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Traditional Hindu Law in the Guise of 'Postmodernism:' A Review Article

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BOOK REVIEW

TRADITIONAL HINDU LAW IN THE GUISE OF 'POSTMODERNISM:' A REVIEW ARTICLE

WERNER F. MENSKI, HINDU LAW: BEYOND TRADITION AND MODERNITY. New Delhi: Oxford University Press, 2003. xxii + 648.

*Reviewed by Donald R. Davis, Jr.**

Werner Menski's recent monograph on Hindu law[1] is a provocative and welcome contribution to the often bewildering complexity of the classical, colonial, and postcolonial forms of Hindu law. The relevance of the present work for comparative and international law stems from the part that India continues to play as a role model for the development of international law among postcolonial states.[2] Furthermore, it is nearly axiomatic that a viable international law can only be predicated on a proper understanding of and respect for the diversity of legal systems which comprise its constituency.[3] It is hoped and expected that this work will generate considerable new interest in the history and contemporary state of Hindu law, especially as it pertains to comparative and international legal problems.

In its most common current denotation, Hindu law refers to a system of personal laws in India first inculcated by the British and subsequently maintained and guaranteed by the Constitution of India[4] (1950) after Indian independence in 1947. Textbooks on Hindu law available today refer primarily to this system.[5] Originally, however, the term was coined by British Orientalists and administrators in the late 18th century to refer to the general system of law prevailing among the Hindu majority *before* British colonial encroachments, as opposed to the "Muhammadan law" of India's politically dominant Mughal dynasty. The British made a much-discussed mistake[6] in assuming that Indian Hindus were governed

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1. WERNER F. MENSKI, HINDU LAW: BEYOND TRADITION AND MODERNITY (2003).

2. MENSKI, *supra* note 1, at 214.

3. *See* Philip Bobbitt, *Public International Law*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 96 (Dennis Patterson ed., 1996).

4. INDIA CONST.

5. The leading Hindu law textbooks are: SATYAJEET A. DESAI, 2 MULLA PRINCIPLES OF HINDU LAW (18th ed., 2001); RANGANATH MISRA, MAYNE'S TREATISE ON HINDU LAW AND USAGE (12th ed., 2003).

6. For details of the early history of the British administration of law in India, see Ludo Rocher, *Law Books in an Oral Culture: The Indian Dharmaśāstras*, 137 PROC. AM. PHIL. SOC'Y 254 (1993) and Richard W. Lariviere, *Justices and Paṇḍitas: Some Ironies in*

by a set of religio-texts known as *Dharmaśāstra*, the treatises on *dharma*, duty in a broad sense, and, similarly, that Indian Muslims were governed exclusively by the Shari'a. Gradually, increasing British colonial hegemony whittled away at pre-existing civil, criminal, and administrative law, leaving behind at best fragmentary vestiges of these already competing Indian legal systems in the form of Anglo-Hindu law and Anglo-Muhammadan law, respectively. Both of these hybrid systems were innovations that relied heavily on British ideologies and presuppositions of law. More specifically, however, the British preserved these personal law systems (including family issues such as adoption, marriage, divorce, etc.) because they considered them "indigenous." All other areas of law were subject to massive reform and Anglicization. Modern Hindu law is the heir of this highly circumscribed system. There are thus three broad periods in the academic discourse on Hindu legal history: classical Hindu law (ca. 500 BC–1772AD, but which obviously deserves further periodization), Anglo-Hindu law (1772–1947), and modern Hindu law (1947–present).

Menski's work focuses on the history and development of Hindu law in all its senses and periods. The expressed concern of the book is to substantiate a claim that Hindu law exists in a postcolonial world, despite some pronouncements of its death as a legal system.[7] As part of this

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Contemporary Readings of the Hindu Legal Past, 48 J. ASIAN STUD. 757 (1989). The nature of the mistake has to do primarily with the British assumption that *Dharmaśāstra* texts represented a kind of black-letter code of religious law. More specifically, as Lariviere points out, it was a "well-intentioned misunderstanding" which led the British to view these texts as religious in nature and to view the authors of the texts as priests, taking the whole system as roughly comparable to the ecclesiastical court system in Britain at the time. Lariviere, *supra*, at 759.

7. Menski discusses these pronouncements of "death" and "supercession" in the opening chapter. In particular, Menski is critical of MARC GALANTER, LAW AND SOCIETY IN MODERN INDIA (1989), a series of essays from the 1960s that insisted on the importance of studying Indian society when studying Indian law. The perhaps surprising result of this insistence, however, was Galanter's use of the Indian case to argue against what is allegedly " 'normal' in legal systems; that law is historically rooted in a society, that it is congruent with its social and cultural setting, and that it has an integrated purposive character." *Id.* at 52. By contrast, according to Galanter:

> The Indian experience suggests a set of counter-propositions. It suggests that neither an abrupt historical break nor the lack of historical roots prevents a borrowed system from becoming so securely established that its replacement by a revived indigenous system is very unlikely. It suggests that a legal system of the modern type may be sufficiently independent of other social and cultural systems that it may flourish for long periods while maintaining a high degree of dissonance with central cultural values.

