

# Hindu Law – Stateless Law?

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Hindu law has the oldest pedigree of any known system of jurisprudence and even now it shows no sign of decrepitude.<sup>1</sup>

*John Mayne*

## 1 Introduction

Human beings from various societies and periods of history have always held underlying conceptions about their laws and the foundation on which those laws rest. In other words, legal philosophy in a broad sense, is certainly not a modern invention. Many of the questions that the ancient Greek philosophers and later Roman lawyers pondered are still dealt with by Western legal theoreticians today. However, after the Age of Revolution (1789-1848) certain questions and accompanying assumptions about law have taken root especially within the Western legal tradition. For almost 200 years Western lawyers and legal scholars have made fixed fundamental assumptions about law. One of the core assumptions is the idea that law and the State belong together. The connection between law and the State has become an implicit and paradigmatic part of our legal understanding concerning the question about what is valid law and who or what is the legitimate producer of such valid laws. Notwithstanding, during the last 20 years or so the paradigmatic bond between law and the State has slowly eroded due to many reasons. Accordingly, we have started to question the very nature of the relation between the State and law as well as our understanding of legal methodology.<sup>2</sup>

Globally speaking, there are plenty of reasons to doubt the exclusive role of the State in relation to law. Lately, phenomena such as global law and transnational law have caused erosion of our paradigmatic understanding of law.<sup>3</sup> In Europe we have seen the rise of European Union law and European human rights law, which both clearly challenge the idea that the connection between the State and law is imperative and unavoidable as to its nature.<sup>4</sup> Nevertheless, it would be wrong to argue that the rise of non-State law would have been caused exclusively by the relatively recent developments within the Western legal sphere. In fact there has always been different legal traditions albeit the mainstream legal thinking has all but forgotten the existence of the Other law or has regarded it as something that will soon pass into the shadows

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1 Mayne, John, *Hindu Law and Usage*, Stevens and Haynes, London 1880, p. V.

2 For a more detailed discussion see, Husa, Jaakko, *The Method is Dead, Long Live the Methods - European Polynomia and Pluralist Methodology*, Legisprudence 2011, p. 249.

3 However, even before these developments it was compellingly argued that the preference of State law was merely a fiction, see Griffiths, John, *What is Legal Pluralism?* Journal of Legal Pluralism and Unofficial Law 1986, p. 1.

4 This novel form of legal pluralism is multiplying because “certain powers held by states are devolving on to other entities or morphing into different political or legal configurations” as Brian Z. Tamanaha points out, Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, Sydney Law Review 2008, p. 410.

of legal history by the onmarch of Western forms of law.<sup>5</sup> The view underlining the victorious advance of Western law is, however, lying on a relatively shaky ground.<sup>6</sup> Perhaps even surprisingly, we can see that various indigenous legal traditions are finding their voice and are uttering the claim of legitimacy for their non-State customary laws. And, of course, there are various forms of religious laws like, for instance, Islamic law.<sup>7</sup> As a result, we conceive more clearly than before that instead of State-centred law we have in fact legal pluralism.

We can make these claims stronger. Indeed, it has been said that even our Western law has roots in legal hybridity. However, our paradigmatic understanding concerning the connection between the State and law has dwarfed the fact that also our own Western law is very much a hybrid as to its nature and clearly has a legal pluralist past. We have, simply, ignored that even State laws tend to be hybrid and diffuse and that there is constant legal cultural motion forming various mixtures of State law and other kinds of normativities.<sup>8</sup> Importantly, it is crucial to fathom that these phenomena which include normative and legal pluralism are not passing phenomena but rather something that is here to stay.<sup>9</sup> Notwithstanding, after the Cold War had ended American historian *Francis Fukuyama* sketched the end of history claiming that we had reached the end point of mankind's ideological evolution, and that the universalisation of Western liberal democracy was the final form of human government.<sup>10</sup>

