts that "[t]ill today women continue to be dependent on men as wives, mother, sisters, daughters. This is endorsed in the Manusmriti – the ancient religious text". While at least this writer does not invest 'Manu' with law-maker status, blaming instead religion as the basis of gender-biased rules, can we be sure that the unacceptable message from this text is actually correctly translated from the Sanskrit original?

Even if women are said to be dependent on men, is the equally important (and linguistically unimpeachable) message not that men are at all times responsible for their welfare? If the same Sanskrit words are translated to mean that Hindu men are at all times liable for the welfare of their womenfolk, why was that message not equally emphasised in popular consciousness? It appears that, first of all, indological scholarship has constructed a skewed understanding of gender relations among Hindus, reflecting the patriarchal perceptions among its pioneers. More recently, such constructs have been employed to justify and ground modernist feminist activism.[78] This example shows that one does not need to take recourse to complex schemes of 'overlapping consensus'; the simple old image of the two sides of a coin, or of the glass that is either half full or half empty does the trick as well. Within the axiomatically interlinked life patterns of Hindus, the male-female symbiosis has, from ancient times, been treated as a key element of microcosmic ordering. Neither female enslavement nor systematic suppression of women would, in the ideal order of things, be seen as appropriate. The basic problem of evidence, namely that everyone seems to quote statements from ancient texts to 'prove' their point of view, feeds itself on an inadequate understanding of 'tradition', which is much more internally plural and flexible than modernist writers would wish to know.

Allowing a plurality of perspectives rather than pushing one set agenda, however, is by itself a challenge for which many writers on Indian law are quite frankly not equipped. This is either because they do not know enough about the concepts, principles and processes underlying traditional Hindu law, or because they imagine – and therefore dismiss as unworthy of their attention – other people's constructions of an inflexible system that is not suitable for supple reform from within. Neither Indians

[77] A significant example is found in Pylee (2000: 7), where we read that "Ambedkar's contribution to the Constitution is undoubtedly of the highest order. Indeed, he was a modern Manu and deserves to be called the father or the chief architect of the Constitution". This kind of 'double whammy' would never be granted to a woman, perhaps with the exception of Indira Gandhi, whose hate figure status as an overly angry 'Mother India' now seems shattered, since postmodern Indians seem to yearn for a strong ruler figure (*India Today*, 20th August 2001: 18-26).

[78] The realisation that much of this does not touch the lives of the common Indian woman is occasionally expressed.

nor Western observers are immune from such deficiencies, which shows that it is not enough to be a Hindu to claim insight into the complexities of Hindu law. Conversely, an outsider perspective might help, but what is the correct distance to achieve proper focus? Significantly, this balancing act itself is a distasteful task for many modernist writers, who have simply asserted that there is no meaningful role for traditional Hindu law concepts, indeed for any Hindu law concepts, in India's future scheme of legal regulation. The faster the whole system would be secularised, the better. Such wishful thinking with all its related fallacies used to abound in the literature, and has been duly criticised. For example, Arun Shourie (1993: 8) castigates Indian intellectuals for being disparaging about India and anything Indian on account of their own ignorance of the rest of the world. Here is a further allusion to the theme of glorifying the West and its models, which parallels Masaji Chiba's (1986) sharp critique of the inflated claims of Western 'model jurisprudence'.

2.3 India's changing concept of the 'rule of law'

The Indian state's legal realism in the face of socio-economic adversity, its more or less grudging recognition of the limits of its own state-made laws, coupled with a somewhat faint remembrance of ancient concepts that idealised self-controlled order, has led towards a broad change of policy in recent Indian law-making. This constitutes a hugely significant departure from the perceived pure standard of the 'rule of law' model, forming another aspect of India's legal postmodernity. This has only gradually become more evident, especially during the 1990s, earlier pronounced upon by legal luminaries such as V. R. Krishna Iyer, in elaborate language that few cared to examine for its deeper meanings.[79] The rejection of legal modernism is also manifest in a brief Independence Day message by Prime Minister Atal Bihari Vajpayee, printed in *India Today* (20th August 2001: 26c), which concluded:

> Since time immemorial, Indian society has rested on the three pillars of morals, ethics and values. Modernism does not mean repudiation of what lies at the core of Indian identity. Indeed, a modern India must also be a moral India. It is only when modernity and morality combine that we can have a forward looking, forward moving India, a country whose future would be known for its 'manifold greatness'.