Id. While Galanter's views here may overstate the gap between law and society in India to some small degree (he softened his own position to some extent later, see *id.* 98–99), Menski's view of Hindu law insists on a rigid and absolute connection of Hindu society and Hindu law, one predicated on vague definitions of all these terms and one that refuses to acknowledge

claim, Menski speaks not merely of Hindu law in the restricted sense of the specifically identified set of personal laws by that name, but also of a vibrant system of "unofficial law" that continues to function outside of and in spite of the official legal world based formally on the Constitution. Both the colonial Anglo-Hindu law and law in independent India are viewed in these terms. On the transition from the former to the latter, Menski states, "In social reality, all that happened was that the official Indian law changed, while more and more of Hindu law went underground, populating the realm of the unofficial law."[8] From here, Menski begins to articulate his position that "living" Hindu law is very poorly represented by any of the official or state laws seized on by some scholars of India's legal history, whether that be the classical Hindu lawbooks,[9] the law developed under British rule, or the present-day Hindu legislative enactments and case-law. Menski thus commits himself to an odd view that Hindu law is a permanent, but "invisible presence"[10] that lurks under the radar of official law, but in fact accounts for much more of law's operation in society. In the end, Hindu law for Menski exists neither in *Dharmaśāstra* for the classical period nor in the systems of Anglo-Hindu or personal Hindu law in the modern period because both allegedly miss the "invisible" operation of "real" Hindu law. This alleged "invisibility" leaves Menski in the awkward position of saying that Hindu law, in his rather idiosyncratic sense, refers to none of the things with which it is commonly associated, but rather to something for which we have but scanty, anecdotal evidence.

However, one point Menski makes in the course of this argument does strike me as important and largely overlooked. The great misunderstanding that led the British to accord the status of code and legislation to the *Dharmaśāstra* texts resulted not only in a dismal failure to deliver justice to Indians, who never looked upon these works as codes of law, but also in an attempt to expurgate unwanted elements of Hindu law by means of colonial legislation.[11] Moreover, the same policy was pursued after independence as well: "it appears evident that the early post-colonial Indian state made a critical mistake if it assumed that it could rewrite Indian law, reform Hindu law out of existence, and eventually create a uniform national legal system, claiming to promote social

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almost any influence of colonial and postcolonial law reforms on the "legal ways" of average people. The evidence provided by Galanter and others is much more convincing in this debate—Hindu law has changed dramatically since the 18th century.

8. MENSKI, *supra* note 1, at 24.

9. Menski despises the term "lawbook" for *Dharmaśāstra*, but with qualification the term is useful as a general description of these texts.

10. *See* MENSKI, *supra* note 1, at 125, 191, 194.

11. *Id.* at 175.

welfare."[12] From this persistence of Hindu law, despite legislative moves to alter or expunge it, Menski draws a larger conclusion that we should abandon "the indeed naive idea that legislation can simply undo types of traditional law based on social and religious norms. These are not of the same genus, and a state-made enactment does not just overrule something like the shastric rule system."[13] The notion that legislation as a mode of law-making differs qualitatively from the traditional modes of law-making in India suggests a possible explanation for at least some of the historical failures of legislative enactments in India to achieve their desired social effects. Whether a kind of return to tradition led by the judiciary, as advocated by Menski, is the solution to this problem, however, may be questioned.[14]

The general view of Hindu law presented by Menski is bolstered in two different ways. The first half of the book provides a history of the conceptual and institutional development of Hindu law from the earliest periods to the present. It provides a reasonable overview of the major classical and medieval texts and traditions now associated with Hindu law. It also introduces readers to the range of scholarship from early British studies to contemporary scholarly and professional writing on law in India. The second half takes up five elements of family law—marriage, child marriage, polygamy, divorce, and maintenance—and attempts to demonstrate in a substantive way how traditional Hindu law in Menski's special sense has persisted into the present and entered into a "condition of postmodernity."

In many ways, the second half is stronger because Menski deals therein with specific issues and cases and musters a credible amount of evidence to bolster his claims. Generally, the second half explores each of these five areas of family law by showing that traditional Hindu marriage practices persist in various locally negotiated forms, despite massive codifications of Hindu law under the British and through four major legislative acts of the Indian Parliament in the mid-1950s.[15] While

12. *Id.* at 233.