Today we know that the fanciful prediction of Fukuyama was all but premature. The developments of the twenty-first century have considerably reduced the popularity enjoyed by Fukuyama's thesis although Western law has spread more or less all over the world. All the same, the result has not been unity. Different local applications and legal pluralism prevail and, moreover, novel forms of legal hybridity are emerging. For example, Islamic law has experienced a new coming and Western States have been forced to acknowledge the existence of regions like Scotland, Catalonia and Quebec. Moreover, indigenous peoples and their legal traditions (for example American

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5 For example, it is a bit of a mystery as to why comparativists have not been interested in African laws, which would offer a huge and rich complexity of legal traditions and a mixing of legal cultures. See Nwachukwu Okeke, Chris, *African Law in Comparative Law*, Roger Williams University Law Review 2011, p. 1.

6 *Prakas Shah* describes the Western scholarly view as “the hubristic cacophony created by Western legal theorists” assumed by “the Western model jurisprudence”. Shah, *The Difference that Religion Makes: Transplanting Legal Ideas from the West to Japan and India*, Asian Journal of Comparative Law 2015, p. 81-82.

7 Interestingly, Islamic law is not only gaining weight within the Islamic world, but it seems more relevant for the discipline of comparative law altogether. See Harasani, Hamid, *Islamic Law as a Comparable Model in Comparative Legal Research*, Global Journal of Comparative Law 2014, p. 186.

8 See Donlan, Seán Patrick, *Remembering: Legal Hybridity and Legal History*, Comparative Law Review 2011, p. 1.

9 Tamanaha 2008, p. 409.

10 See Fukuyama, Francis, *The End of History and the Last Man*, New York, Free Press 1992.

Indian peoples, the Maori, the Sámi, aboriginals, the Inuit etc.) are becoming not only distinguished but also recognised. So, it is not anymore so astonishing to note that the legal relations between indigenous peoples and States have developed towards an asymmetric and pluralistic model which has eroded the idea of a unitary State and the exclusiveness of State law.<sup>11</sup>

In this article one of the oldest, and possibly least known, non-State legal tradition of Hindu law is dealt with. The point of view of this paper is that of comparative jurisprudence in a modern and methodologically pluralistic sense.<sup>12</sup> The idea is not so much to look back in legal history but, rather, to look around contemporarily and to see the exquisite legal hybridity which Hindu law has always stood for. To be sure, the aim is not to present an exhaustive description of Hindu law or to deal with actual legal questions but to scarcely address some of the key facets of Hindu law as an important and intellectually intriguing form of Stateless law.<sup>13</sup> This article is structured as follows: after the introduction in chapter 2 we look at how Hindu law is presented in the field of comparative law, then, in chapter 3, we look shortly at the history of Hindu law. In chapter 4 we discuss the place and role of Hindu law especially in India, and in the final chapter we draw some conclusions and sketch some trajectories for the future based on the current state of affairs of Hindu law in a globalising world.

## 2 Hindu Law as the Other Law

Hindu law is clearly a form of Stateless law and is best described as a specific legal tradition.<sup>14</sup> However, its role and recognition has proved to be precarious for the discipline of comparative law. Now, it would be an exaggeration to claim that macro-comparative law has been completely blind to recognising the Hindu legal tradition.<sup>15</sup> Yet, Hindu law's place in the world mapping of law

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11 See Uimonen, Jari, *From Unitary State to Plural Asymmetric State*, Rovaniemi, Lapland University Press 2014.

12 See Husa, Jaakko, *A New Introduction to Comparative Law*, Oxford, Hart Publishing 2015, ch 6.

13 It might be good to remember that in the field of Hindu law research there seems to be differing views. And as noted by *Enrica Garzilli* in her book review of Werner Menski's *Hindu Law* (2003) "an inquiry into sources of (Hindu) law presupposes and implies a certain degree of interpretation which implies judgements of value", Garzilli, *Book Review*, *Journal of Asian Studies* 2005, p. 785. Garzilli harshly criticises Menski's book. In this article, however, I rely mostly on Menski's views concerning Hindu law – for a comparative lawyer his views are easier to understand (and they make sense) than those of Indologists. This choice of sources may leave room for criticism, but as the point in this article is to use Hindu law as an example offering an alternative way (*i.e.* this is not a study of Hindu law as such) to conceptualise and understand Stateless law, the approach of this article suffices for the present purpose.