This does not appear as a legal message, but it is evident to the trained eye that the nation's leader, the ruler figure, refers back to indigenous principles of self-controlled order rather than a formalistic 'rule of law' model. The hidden legal message is therefore stark, but clouded by nationalist tinges of 'greatness'. It is easy to dismiss

[79] A new study on the living legend of India's Lord Denning, the former Supreme Court judge V.R. Krishna Iyer (Krishnaswamy 2000:xv) cites the great man himself who claims that "[a]ny person who had drunk deep of the cultural heritage of ancient Indian vintage, justly called the wonder that was India, gains a vision of the human promise too profound for expression in Western diction and West-bound Eastern thought".

such words as a moralistic appeal to Indian traditions and thus, in some vague sense, further evidence of *hindutva*. However, the above redefinition of 'modernism', its indianisation and in fact Hinduisation, clearly demonstrates that the current Indian leadership, weak as it may appear to be, has grasped the deeper message that Indian law-making and governance have had to move beyond simple modernism. This has resulted in a process that involves the re-cycling of ancient indigenous models of self-regulation which bypass and exonerate state law, rather than relying on it. The above appeal to morality implies a hidden refutation of legal positivism, it is not just a rhetorical gaffe, as many observers might assume.

Researchers in any field of Indian studies would expect too much if they were to look for open, official admission of the fact that a new guiding policy of supervening state control for an otherwise largely self-controlled social order had been put in place in postcolonial India, rather than a system in which the state simply laid down the rules and expected citizens to follow them. The above statement by the Indian Prime Minister is no exception and painstaking research would uncover many similar statements. At least in the field of family law, but also in the constitutional realm, policies relying on morality rather than positivist law were in fact followed earlier, if only researchers cared to re-examine the evidence perceptively and stopped highlighting only slices of socio-legal reality. The fact that earlier researchers did not look for what seems to strike us now as most significant in contemporary Indian legal developments does not mean that such evidence did not cry out for analysis before. Researchers on Indian law, like everybody else, have their own agenda at specific times,[80] and we should certainly not expect them to indulge in research on the irrelevance of law; that is a pastime for political scientists, as recent writing shows with great conviction.[81] One should not expect an Indian Prime Minister, however strongly influenced by Hindu concepts he may be, to dwell explicitly on the peripherality of modern state law.

It is an indisputable and well-documented fact that modern Indian state law (and perhaps all state law) has always been a compromise between the desirable and the possible. The initial design of modern Indian family laws after Independence – and of Hindu laws within this field - fits that pattern of constant compromise perfectly. Postmodern Hindu law has involved a remarkable shift from a modernist, legocentric attitude towards a more traditionalist, socially-aware approach. This is therefore no outright victory for tradition. Nor does it signal the defeat of the modern state as a regulator of norms among citizens. The Constitution still exists as an ultimate focal point for legal claims against the state or fellow citizens. The Supreme Court remains in place as the ultimate arbiter within the formal system, and even though access to the courts has only marginally improved, the *possibility* of access to justice is there, so that justice is within reach, if not offered on a plate (Menski 1996b).

Thus, my argument here is certainly not that the Indian state has become irrelevant for Hindu law regulation and has handed the field over to traditionalism and, assuming the worst, to some saffron league of old men who claim to be able to tell everyone what 'the law' of Hindus is or should be.[82] The main point is that the

[80] In this context, it is necessary to stress again the overpowering doctrinal and positivist bias of Indian legal scholarship.

[81] Thus, Corbridge and Harriss (2000) emphasise, through the idiom of the state, various aspects of the limits of state legal control and the ultimate inability of the state to regulate local order.