13. *Id.* at 251.

14. Menski argues: "To promote a better quality of justice, thereby recognizing that justice was not guaranteed by the Constitution merely on paper, postmodern Indian law reintroduced ancient special techniques for achieving easier access to justice." *Id.* at 259. This assertion is not supported very well by Menski's substantive chapters (8–11) because it is expressed in vagaries about "culture-specific," "flexible," "justice-focused" techniques that are themselves never specified. Moreover, the claim that Indian judges today are *returning* to tradition in this way seems to contradict Menski's assertion that "postmodern" Hindu law is "hybrid" and "the spirit of the old system, the 'legal postulates' of Hindu law, could never have been legislated away," a position that seems to indicate continuity, not break and return. *Id.* at 257, 266.

15. Specifically, the Hindu Marriage Act No. XXV of 1955, HINDU CODE (1955), the Hindu Adoptions and Maintenance Act 78 of 1956, HINDU CODE (1956), the Hindu Minority

Menski makes a compelling case that the "official law" does not appear to govern many Hindu legal practices relating to marriage in an absolute way, it is hard to follow him as far as saying that the state law is and has always been irrelevant.[16] Thus, while Menski forcefully reiterates the important point that changing social realities must be understood alongside the development of law,[17] he appears to deny any impact at all of state legislation on the evolution of modern Hindu law.[18] Though readers looking for discussions of specific issues of family law in Hinduism should refer to the second half of the book, the review that follows will concentrate on the first half of the book because so many of the arguments of the second part are predicated directly upon Menski's understanding of the nature and history of Hindu law. Because this understanding is rather different from my own, I will also offer occasional alternative views to some of the central questions raised by Menski.

Perhaps the central debate in all studies of the nature of Hindu law is how to characterize the relationship between *dharma*, broadly religious and legal duties, and law. It is often noted that Indian languages have no word for either religion or law, but *dharma* has often been described using these terms nevertheless.[19] Most of Menski's essential argument

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and Guardianship Act No. 32 of 1956, HINDU CODE (1956), and the Hindu Succession Act No. XXX of 1956, HINDU CODE (1956).

16. MENSKI, *supra* note 1, at 273–4, 325, 377, 428, 505. In one particularly problematic example, child marriage, Menski claims:

> [T]he practice of child marriage has declined in its extent today, [and] it could be said that child marriages no longer constitutes a grave problem. Indeed, social developments have taken care of the issue . . . What irks and confuses modernists, however, is not only that society has shown its capacity for internal self-reform, but that modernist reform ambitions in the legal control of child marriages appear to have been more or less completely defeated.

Id. at 325 (footnotes omitted). Not only is such a statement dangerous as to the extent of child marriage (based on one ethnographic account from Rajasthan), but it also fails to explain why Hindu society failed reform itself to abolish exploitive child marriages *before* the legislative actions of the British and Indian authorities.

17. This point was made long ago by GALANTER, *supra* note 7.

18. It is particularly remarkable that Menski spends so little time discussing the efforts to abolish caste through legislative means. This most-discussed of Indian topics would seem to provide an interesting proving ground for Menski's ideas. Caste has persisted, despite legislative efforts against it, but recent scholarship also suggests that the British rigidified and reinforced pre-existing caste structures for their own purposes. *See* SUSAN BAYLY, CASTE, SOCIETY, AND POLITICS IN INDIA FROM THE EIGHTEENTH CENTURY TO THE MODERN AGE (1999). It would, therefore, be most interesting to see how Menski would handle the issue of caste from a legal perspective.

19. Patrick Olivelle states: "The term *dharma* may be translated as 'law' if we do not limit ourselves to its narrow modern definition as civil and criminal statutes but take it to include all the rules of behaviour, including moral and religious behaviour, that a community recognizes as binding on its members." DHARMASŪTRAS: THE LAW CODES OF ĀPASTAMBA, GAUTAMA, BAUDHĀYANA, AND VASISTHA xxi (Patrick Olivelle trans. 1999); *see also* Richard

about the nature of Hindu law can be derived from his notion of the "*ṛta/dharma* complex." Menski describes this complex as a kind of psychic background to all Hindus' actions and argues that "in Hindu law the principal conceptual starting point is provided by the somewhat unquestionable awareness of a pre-existent entity, the observable order (and occasional disorder) of nature, conceptually embodied in the *ṛta/dharma* complex."[20]