14 See Glenn, H. Patrick, *Legal Traditions of the World*, Oxford, Oxford University Press 2010, p. 288-316.

15 About the distinction between micro and macro-comparative law, see Husa 2015, p. 100-102.

has been somewhat uneasy. Western law's epistemic and legal theoretical concentration on formal norms, institutions, cases and doctrines has left the nuances of the other legal spheres largely in the shadows.<sup>16</sup> One example of this is the neglect of South East Asia by comparative law; to argue that the laws of that area are simply Asian, customary, authoritarian, Confucian or Islamic hardly captures the convoluted reality of them.<sup>17</sup> This problem is obvious in the area of Western research on Chinese law where the Western representations of Chinese law tell surprisingly little about how Chinese law is actually understood and practised.<sup>18</sup> But, why has such a grand legal tradition as Hindu law been epistemologically so onerous for macro-comparative law to identify and recognise?

To state the obvious, the main problem of the macro-comparative approach has been its cultural bias. This can be seen in the fact that the macro-notions are constructed from the point of view of Western, *i.e.*, Roman–German (civil law) and common law.<sup>19</sup> Culturally remote systems are positioned in a shallow class like for instance “religious law” or “indigenous law”, making them virtually nothing more than curiosities.<sup>20</sup> Not surprisingly, then, the whole project of grouping and classifying the legal systems or legal cultures of the world has been criticised.<sup>21</sup> In any case, it reminds of the fact that the so-called parent systems (civil law, common law) have a very strong foothold in macro-comparative law, and, hence, other kinds of legal traditions like Hindu law are seen as something profoundly different; something representing legal otherness (*i.e.* the Other law). In sum, it would seem that the Western legal scholars have used this kind of Other law to help to conceptualise “us” and “them” through laws and legal cultural differences.

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16 See Menski, Werner, *Comparative Law in a Global Context*, Cambridge, Cambridge University Press, 2006, p. 25 *et seq.*

17 See Harding, Andrew, *Comparative Public Law: Some Lessons from South East Asia*, in Andrew Harding and Esin Öricü (eds.) *Comparative Law in the 21st Century*, London, Kluwer 2002, p. 249.

18 Ruskola, Teemu, *Legal Orientalism*, Michigan Law Review 2002, p. 179. On the other hand, it is difficult not to impose some form of implicit Orientalism; one form of Orientalism may become replaced by another, see Peerenboom, Randall, *The X-Files: Past and Present Portray of Chinas Alien “Legal System”*, Washington University Global Studies Law Review 2003, p. 37.

19 See *e.g.* Glendon, Mary Ann, Wallace Gordon, Michael and Carozza, Paolo, *Comparative Legal Traditions in a Nutshell*, St. Paul, Minn, West Group 1999 which is devoted to the separation between civil law and common law. Critically, see Frankenberg, Gunter, *Critical Comparisons: Re-Thinking Comparative Law*, Harvard International Law Journal 1985, p. 411 (“‘implicit normative scale’ which has Western law sitting at the top”, p. 422).

20 As Menski critically asks: “But who are we to pre-judge a culture and a religion without studying it properly? When we simply classify and dismiss anything Hindu or Muslim as religious, for us there is no fuzziness anymore; for us, these entities are just polluted and deemed backward by association with religion”, Menski, *Fuzzy Law and the Boundaries of Secularism*, Potchefstroom Electronic Law Journal 2010, p. 47 (Menski 2010 a).

21 See Monateri, Pier Giuseppe, “*Everybody’s Talking*”: *The Future of Comparative Law*, Hastings International and Comparative Law Review 1998, p. 825. See even Harding 2002.