[82] Significantly, Corbridge and Harriss (2000: xix) argue that Hindu nationalism will ultimately be constrained by its inordinate, exaggerated emphasis on a constructed uniformity. The legal evidence produced in the present study indicates that such articificial uniformity can neither be maintained in socio-political reality nor in the legal field.

multiple discussions of the roots and roles of Hindu law and its place in today's world continue, but that there has been a remarkable shift of emphasis, away from law and the state's claim to rule the roost, towards society and greater recognition of the potentially beneficial role of social norms and obligations. The overarching policy concern in this debate has been quite manifestly the state's need to be seen to secure for all Hindus, and ultimately for all Indians, a sustainable legal framework for the protection of basic justice. In the age of increasingly empty state coffers, this has marked a retreat of the state and its institutions to a vigilant safety-valve position, rather than omnipresent state control. In this respect, postmodern reconstruction of law-making in India has involved a reduction of the state's presence and greater reliance on self-controlled ordering mechanisms within society. All of this, I argue here, has taken place *within* the ambit of Hindu conceptual models, without stepping totally outside Hindu legal traditions and superseding them in an imagined process of modernisation.

This has been possible because Hinduism and Hindu law are not something one can radically change overnight, modify through the stroke of a pen, or even remove through residence abroad. As a personal law, Hindu law is presumed to travel with the individual wherever s/he goes. As Derrett (1957: 2-3) highlighted, there is such a thing as 'cultural heritage' and its consequences are manifest in the ways Hindus live and think:

> There is a reality and a permanence in all Hindus of certain fundamental beliefs about the nature of life, the individual's place in it, his essential relationship to his kindred, his caste-fellows and his neighbours, and the consequent duties which and which alone life can demand of him. Economic conditions may change, new ideas may be welcomed and naturalised, adjustments of many kinds necessarily accompany the alteration, but the psychological background and mental furniture of even a western-educated Hindu will remain, by and large, true to his type and his inheritance. Individuals may not be aware of this, and may be more acutely conscious of the differences between caste and caste, tribe and tribe, community and community; this is because at the moment of consideration, they may be more impressed by the formal than by the substantial, the superficial than the essential. The observer must not allow the outer garb to mislead him as to the nature of the inner spirit.

If this is an appropriate reflection of Hindu reality - and I submit that it is - then any legal reform project that assumed the possibility of the eventual abolition of Hindu law in India was entirely hypothetical or fictional and could never be a success. In postcolonial India, Nehru in particular knew this only too well and thus sided with Gandhi's tradition-focused approach rather than with Ambedkar's radical modernism. Today, it seems that the early postcolonial path envisaged for reaching the developmental goals of modernity, namely formalistic legalisation and ultimate secularisation along Western lines (culminating in uniformisation and de-Hinduisation) has had to be abandoned, most evidently with regard to the Indian family law system. Since there is no realistic prospect of eventual de-Hinduisation of Indian laws, let alone of Hindu law, the Indian legal system will always remain linked to its many cultural roots. The real question is then whether analysts will be able to trace this strong rootedness in indigenous normative orders, assuming they have the will, in the first place, to recognise what is happening.

Whatever observers have been saying, it is manifestly visible in recent Indian legal developments that there has been a movement in favour of secularisation, but along Indian lines, aiming for a position in which the separate systems of personal family law are retained, while their respective provisions are being modified to become almost identical in substance.[83] Actually, this strategy represents nothing new in a system marked by 'unity in diversity', but many observers have found it difficult to follow this train of thought and to recognise its practical implications for the law. The recognition that tradition incorporates modernity and may include dynamism rather than stagnation, while modernity may not exclude tradition and conservative adherence to established privileges, is also hardly new, but these seemingly binary pairs have confounded many. As so often, a re-reading of Derrett's insightful work (1970: 1) helps to solve such riddles:

> In tackling Hindu law the first thing to remember is the tension between the past and the present, the desire to be traditional and the desire to be up-to-date…it is too readily forgotten that the tensions to which we allude were present centuries ago, though not always in the same form, and the conflict between 'foreign' manners and ancient ways is endemic in India and has been going on since the Vedic age. Far too few critics of the present order realise that their ancestors were engaged in corresponding if not actually similar complaints centuries ago.