Thus, one of the principal arguments of the work as a whole relies on a debatable conceptual connection between the two terms *ṛta* and *dharma*, the former important in the early Vedic literature of India (ca. 1500BC–500BC), the latter perhaps the most central of all classical Hindu concepts.[21] *Ṛta* most often means "truth" or "order" and refers both to the true and everlasting movements of the cosmos and to the proper recitation of ritual formula as part of a Vedic sacrifice. Following a line of thought that seems to emanate with Hindu reformers of the 19th century, several scholars, including Menski, have suggested that "*ṛta* metamorphosed gradually into *dharma*"[22] called this simple conceptual evolution into question. For instance, on this alleged connection, Halbfass writes:

> The connection between *ṛta* and *dharma* is certainly much more elusive and problematic than it appears in numerous attempts to derive *dharma* from *ṛta*, or to explain it as its later 'equivalent.'
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> . . . .
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> The association between *ṛta* and *dharma*, which Neo-Hinduism emphasizes, usually presupposes that the concept of *dharma* involves universal cosmic laws . . . . Yet the idea of an objective natural order effective in the world, specifically in inanimate things, i.e., of something like a natural law, has little importance for the ancient and traditional usage of *dharma*.[23]

The alleged cosmic and universalistic dimensions of the essential Hindu religious and legal concept *dharma* have been subject to intense

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W. Lariviere, *Law and Religion in India*, *in* LAW, MORALITY, AND RELIGION: GLOBAL PERSPECTIVES 75 (Alan Watson ed., 1996); Ludo Rocher, *Hindu Law & Religion: Where to Draw the Line?*, *in* MALIK RAM FELICITATION VOLUME 167 (S.A.J. Zaidi ed., 1972).

20. MENSKI, *supra* note 1, at 79–80.

21. For an authoritative recent account of the semantic range of *dharma*, see Patrick Olivelle, *Power of Words: The Ascetic Appropriation and the Semantic Evolution of* dharma, *in* ASCETICISM AND POWER IN THE ASIAN CONTEXT (Peter Fluegel & Gustaaf Houtman, eds., forthcoming 2004).

22. Menski, *supra*note 1, at 89.

23. WILHELM HALBFASS, INDIA AND EUROPE: AN ESSAY IN PHILOSOPHICAL UNDERSTANDING 315 (1988).

scrutiny and criticism in recent scholarly work.[24] For classical Hindu law, *dharma* is empirical, local, context-specific, immanent, flexible, and mutable. As such, it eschews transcendence and universalization because it is rooted in particular people and communities whose duties should not be extrapolated as models for everyone. Menski understands and describes well the context-specificity of *dharma*, but he wrongly attempts to portray, at the same time, *dharma* as "submitting" to a "superhuman, macrocosmic form of order in the world which is not directly subject to human influence."[25] For most of Indian history, this is inaccurate. It is only in the 19th century that a heavily Christianized notion of ethics penetrated Hindu thought and led to a reconceptualization of *dharma* as a universalizing ethical standard.[26] Until this time, *dharma* was a highly ethnocentric concept that marked off "good" people from "bad" and its content was determined primarily through the standards and conventions of such "good" people.

As a result of Menski's postulation of a highly suspicious "*ṛta/dharma* complex," almost everything he asserts with reference to this allegedly "unquestionable" premise of Hindu law is itself called into question. One example of this false support relates to Menski's frequent assertion that "self-controlled action . . . remains the hallmark of the classical Hindu law system."[27] Menski defines this mode of legal process, also deemed "self-controlled order," as a "method, which results primarily in the invisible process of internal self-examination of one's conscience, [and which] may well settle nearly all disputes or situations of insecurity."[28] It seems that Menski is arguing that Hindu law is based on a largely self-regulatory system of simple personal conscience and of social constraint in the form of customary law. Such self-regulation allegedly works because of a pervasive psychological conformity to some "macrocosmic order" and because of social pressures to do the same. The general impression one gets from such description is of a romanticized, harmonious world in which state law is unnecessary—a description which always deserves suspicion.

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24. In addition to Halbfass, see Richard W. Lariviere, *Dharmaśāstra, Custom, 'Real Law,' and 'Apocryphal' Smṛtis*, *in* RECHT, STAAT, UND VERWALTUNG IM KLASSISCHEN INDIEN [THE STATE, THE LAW, AND ADMINISTRATION IN CLASSICAL INDIA] 97 (Bernhard Kölver & Elisabeth Müller-Luckner eds., 1997) and Albrecht Wezler, *Über den sakramentalen Charakter des* Dharma *nachsinnend*, *in* RAUM-ZEITLICHE VERMITTLUNG DER TRANSZENDENZ: ZUR "SAKRAMENTALEN" DIMENSION RELIGÖSER TRADITION 63 (Gerhard Oberhammer & Marcus Schmücker, eds., 1999). For more on the concept of *dharma* in Indic traditions, see the special issue on the subject in 32 J. INDIAN PHIL. (forthcoming 2004).