Today, we may wonder how it was possible to place such legal traditions as Hindu law into narrow macro-comparative second-class compartments. It does not take a lot of effort to grasp that Western comparatists have made an unconscious background assumption according to which it was not particularly important to pay attention to religion: the religious context of both common law and civil law was roughly the same Christian cultural sphere. In this kind of intellectual climate it was not considered necessary to devote time to the study of Hindu law, Islamic law or Jewish law because they all formed an exception to the assumed common Christian American-European main rule.<sup>22</sup> However, now it seems that religion has made a kind of comeback in comparative law, and there is a growing number of comparatists who are prepared to take into consideration also the impact of norms and doctrines with an openly religious background.<sup>23</sup> By and large, this new trend is based on legal theoretical ideas according to which there a) exists non-State laws (or significant competing normativities) and b) these Other laws have also normative (*i.e.* legal in a broad sense) significance. Moreover, also the internal change in the comparative law discipline is meaningful in this context: comparative law and anthropology are once again finding each other.<sup>24</sup> This development is welcomed because it makes it easier to grasp that legal traditions are not isolated entities.

However, it would not do justice to reality to claim that there would be a general trend towards understanding and taking into account non-Western forms of normativities. For instance, the current processes of Europeanisation and globalisation seem actually to reinforce the development of Westernisation.<sup>25</sup> Today, consequently, we seem to have only two genuine legal traditions: civil law and common law. This has broad implications. For instance, in regard to Africa and Asia or indigenous or religious laws this two-tier paradigm seems but to caricaturise the Other law.<sup>26</sup> In effect, we seem to

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22 This fact also explains why Western legal transplants do not function well in a non-Christian legal environment. As Shah (2015, p. 84) says: “dysfunctional effects result when certain kinds of legal ideas, embedded as norms within the Western culture, which are constituted by a religion, Christianity, are transplanted into those non-Western cultures that do not have religion” (by religion Shah is referring to monotheistic religions like Christianity, Islam and Judaism).

23 For a larger discussion, see Husa 2015, p. 157-160.

24 See Riles, Annelise, *From Comparison to Collaboration: Experiments with a New Scholarly and Political Form*, Law and Contemporary Problems 2015, p. 147.

25 However, it would not be quite correct to claim that this trend is very recent. It could be already seen in the work of Koschaker, Paul, *Europa und das römische Recht*, Munich, Biederstein Verlag 1947. This trend is especially clear in the area of private law where it has brought novel significance to distinctively European comparative law, see Joerges, Christian Joerges, *Europeanization as Process: Thoughts on the Europeanization of Private Law*, European Public Law 2005, p. 67.

26 The situation is actually quite complex, and today we can also speak of legal colonialism without colonizers *i.e.* form of self-colonialism. This problem is not dealt with in this article. See for such analysis *e.g.* Ruskola, Teemu, *Legal Orientalism*, Cambridge MA, Harvard University Press 2013, p. 198 ff.

have a conflicting situation of West versus the Rest.<sup>27</sup> None of this is a genuine surprise, as we can grasp why we have had these challenges. Clearly, the cardinal imperfection of macro-comparative law is that it is so intra-cultural. Studied traditions are rather close to each other, based roughly on similar cultural–legal assumptions operating under quite similar intellectual, socioeconomic and political conditions.<sup>28</sup> On the contrary, the legal subtleties of culturally remote legal traditions have remained vague and there has been very little detailed knowledge available.<sup>29</sup> Put in a one sentence formulation, we Western comparatists have painted our prejudices and fictions on the canvas we have assumed to be the Other law.