Derrett (1970: 13-14) also noted, towards the end of his introduction, that the underlying concepts of Hindu law could never be abolished. A symbiotic interaction of various elements, representing internal self-control as well as external control and influence, would therefore be necessary to bring about satisfactory legal development in India:

> Flexibility, diversity, adaptability, and the genius for adjustment without changing one's entity – these are the hallmarks of Hinduism, properly not less a way of life than a religion…the common denominator of Hinduism is still valid in legal contexts and is equally valid in all of them; …it is not open to being abolished or otherwise interfered with, whether from above or below; and…one can safely count on its efficacy in the indefinite future. The Old India, which pops up now and then in our law reports, and which is the submerged six-seventh of India, is not going to melt…in the warm streams of the world's currents, but is going, positively and even relentlessly, to contribute in its turn something to the world's knowledge of how people should live and let live, should co-exist in a positive and not merely neutral sense and should build a common culture in which all elements, however apparently incompatible, can bring out the best in each other. Certainly the Old India is not something which Indian reformers can expect to disappear in their lifetimes, and if they think that they can count without it, they will be making a big mistake. This does not mean that the "missionary" role of the higher culture is useless: on the contrary the Old India, with its recidivist tendencies, needs the "missionary" culture, with its deep tinge of Brahminism, like a donkey needs the stick…A stickless donkey and a donkeyless stick are about equally worthless; the two together, with their unseen driver, can reach some goal, which Indian life persistently presupposes and yearns for.

[83] This is one of the possible strategies for the uniformisation of Indian personal laws, as discussed in Dhagamwar (1989), but it is of course not a favoured option.

While Derrett's commitment to pluralism and to the peculiarly Indian form of secularism as a means to protect internal diversity and the resultant hybridity is striking, most relevant for the present analysis is how he employs the image of the donkey and the stick to emphasise the need for continued balancing of conflicting pulls and expectations.

More than thirty years later, we can test for ourselves the sagacity of such comments and predictions. In current Indian legal practice, for all to see, this has meant putting Article 44 and the project of the Uniform Civil Code into the Indian Constitution of 1950, while at the same time leaving it in cold storage, now probably for ever. Meanwhile, not only Hindu law but all Indian personal laws have experienced some reinvigoration especially during the 1980s, not only through their continuing intimate link with social norm systems, but through planned legal processes, designed to harmonise all Indian personal law systems along roughly similar lines to minimise unconstitutional discrimination on the basis of religion. This ongoing process demonstrates that the postmodern Indian state has in no way renounced its function as the ultimate arbiter, a point which judges vigorously assert from time to time. The donkey continues to live and is allowed to roam, but not without a measure of control. While the Indian state has revised its originally somewhat hostile approach to the personal law system, it has now begun to work constructively within a framework of personal law regulation, instead of seeking to abolish the system as a whole in favour of a secular Uniform Civil Code for all Indians.

The key point for our analysis of postmodern Hindu law becomes, then, an investigation of the extent to which this remodelled and reinvigorated system of personal law can deliver justice, specifically to the hundreds of millions of people presumed to be governed by Hindu law today. That particular formulation of the key issue raises, of course, the further question of what is meant by 'justice'. In this regard one must note that assumptions about 'justice' in Indian law have also undergone postmodern changes which have not been widely noted and sufficiently analysed. To the extent that the state and legal centralism had earlier lost credibility as guarantors of justice in India, while postmodernist, retraditionalised, socially and culturally focused approaches to legal regulation regained more open (rather than merely latent and grudging) acceptance, the entirety of Indian law had to undergo near-revolutionary changes.[84] In the field of family law, the postmodern Hindu personal law that has developed during the 1980s and 1990s now faces critical examination as to whether it can deliver justice.

Although this will be hotly disputed and, from certain perspectives, simply derided and denied, it appears significant to me that this kind of examination of justice in India focuses more on whether justice is being achieved in a relativised sense and in terms of *dharma*, rather than in terms of absolute, modernist, equalising and purportedly universal assumptions of the law. Whether this allows anyone to redefine the postmodern Indian state law as a new element of *dharma* is in my view a political question which need not be fully answered by lawyers, since there will always remain an element of *dharmic* foundation in the legal systems applying to, and being applied by, Hindu people.