25. MENSKI, *supra* note 1, at 87; *see also* HALBFASS, *supra* note 23, at 334–48.

26. *See* HALBFASS, *supra* note 23, at 334–48.

27. MENSKI, *supra* note 1, at 95.

28. *Id.* at 126.

Unfortunately, Menski's argument rests on a fundamental misrepresentation of the classical Hindu position regarding the sources of *dharma*. According to the most famous of the *Dharmaśāstra* texts, the Laws of Manu, *dharma* has four sources: 1) the Vedas, the sacred texts of early Hinduism, 2) tradition, especially as set forth in treatises like *Dharmaśāstras*, 3) customary laws created by local or regional communities, and 4) personal preference.[29] All classical Hindu legal texts and commentaries agree that these sources of *dharma* (not exactly the same as sources of law)[30] are listed in order of decreasing importance and authority, so that conflicts between sources are resolved by appeal to the higher source. The idea here is that a person's duties are first and foremost declared in the Vedic texts. Further duties not specified therein are declared in the treatises on *dharma*. What is specified in neither of these sources should be negotiated locally and, in any matter still not covered, one may do as he pleases so long as his actions do not contravene established rules. In particular, Menski's interpretations of *ātmatuṣṭi*, the fourth source of *dharma*, as "inner contentment," "personal conscience," and "self-satisfaction" are misleading because the compound term literally means "what pleases oneself." The former translations suggest an internal appeal to innate morality, no doubt informed by Menski's "*ṛta/dharma* complex," while the latter suggests a simple choice that has no moral or legal consequences because it typically concerns mundane personal matters. One should imagine here a scenario such as what clothes one should wear on an average day. While there are *dharmas* of appropriate dress, within specified limits, one may wear whatever she wants. Menski seems to suggest that, in fact, such "self-controlled order" constitutes the most important element of law and order in Hindu thought, i.e. that this "order" affects more than mere personal choices, but rather all kinds of legal problems and disputes. Menski's extended and somewhat fanciful descriptions of the Hindu law's well-developed rules of punishment (*daṇḍa*) as "assisted self-control"[31] and legal procedure (*vyavahāra*) as "flexible dispute resolution management"[32] do not

29. *See* THE LAW CODE OF MANU 23 (Patrick Olivelle trans., 2004).

30. On the distinction of *dharma* and law, see ROBERT LINGAT, THE CLASSICAL LAW OF INDIA (J. Duncan M. Derrett trans., 1973).

31. MENSKI, *supra* note 1, at 107.

32. *Id.* at 103, 112 nn.88, 89. In this section, Menski offers a conceptual periodization of Hindu law as originating in *ṛta* ("submission to a macrocosmic order") and *dharma* ("microcosmic self-controlled order"), and then developing into *daṇḍa* ("assisted self-control, literally "punishment") and finally to *vyavahāra* ("informal dispute resolution"). Implicit throughout is a basic chronological ordering here as well. However, the whole scheme is, frankly, strange and makes little sense when read against the *Dharmaśāstra* texts or other historical sources from India. The latter three terms, for example, are found right from the earliest *śāstra* texts, e.g. Laws of Manu.

ameliorate his single-minded commitment to a view of Hindu law that denies any semblance of formality, institutionalization, or political control.[33]

The hierarchy of *dharma*'s four sources is admittedly a theoretical perspective of jurisprudential texts in Hindu law, but that does not justify Menski's asserting, without evidence, that this ranking of legal and religious authority is inoperable in practical contexts. He bluntly states, "this top-down hierarchy does not make sense in daily practice .... Common sense suggests that the textual statements about the hierarchy of the sources of dharma must be read in reverse order to retrace the methodology of finding the actual sources of dharma."[34] This statement confuses the chronological order of appeal to authority with the expressed and fixed ranking of authority. Personal preference may be experienced first in regard to any particular duty or course of action, only to be confirmed or disallowed by subsequent appeals to customary law or rules of *Dharmaśāstra*. But, this fact does not invert or subvert the superiority of explicit textual prescriptions and customary laws as authoritative and binding statements of duty, which is precisely the impression Menski leaves his reader with in this discussion. Menski's position is tantamount to making the trite observation that Americans obey or disobey traffic laws not because of their knowledge of and constant mental appeal to statutory rules but rather because of their personal choices and preferences developed through experience. Such a position says nothing about the legality of those choices, either in American or in Hindu law, for in both cases it is only an appeal to or contravention of higher sources of law or *dharma* that will test their legality and/or potentially bring sanction. To dismiss the hierarchy of *dharma*'s sources so easily, as Menski does, begins to disaggregate what Menski sees as Hindu law from the prescriptions set forth in the *Dharmaśāstra* texts.