Now, epistemological emancipation of macro-comparative law opens a route for a broader epistemology of law as something which is not necessarily created by the State.<sup>30</sup> By the same token, this also opens up changes in our legal epistemology by allowing more legitimate space for such legal traditions that are not emanating from the legal competency of a Sovereign State. Notwithstanding, things are slowly changing also in the comparative law academia. One of the most obvious adjustments in macro-comparative law has been the abandonment of the idea of the purity of a legal system; hence, today, most comparatists tend to underline legal hybridity or legal pluralism.<sup>31</sup> As already suggested, part of this paradigmatic change has provided new possibilities for more pluralistic approaches to legal traditions and, thus, also

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27 However, this does not mean to say that there would not be important differences also between Western legal systems. See e.g. Legrand, Pierre, *Against a European Civil Code*, *Modern Law Review* 1997, p. 44 (holding that there are fundamental differences between common law and civil law). However, there are completely opposite views like that of Gordley, James, *Common Law und civil law: eine überholte Unterscheidung*, *Zeitschrift für Europäisches Privatrecht* 1993, p. 498 (holding that the distinction is obsolete).

28 Such expressions as “epistemic racism” and “Eurocentrism” have been used, see Baxi, Upendra, *The Colonialist Heritage*, in Pierre Legrand and Roderick Munday (eds.) *Comparative Legal Studies: Traditions and Transitions*, Cambridge, Cambridge University Press 2003, p. 46.

29 It is quite believable that legal positivism has been the key obstacle stopping Western legal scholars from understanding legal plurality and complexity, Menski, Werner, *From Dharma to Law and Back?*, *Heidelberg Papers in South Asian and Comparative Politics* 2004, p. 5 (Menski cites *Ugo Mattei* in a key passage).

30 Although the situation is as *Harold J. Berman* describes: “Only in the last decades of the twentieth century did comparative law texts begin to include short chapters on Islamic law, Judaic law, Hindu law, Buddhist law, and other types of non-Western religious legal traditions, usually, however, without drawing specific comparisons and contrasts between them and religious aspects of Western legal systems”, Berman, *Comparative Law and Religion*, in Mathias Reimann and Reinhard Zimmermann (eds.) *Oxford Handbook of Comparative Law*, Oxford, Oxford University Press 2006, p. 740.

31 See e.g. Örüçü, Esin, Attwooll, Elspeth and Coyle, Sean (eds.) *Studies in Legal Systems: Mixed and Mixing*, The Hague, Kluwer 1996); Palmer, Vernon Valentine (ed.) *Mixed Jurisdiction Worldwide: The Third Legal Family*, Cambridge, Cambridge University Press 2001 and Donlan 2011.

new room for a more nuanced understanding of Hindu law as one of the major legal traditions in the world.<sup>32</sup>

For anyone interested in the phenomenon of non-State laws, the Hindu law is a fascinating example of a subtle transnational legal tradition which has normative force beyond and within the legal architecture of the modern State. As outlined above, Hindu law seems to underline that law without the State is possible, and that law is not necessarily a product of a hierarchical and authoritative order created and upheld by the State.<sup>33</sup> But in order to substantiate this argument we need to answer the very elemental question of what in fact is Hindu law. In short, what kind of a legal tradition is Hindu law?

### 3 What is Hindu Law? A Very Short Answer

Thirteen years after the independency of India a prominent Indian jurist *M.C. Setalvad* proclaimed in his Hamlyn Lectures in 1960 that, “India has adopted, except for family or other racial or religious law, the common law”.<sup>34</sup> In many respects Setalvad’s account was, of course, right. However, his account is not adequate for the present purpose; it says nothing about Hindu law besides placing it in a special space where it is not connected to India’s otherwise common law legal system. This characterisation of Indian law is very much State-centred and, thus, it conceals subtleties and nuances by drawing a clear line of demarcation between the State law and personal religious-based law. Yet, we can choose another line of argumentation and inquiry.