In this respect, the traditional relativity of *dharma* and its constant emphasis on situational specificity militate directly against the constitutional reliance on absolute

[84] For constitutional law, these are poignantly captured in an analysis by Professor Sathe (2001) of the role of H. M. Seervai, a leading constitutional lawyer and textbook author, initially an avid legal positivist, whose experience of the Emergency and other illegalities led to changed perspectives.

equality of all citizens (Menski 1996b). Most writers see a commitment to *dharmic* values and to constitutional norms as incompatible. While formally, therefore, postmodern India has to stick to its constitutional framework and ideals, in reality the Indian legal system has been operating more like a reincarnation of traditional Hindu law, allowing for difference in accordance with circumstances,[85] because the modern system did not result in the promised equality But this is not the Hindu law preached by misguided scholars, saints and confused foreign observers. It is highly significant that Corbridge and Harriss (2000: 179) bring in the concept of "a kind of reversed Orientalism" and refer to this reconstruction by a number of thinkers (*id.*):

> They hold that Hinduism, by contrast with the other great religions, is uniquely and distinctively characterized by pluralism and by 'tolerance'. This was Gandhi's view, not least, and is appealed to by several contemporary writers.

Classical Hindu law, indeed, was not what it is made out to be in most 'Orientalist' treatises on the subject. The *Manusmriti*, that so-called 'Code of Manu', a dreadfully persistent misrepresentation of classical Hindu law, is still simplistically read to lay down strict rules which imposed innate Brahminic superiority and exclusivity, while disempowering other Hindus, including all women (Agnes 1997), to the point of total subservience.[86] Evidently, such interpretations have always suited those who found themselves privileged, and now justify the activism of those who claim to be disadvantaged or more enlightened than the rest. But the scope for self-supporting subaltern opposition has also always been much wider than scholarship, Orientalist or otherwise, has been willing to admit. The relativity of anything that is supposedly 'legal' in the ancient Hindu traditional literature should not be a new conceptual element, but indological as well as modern Indian legal scholarship seem to have their own rules about purposeful distortion. I have at times felt like fighting Quixotic windmills when emphasising the need to highlight the multiplexity of Hindu interpretations, rather than rushing towards expedient stereotypes. My esteemed 'Orientalist' colleagues assure me that I am wasting my time reminding them that Manu was not a law-maker, but the 'Laws of Manu' have continued to reappear in leading titles several times since Buehler's pioneering blunder.[87]

While it seems pointless, and yet so crucial, to insist on the relativity of law within an indological framework of reference, lawyers clearly have their own problem of recognising the relativity and limits of law, as discussed above in chapter 1. For the present analysis of postmodern Indian and Hindu laws, it is important to highlight that the consequences of India's recent distancing from the axioms of Western-style modernity are not actually hidden from view. They are there for all to see, openly displayed in some statutes, such as section 7 of the *Hindu Marriage Act* of 1955. Such evidence needs to be highlighted and debated afresh. Postmodern examples of guidance for the donkey envisaged by Derrett can be found above all in numerous court decisions, which are analysed in the main body of this study. Examples from the

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[85] In this, the law follows old models to the effect that what is right (*sadācāra*) is situation-specific and "context-sensitive" (Larivière 1976: 101).

[86] Madhu Kishwar (2000) has recently made fun of this blind belief in old men's sayings, suggesting tongue-in-cheek that her own pronouncements might be read as *Madhusmriti*.

[87] See Bűhler (1975) and thereafter Doniger (1991). The most recent study of various *smriti* texts, produced by Patrick Olivelle (2000), is presented by the publishers as a collection of legal codes, though the author himself quite clearly takes a different view. Here, the market seems to dictate, since a book on law would sell better than the translation of ancient wise men's sayings.

centre of Indian constitutional law could be given in abundance, too, proving that within an idiom of equal citizenship, explicit recognition of differential statuses remains not only a conceptual possibility but a fact sustained in socio-legal reality.

Thus, in 1982 the Indian Supreme Court, in *S. P. Gupta v. President of India*, AIR 1982 SC 149, finally accepted that something was seriously wrong in the state of India, and held that access to the fundamental rights guaranteed by the Constitution, through direct petition to the highest Court 'by appropriate proceedings' under Article 32, could mean for certain Indians in certain situations that they may send a postcard from jail or a fax from a remote location, or get someone else to initiate legal proceedings on their behalf through public interest litigation. Promptly, many privileged citizens of India, including lawyers and legal textbook writers,[88] were up in arms about the favourable treatment given to impoverished co-citizens, who would now flood the courts with their little claims.[89] When it comes to the much-debated 'protective discrimination' for historically disadvantaged low-caste groups of Hindus, too, the privileged Indians are found to complain vociferously.[90] In similar vein, some male scholars have complained about undue legal privileges given to women (see in particular Mahmood 1986). In a pluralist postmodern legal system faced with competing claims, such complaints represent the essence of an ongoing and animated debate about the direction of legal change.