This disaggregation sets up an untenable gap between Hindu law and *Dharmaśāstra*, a gap that allegedly persists in the "invisible"

33. It is hard to imagine a legal *system* persisting in history without some formal elements, institutions, or governance. Menski gives the impression that Hindu law lacks all of these because everything is negotiated personally or in small communities. Such a view cannot account for any unity to Hindu law and certainly precludes describing it as a system. It is here that the *Dharmaśāstra* texts enter, for they provide an academic, jurisprudential reflection on actual legal practice and localized discourses of law. Part of their purpose was to offer a system to the highly region-specific legal standards. That system was never fully implemented nor accepted, but always exerted a measure of influence over the shape of local legal systems, even as these informed the *Dharmaśāstra*'s own development. *See* Donald R. Davis, Jr., *Recovering the Indigenous Legal Traditions of India: Classical Hindu Law in Practice in Late Medieval Kerala*, 27 J. INDIAN PHIL. 159 (1999).

34. MENSKI, *supra* note 1, at 125–126. It is odd to see an appeal to "common sense" in a work purporting to advocate a postmodern approach to Hindu law.

continuation of this "hidden" Hindu law under Anglo-Hindu law and in modern Hindu law. For the classical period, Menski concludes, "Most of Hindu law at this time remained informal, unrecorded and inaccessible to formal legal analysis and positivist control."[35] Two questions must immediately be raised: How does Menski know such law existed if it was "unrecorded" and "inaccessible"? and What is Hindu about such law, if it existed in the general populace of India, which has always been more than just Hindu? Postulating such a gap, moreover, ignores a growing body of scholarship that tries to demonstrate more precisely the practical role of *Dharmaśāstra*, Anglo-Hindu legislation, and modern parliamentary enactments on the "living law" of India in historical perspective.[36]

To substantiate the gap between state or elite law and "real" Hindu law, no matter what the period, one might expect a presentation of historical evidence for this "unofficial law." Instead, Menski offers a relentless critique of the deficiencies he sees in existing secondary Hindu law scholarship, which, according to him, contains an uncritical commitment to modernist and positivist presuppositions about law. Menski's aversion to what he sees as the myopia of modernism and positivism when applied to comparative law is apparent on almost every page of this work. It would perhaps not be overstating the case to say that Menski is obsessed with attacking what he sees as pernicious and illegitimate characterizations of Hindu law by those who purvey "strange academic half-truths" and "cling blindly to modernist discourses about law."[37] But just what does Menski mean by these highly contested terms? In the introduction, Menski provides his definition:

> 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.
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> . . . .
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> The concept of 'modernity' is widely defined as that body of ideas and practices associated with the Enlightenment ideals of industrialization, a strong nation-state system and identity, progress, rationality, reason, and objectivity. . . . it is important to note that modernity in the legal field is generally understood as

35. *Id.* at 120.

36. *See* Lariviere, *supra* note 24; Davis, *supra* note 33; RADHIKA SINGHA, A DESPOTISM OF LAW: CRIME AND JUSTICE IN EARLY COLONIAL INDIA (1998).

37. MENSKI, *supra* note 1, at 551.

> meaning positivist or centralist lawmaking, which claims that only the state, as the sovereign, lays down and maintains a body of rules for society to follow.[38]

I find these characterizations of both modernism and positivism to be extremely narrow. Such descriptions lead to stereotypical caricatures of the role of these ideologies in global perspective. Recent work has deftly shown that regions like India have constantly articulated alternative modernities, differing tremendously in their characteristics from those identified by Menski.[39] Moreover, Menski presumes a unity of modernist ideology[40] among all Westerners, but this presumption is belied by the severe and important internal debates over the nature of the colonial encounter, the role of technology and progress, the value of reason, etc. Thus, modernism existed in diverse modes even in strictly Western discourses. Likewise, with positivism, Menski relies on a view of positivism that seems to stop with Austin's "command of the sovereign," ignoring the extremely influential and sophisticated reformulations of positivism by Hart and Raz in the 20th century.[41] For Menski to define modernism and positivism in these simplistic and stereotypical terms seriously weakens his critique because scholars of Hindu law sometimes frame their work by using vocabulary and concepts that emanate from Western legal theory and history for the dual purpose of developing an analytic vocabulary of comparative law and communicating to audiences unfamiliar with Sanskrit legal vocabulary. To do so does not imply an uncritical commitment to either some monolithic modernism or to a crass legal positivism.