First of all it is useful to place Hindu law in a larger cultural and non-Western framework in which we can see a certain parallelism between Hinduism and Buddhism, which are both religious belief-systems prevailing among hundreds of millions of people living especially in India and in East and Southeast Asia. However, these religious traditions are clearly different from the monotheistic religious traditions. As noted by *Harold J. Berman* both of these religious belief-systems share “dharma” which might be translated as “law” but which should, however, be conceived of more as a kind of sacred law rather than positive State-law.<sup>35</sup> In any case, we can assume that dharma

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32 Especially Menski’s *Comparative Law in a Global Context*, Cambridge, Cambridge University Press 2006 must be mentioned in this context, because it opened new dimensions to the earlier one-sided Western oriented tradition of comparative law. Also Glenn deals with Hindu law in his *Legal Traditions of the World*, Oxford, Oxford University Press 2010 as one of the major legal traditions of the world.

33 This, of course, means that the Western oriented legal paradigm according to which “The Indians are invited to learn something from us, but there is nothing left for us to learn from Hindu law” (Menski 2004, p. 19) is losing ground.

34 Setalvad, M.C. *The Common Law of India*, Stevens & Sons, London 1960, p. 226.

35 Menski (2004, p. 12) explains that there is “no one prescription possible” because dharma is “a very wide concept, something like ‘rule of law’, into which one can fit ideal democracies as well as dictatorships”. According to *Gilles Cuniberti* there is no equivalent in Indian languages for the Western concept of “law” and they do not separate between “legal”, “religious” or “moral” norms, Cuniberti, *Grands systèmes de droit contemporains*,

(as the duty to do the right thing) is a key concept in Hindu law.<sup>36</sup> This kind of law deals crucially with the spiritual precepts through which people may attain enlightenment and “nirvana”, which refers to the ultimate rebirth.<sup>37</sup> Against this backdrop we can see that the philosophical basic assumptions behind Hindu law are different to those of the Western major legal traditions *i.e.* common law and civil law, which are both deeply embedded in the Christian culture. Especially, we can see that the place and role of the State is different than in the Western paradigm.<sup>38</sup>

For an outsider, like a Western legal scholar, it is sobering to realise just how ancient this legal tradition actually is. India has an exceptionally long history of law starting from the Vedic ages (c. 1500–500 BCE), perhaps even from the Bronze Age (starting c. 3000 BCE) and the Indus Valley civilisation which had its mature period between 2600 BC and 1900 BC. Parts of these ancient roots are still alive in the sense that law is even today, to an extent, a matter of religious norms and philosophical discourse. The Hindu legal tradition of today is still rooted in the past and emanates from the Vedas, the Upanishads and other religious texts and has been transformed by later practitioners from various Hindu philosophical schools and even later by Jains and Buddhists.<sup>39</sup> An important document from the past is Manu Smriti or “The Laws of Manu”, which is an ancient text that formed the source for Hindu law and social customs for thousands of years.<sup>40</sup> Although The Laws of Manu are sacred as to their nature they differ from many other types of religious laws. Importantly, Hindu legal tradition does not have a sacred code of laws which would be dictated verbatim by God.<sup>41</sup> In fact, the codes of Hindu law are based

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Paris, LGDJ 2011, 382. *See also* Kumar Sarkar, Benoy, *The Theory of Property, Law, and Social Order in Hindu Political Philosophy*, International Journal of Ethics 1920, p. 311 (“Dharma is a very elastic term...It really admits of almost all the ambiguities associated with the term ‘law’”, p. 314-315).

36 Menski, Werner, *Sanskrit Law: Excavating Vedic Legal Pluralism*, SOAS School of Law Legal Studies Research Paper Series 5/2010, p. 5-6 (Menski 2010 b). Also the linguistic complexity of the ancient Sanskrit texts and concepts causes also problems for the present legal understanding of those texts (*ibid* p. 13).

37 Berman 2006, p. 743. This author finds it difficult to separate Hinduism’s “nirvana” and Buddhism’s “enlightenment”, yet for the purposes of the present article there is no need to embark deeper into this.

38 This is not to say that the State would not have a place in Hindu law, but rather that the relationship between Hindu law and the State is different. When Sarkar (1920, p. 314), against this background, says “No state, no dharma” he means that the State is not the origin of Hindu law, but at that same time it provides sanction (danda) in order for the Hindu law to become real.