The critical point for our present debate is this: by 1982, the Indian constitutional framework was rethought by the superior judges, and by the late 1980s such revised visions of what appropriate legal regulation for a billion Indians was about had also made its mark on the courts' handling of family law disputes. Rather than pretending that husband and wife as co-citizens were equal players in a court battle, Indian courts now began to discriminate against men, and they continue to do so for good reasons.[91] The howls of dismay from male observers have still not died down, but there is a strange silence from modernists who do not seem to believe what they see here, do not trust the state (Agnes 1997), or simply do not want to take note of India's restructured postmodern family law regulation. Because the state applies carrot and stick techniques to goad the donkey, many observers seem confused about the direction taken by India's legal developments and seem to tell us only what they want to instead of giving a full report.

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[88] An early, entirely hostile study is Agrawala (1985). It took some time until academic writing in favour of public interest litigation appeared, but note the early attempt by Upendra Baxi (1986b) to publicise social action litigation.

[89] Meanwhile, this strategy of simple access to the superior courts has been abused in many different ways and has been diverted for the use of middle class repeat players who pursue their own "publicity oriented and private vengeance litigation", as it is described by Shri M. K. Damodaran, Advocate-General of Kerala, in a speech in 2001(2) KLT J 5, at p. 6. For details of such abuse see also Menski et al. (2000: 106-132).

[90] On the benefits and costs of this policy see Galanter (1984). A huge literature has built up on this topic, which remains heavily contested and reflects the resentment of many privileged Indians.

[91] This process continues, at present in the field of Christian personal law, where the opening up of grounds for divorce for women by *Mary Sonia Zachariah v. Union of India*, 1995(1) KLT 644 (FB) has now led to cases by men seeking easy divorce on the grounds of cruelty. As could have been predicted, given the high level of justice-consciousness in the High Court of Kerala, a Christian husband's claim for easy divorce on the basis of cruelty, as attempted in *Philip v. Susan Jacob*, 2001(1) KLT 890, or simple nullity on the basis of fraud, as was tried in *Benny Mathew v. Philomina*, 2001(1) KLT 597, are not to be allowed. Thus the learned Court actually treats all Indian men equally in divorce law, which shows that Hindu men find it more difficult today than a decade ago to obtain easy divorce or nullity. It appears that the learned judges are strict in order to protect women against being thrown out of marriage by unscrupulous men of any community as far as possible.

It is fair to say that India has so far been cautious not to advertise this postmodern retraditionalisation process of its legal system during the 1980s and 1990s too widely, probably because this would inevitably generate bad publicity abroad and cause further misunderstandings about the country's commitment to human rights and the observance of so-called international standards. The chorus of calls for Indian law to follow modern Western and 'universal' standards, which is frequently made by legal writers, has become even louder in the context of the bulging literature on human rights.[92]

It is entirely predictable that some modernist readers will reel in horror when they see evidence of what postmodern Hindu law permits: continued legal acceptance of religious marriages as legally binding, of child marriages, even of polygamy, to name just a few bones of contention. But that same postmodern Hindu law system also contains other rules, whose importance cannot be denied and should be rethought by those modernists who only seem to look at some of the evidence, but not the whole picture. Thus, most critically in the absence of state welfare provisions, not only Hindu husbands, but all Indian ex-husbands, have been taken to task in honouring traditional obligations towards any wife, once married.[93] Significantly, in principle but depending of course on circumstances, an Indian wife (and that term now includes divorced wives and wives who are a party to formally invalid marriages),[94] is now legally entitled to various forms of maintenance, firmly a charge on the husband or his family.