As part of his criticisms of the alleged modernist and positivist biases of other Hindu law scholars, Menski exaggerates the shortcomings of his colleagues and presents only cartoon descriptions of their work. Three groups suffer particularly under Menski's vitriol: 1) Indian scholars, 2) feminists, and 3) "American specialists." Menski lambastes "numerous Indian scholars who nailed their flag, as it were, to the mast of modernity and have more or less explicitly sought to distance themselves from their 'traditional' and supposedly backward environment."[42] Furthermore, according to Menski, Indian scholars, especially the

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38. *Id.* at 6 & n.8.

39. *See, e.g.*, PARTHA CHATTERJEE, THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES (1993); DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE (2000).

40. *See* MENSKI, *supra* note 1, at 6, 11, 257, 569.

41. *See* H.L.A. HART, THE CONCEPT OF LAW (2nd ed., 1994); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979).

42. MENSKI, *supra* note 1, at 188.

authors of the leading textbooks on Hindu law,[43] are "not only sycophantic, but culture-blind and sadly self-deprecating."[44] Feminists are denounced in the chapters on marriage and maintenance because their "writing only perpetuates modernist stereotypes about Hindu 'tradition' and its anti-women effects."[45] More generally, Menski asserts that "myopic feminist scholarly writing ... disadvantages and betrays Indian women and commits violence against the very people ... it purports to protect."[46] The veracity of such blanket critiques is belied by the actual diversity of thought and opinion among Indian scholars and feminists. In this writer's experience, Menski's characterizations would at best apply to a tiny fraction of the writing on Hindu law. Moreover, the recent Hindu nationalist governments in India have created a climate of discussion that stifles the kind of arguments Menski himself finds so troublesome. Indeed, despite regular disavowals, Menski's work can frequently be read as supporting a nativist and apologetically Hindu agenda.[47]

Finally, the group of which I am a part, is rather badly misrepresented in the concluding chapter. Menski claims that "American specialists" in Indology, including Rocher, Lariviere, and Olivelle (all of

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43. *Id.* at 266: "Indeed, it is fair to state that Indian legal textbooks generally disappoint and seem not to grasp the central socio-legal issues in Indian legal development today." Blanket criticisms such as this are common in Menski's writing.

44. *Id.* at 188.

45. *Id.* at 279. Similarly, the chapter on maintenance opens: "It seems that feminist scholars, themselves often privileged members of an elite group, could afford to focus on ideology and reformist agenda, while paying little attention to the material circumstances of impoverished women." *Id.* at 484.

46. *Id.* at 9.

47. Consider, for example, the following quotes from Menski:

> Hindu law as a conceptual entity has remained an integral part of the living and lived experience of all Indians ...
>
> ....
>
> Hindu reality ... is far from confused ... The ruminations of anti-religious, anti-Indian, and ultimately anti-Hindu observers have more or less deliberately ignored the deepest layers of Hinduism that only a few authors seem to have been able to articulate.
>
> ....
>
> Scholarship and legal doctrine have formally divested Hindu society, and ultimately every individual, of their critical role in ascertaining righteousness. Both anti-religious and anti-traditionalist modernism ... have therefore conspired to pacify Hindus ... while ripping apart those very foundations that empowered Hindus to define for themselves what is appropriate in any particular situation.

Id. at 25, 87, 130 (including two references to his own work). Such quotes are both inflammatory and misleading.

whom were my teachers), argue that *Dharmaśāstra* texts were "legal texts written by jurists for lawyers."[48] This is just wrong and completely misses the point that Rocher and his students have consistently made for close to fifty years now,[49] namely that *Dharmaśāstra* texts must be seen as part of an intellectual, theological, and scholastic tradition in the first place and can only secondarily be used as sources for a history of law. It is telling that among the more than 100 works published by Rocher on Hindu law, only one is cited by Menski.

Overall, the acerbic language used by Menski against almost every scholar of Hindu law, save his own teacher J.D.M. Derrett, leaves the reader with a strong sense of Menski's frustration at the present state of Hindu law scholarship. In the end, however, this frustration leads to paternalism and hubris:

> My specialist position as one of very few scholarly experts on Hindu law outside India allows me to claim with some force that it remains necessary for outsiders to explain, also for the benefit of today's Indians, how they may learn to see the wood for the trees.
>
> . . . .
>
> It has been necessary to be harsh at times in view of the need to highlight the starkness and depth of our collective ignorance and stubbornness.[50]

Menski's fatherly reproaches are genuinely motivated by a desire to further knowledge on Hindu law and are based on considerable erudition and insight. However, it is fatuous to lecture colleagues in this manner and to claim superior and unique knowledge of the spirit of Hindu law. Menski's ideas are purposefully provocative, but are directed against the wrong people. It is not so much that scholars of Hindu law, whether Indian, European, American, or Japanese, do not understand the immense difficulties involved in describing even the foundations of legal history in India and the present state of law, as the fact that comparative and international legal studies fail to recognize the value of studying Hindu law at all. In my view, this is the case Menski should have made in this book,

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48. *Id.* at 548.