39 In short, vedas are the sacred texts of Hinduism and smritis are rules of conduct that are basically derived from the vedas. *See also* Cuniberti 2011, 384-385.

40 However, certain critical point of view may be useful when discussing about the Laws of Manu, *see* Menski, Werner, *Postmodern Hindu Law*, SOAS Law Department Occasional Papers 2001, p. 31.

41 Glenn (2010 at 239) says that the Hindu law books “are law books of a particular kind”, and even though they are derived from divine sources and hold authority they are not structured in a manner so that there is a clear hierarchy (“nobody talks about pyramids in

upon the time, place and contemporary circumstances of the people and communities to whom they apply.<sup>42</sup>

From the viewpoint of comparative law, which is not the same as the viewpoint of an Indologist or Hindu law expert, the most crucial feature of Hindu law seems to be its resilience as a non-State based legal tradition which is still living and breathing despite it being ancient. Hindu law has actually defied many death wishes, its demise has been predicted many times and even its death has been proclaimed. Notwithstanding, there are still some 800 million people governed in one way or another by Hindu law. However, we should not jump to conclusions concerning the role and weight of Hindu law today. In today's situation Hindu law is a somewhat postmodern phenomenon, which entails internal dynamism and a certain capability for flexibility as the example of Indian law (ch 4) shows.<sup>43</sup>

When we are trying to make sense of legal traditions outside the cultural scope of our own Western forms of law we cannot rely epistemically on our doctrinal or other distinctive forms of methodology which work properly only within our legal cultural sphere. In other words, we must seek for the support of disciplines other than law. One such helpful discipline is legal anthropology, which provides certain basic observations of the relation between the State law and the Other law. Legal anthropology tells us, among other things, that “people in local communities often do not distinguish clearly whether and to what extent their norms and practices are based on local tradition, tribal custom, or religion”.<sup>44</sup> Moreover, Hindu law shows that it is not only national Indian law, but it is also applied widely abroad where it may be recognised as a form of personal law, for example, like in some States in Africa (*e.g.* Kenya).<sup>45</sup> Moreover, Hindu law can be found also in the Western States where Hindu people still follow their traditional law albeit in the form of unofficial law. As a result, we can see hybrid combinations between Western forms of law and Hindu law as, for example, an English Hindu law which combines the local Western law and the distant Hindu law. As *H. Patrick Glenn* said, in these cases, the hybrid “combination occurs whether it is authorized by law or not”.<sup>46</sup>

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Hindu law”, *ibid*, p. 290). See also Menski (2001, 11) who reminds that as a legal tradition Hindu law is closer to African laws and other informal East Asian laws than those legal traditions which originate from the Middle East.

42 This is an empirical fact in the sense that Hindu law is applied to living situations and by living human beings. From the point view of Hindu legal philosophy, on the contrary, the legal sources are not related to any certain time or space, and instead they are regarded as “beginningless (anadi), self-existent and forever immanent”, Glenn 2010, p. 291.

43 Menski 2001, p. 1.

44 Otto, Jan Michiel, *Sharia and National Law*, Leiden, Leiden University Press 2008, p. 30 (talking especially about Sharia).

45 However, the actual role and weight of Hindu law does not necessarily rely on the official law. For example, in South Africa the official legal systems (State law and customary law) are accompanied by the unofficial legal systems like Hindu law, Jewish law and Muslim law. See for a more detailed discussion, Reutenbach, Christa, *Deep Legal Pluralism in South Africa*, *Journal of Legal Pluralism* 2010, p. 143.