Thus, postmodern Hindu law emphasises again the duties of citizens rather than their rights, and expects of men who have control of economic resources that they should behave responsibly towards women, children and all others who are dependent upon them. The state law thus reflects social patterns of gender inequality and their economic consequences and remoulds the family law accordingly, rather than reproducing statements of formal equality and individual rights, which would not match with socio-economic realities on the ground. That methodology and procedure in itself will be seen as highly objectionable by modernist observers, such as Agnes (1997), who still wish to make axiomatic claims for absolute equality. It is notable in this context that a lot of Indian writing on family law still pushes the agenda of modernisation and individualisation, despite growing evidence that in the supposedly most modern societies of the world social fragmentation creates more problems than it solves whilst existing problems, such as violence against women, have not receded.[95] Notably, Giddens (2000: 85) emphasises that "[t]here is no future for the 'egalitarianism at all costs' that absorbed leftists for so long" and argues strenuously for a restructuring of welfare systems in view of the "perverse outcomes to which the welfare state has given rise" (*ibid.*: 121).

Hindu law has developed along this 'third way' and has rediscovered the joint family as a social welfare mechanism (see in detail Menski 2001, chapter 5). It has thus revived an institution that most modernists could not wait to see disappear, but

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[92] See Lawyers Collective 2000 (1-63) for a collection of seminar papers focusing on domestic violence, with specific attention to international law.

[93] However, even an experienced writer such as Agnes (1997: 565) remains misguided on this issue with regard to Muslims. For details on this complex debate see Menski (2001, chapter 4).

[94] This well-established position was recently confirmed in *Mannan Khan v. Family Court*, reported as Case No. 99 at 2001(1) KLT SN 81 from the High Court of Andhra Pradesh.

[95] Significantly, Diwan and Diwan (1994: xv) point out that "[d]omestic hooliganism and violence against married women – the wife battering – occur all over the world on a significant and disturbing scale". This is a far cry from the insinuations in much of the relevant Indian literature that Hindu traditions are responsible for such atrocities against women.

which has of course tenaciously survived in its various modified forms. Significantly, regardless of what modernist commentators such as Paras Diwan (1993) argued with much persuasion, many Indian judges saw such matters differently and behaved much more as members of Indian society than passive scholars. Through the undoubtedly well-considered mental efforts of judges, manifested in a wide range of judicial decisions, the postmodern Indian state has discovered that a restructuring of family law along traditional Hindu lines, but not of traditional Hindu law *per se*, emphasising today's social obligations rather than tomorrow's individualistic rights, would be better for the state as well as its people. Thus, the Indian state can today rightfully proclaim its concern for the protection of women and children, while no longer facing the expectations that the needs and resulting social welfare claims of such individuals would be met and honoured by the state itself. The postmodern Indian welfare state, by relying on remodelled Hindu concepts, has saved itself from falling into the trap of inflated promises in which virtually all developed countries now find themselves.

Hence, the superior judges as a collectivity have, it appears, performed a wondrous trick. Operating as spokespersons of the modern state, at least some judges (and in fact the judiciary as an institution) feel no inhibitions in seeking to guarantee indigent individuals social welfare protection through recourse to traditional norms.[96] Judges have thus relied on moralising appeals to the individual's conscience, reminding all citizens of their *dharmic* duties in society, rather than the letter of the modern law as it applies to every citizen of the state.[97] Thus, within an outwardly modernist legal model of uniformity and equality before the law, the judges operate a reality-focused system of dispute settlement in which ultimately the facts and circumstances of every case in relation to the undefinable entity of righteousness seem to count more than the formal letter of the law. Whichever disputed topic we turn to, postmodern Hindu law represents a continuing compromise, not an end point or conclusion in a contest. To that extent, therefore, Hindu law now lies in a truly postmodern condition beyond tradition and modernity.

[96] Of course this can never be foolproof. If the husband himself is impoverished, the wife cannot hope to claim from him, although she has a legal right. It was held in *Sivankutty v. S. Komalakumari*, AIR 1989 Ker 124, at p. 129, that "[i]n a case where the husband happens to be an indigent person or becomes an indigent person, it is a misfortune that has to be shared by the wife also".

[97] Interestingly, Giddens (2000: 50-54), in summarising the 'third way', echoes this principle of reminding members of society of their obligations towards one another.

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