49. See, among many possible examples, Ludo Rocher, *Hindu Conceptions of Law*, 29 HASTINGS L.J. 1283 (1978). For Olivelle's current work, see OLIVELLE, *supra* note 29. The fact that Rocher, Lariviere, and Olivelle continue to use the word law in their discussions of *Dharmaśāstra* is a choice they make based upon sound reasoning and examination of the alternatives. Almost every work of theirs justifies and qualifies such usage, while pointing out the limitations and the problems of such usage as well. None would equate *dharma* and law, as Menski claims.

50. MENSKI, *supra* note 1, at 573, 576.

rather than incessantly berating colleagues engaged in the same struggle for academic recognition.

Furthermore, Menski's book is poorly composed from the perspective of style. Repetition in the extreme characterizes the general flow of this 648-page book, and the principal arguments could easily have been expressed in a book one-third the size of the present volume. Typically, to justify such length in today's publishing world, one must present a plethora of new material and significant arguments based on original sources. Instead, Menski relies almost exclusively on secondary literature to make his case, especially when discussing classical Hindu law. Even his lengthy discussions of aspects of modern family law make only sparing use of the relevant case-law in the sense that, while many cases are cited, very few are discussed. Instead, Menski prefers to engage a host of secondary scholars, especially his own teacher, J.D.M. Derrett, the doyen of Hindu law scholars. Even here, however, the manner in which Menski critiques and relies on secondary works is deceptive, in that among the numerous citations only a few works are truly engaged, sometimes to the point of excess.[51] The excessive focus on a few scholars leads to a cumbersome and irksome mode of expression. To the particular consternation of this reader, Menski has a deep affinity for the block quote and an unfailing belief in the power of scholastic commentary as a form of communication.

Although it is not appropriate here for me to offer an alternative vision of the nature and history of Hindu law, the reader is perhaps entitled to more than just criticism of Menski's work. As a basic preliminary assessment, it is my view that Hindu law would be much better characterized using the descriptors of Legal Realism: attention to facts and context, concern for specific outcomes, respect for the conceptual, but not the empirical, function of legal rules, and a qualified recognition of positive law.[52] Menski himself emphasizes most of these elements as well, although he would balk at Leiter's notion that Legal Realism presupposes a form of positivism in its theory of law.[53]

To conclude, Menski argues that the only viable descriptions of Hindu law are either a "recourse to individual conscience" or "citing the Constitution."[54] Obviously, there is a myriad of legal institutions and

51. For example, Chapter 6, "Contesting Modernity" contains 25 block quotes from two works by J.D.M. Derrett and at least twice that many further references to these two works.

52. *See* Brian Leiter, *Legal Realism and Legal Positivism Reconsidered* 111 ETHICS 278 (2001); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997).

53. Leiter, *Legal Realism and Legal Positivism Reconsidered*, *supra* note 52, at 292.

54. MENSKI, *supra* note 1, at 267.

ideas that can and did exist in Hindu law between these two levels. Thus, while Menski is correct to argue against an overly legalistic interpretation of the importance of textual law and state law, the alternative need not be some vague "self-controlled order." Menski fails to see that practiced Hindu law operates at many levels, the most important of which are intermediate between the two he has identified. Caste associations, village assemblies, guilds, monasteries, merchant groups, military groups and even rulers played important roles in the creation and enforcement of laws. Various elements of the modern bureaucracy have usurped many of these roles, but throughout the history of Hindu law, the law in practice was always a negotiated compromise between the influences of local customary laws, the political interests of powerful individuals and groups, and the sometimes immense authority accorded to the classical textual law or modern state law. The texts and legislations of Hindu law try desperately to make a system out of this diversity and this system indeed acts back upon local laws, even if it never achieves perfect conformity. Menski believes that modernist/positivist interpreters expect and write as if that conformity automatically followed from the time elite laws hit the printed page. Such crude expectations are hardly to be found in most scholarly work on Hindu law, because most authors are simply trying to understand what system, if any, exists in Hindu law and what, if anything, is Hindu about that system—two questions that Menski is woefully weak in answering.

Overall, though it always easy to criticize and find fault, I must recommend that Menski's work be read with caution and only in conjunction with other scholarship on Hindu law. There is a lot of useful information in this work and Menski does not accept any received wisdom without subjecting it to intense scrutiny and testing against his own experience and knowledge. For its iconoclasm and drive to find new interpretations of Hindu law, Menski's work is to be commended. However, most of his particular arguments and conclusions are too speculative and unsubstantiated to find general acceptance and it is hoped that others will take up Menski's challenge to produce ever more refined studies of this important and still obscure legal tradition.