46 Glenn 2010, p. 315-316.

#### 4 Hindu Law Today – Some Key Points

Clearly, an apt example of Hindu law can still be found in India where the legal system is fundamentally openly pluralistic in the sense that it recognises various non-State based normativities and gives them a certain footing in the State's formal law. Obviously as a legal tradition Hindu law is old, but it too has changed. A significant change in the historical development of Hindu law occurred in the sixteenth century when India fell under Islamic rule, and thus the jurisdiction and administration fell under the influence of Islamic law. Later, the formal position of Hindu law improved in the British period of the nineteenth century when it was given an official status.<sup>47</sup> The British period also meant restrictions in the sphere of Hindu law, because its application was limited to certain fields of law while at the same time the British general law in regard to India was correspondingly expanded.<sup>48</sup>

The underlying and unavoidable problem was legal cultural because as *Prakash Shah* explains, “The British were reading Indian society according to their own understanding of state-religion relations”.<sup>49</sup> This fundamental legal-epistemic flaw had serious corollaries. The British imperial power, on the one hand, advanced the position of Hindu law but, on the other hand, prevented its spread to new fields of law that had been born because of social development. As a practical result stemming from the Anglo-Hindu law, the classical Hindu law and jurisprudence started to weaken and petrify.<sup>50</sup> The applications of classical dharma were altered in the British period, and, for example, the legal fields concerning private property and the law of obligations were formulated on the basis of common law. The attempts of British judges and administrators to follow Hindu law in their decisions were, due to an insufficient knowledge base that was often distorted, fatal for the development of Hindu law. As a result, a combination, which was not quite Hindu or British law, was created.<sup>51</sup> In general, courts were expected to apply the common law in their decisions,

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47 British Crown rule was only formally established in 1858, which ended a century of control by the East India Company (1757-1848). The British influence on the law of India had started already during the East India Company period. Yet, in fact, some form of British rule was in place in India between c. 1600-1947. See Peers, Douglas M. and Gooptu, Nandini (eds.) *India and the British Empire*, Oxford, Oxford University Press 2014 (offering new points of view in colonial studies, stressing dialogue and hybridization).

48 Glenn 2010, p. 311 notes that the very nature of the Hindu legal tradition (lacking a clear legal structure in the Western sense) offered relatively little resistance to the expansion of Western law. Nevertheless, Glenn (2010, p. 312) also points out that Hindu law has been remarkably resilient and that “time has always been on its side”.

49 Shah 2015, p. 94.

50 British rule was behind this development and stressed the official law according to the paradigm of the State law. “Hindu law came to be, under the appellation Anglo-Indian law, ‘not the sastric law but the law as declared by the courts themselves’...decisions became win-lose...clarity replaced imprecision, custom became difficult to establish...the role of traditional tribunals declined”, Glenn 2010, p. 313.

51 Shah 2015, p. 94 describes this process: “Repeated attempts were made to write codes reflecting a distillation of Hindu law in this way, while subjection to the English paradigm of judge-made law did its own work in undermining customs”.

but it was possible that Islamic or Hindu law was applied if it was a case of family law or law of inheritance. The basic situation is still the same although India, of course, is an independent State.<sup>52</sup> However, by and large, what happened was that the new official law of an independent India changed and Hindu law retreated, went underground and turned mostly into some kind of unofficial law.<sup>53</sup> Whatever one thinks of this postcolonial self-colonialism, it seemed that the onmarch of the Western legal paradigm was unstoppable. Shah points out that the Indian proponents of the 1950s reform justified this policy by arguing that they were only continuing what the British had initiated, and, now that the “indigenous” Government was doing the same, there could be no objection.<sup>54</sup>

In any case, India is an interesting example of legal pluralism and religious law, because Hindu law has official and recognised status in the State law.<sup>55</sup> Hindu law and official State law undoubtedly rub shoulders. Basically, Indian Hindu law today can be found in a codified form in four Parliamentary Acts: The Hindu Marriage Act (1955), The Hindu Minority and Guardianship Act (1955), The Hindu Adoption and Maintenance Act (1955) and The Succession Act (1956). These Acts are legally relevant to all Hindus living in India. Now, the basic definition of a Hindu is in the Constitution Act (Art. 5(2)(b)) which refers to Hindus when speaking of “persons professing the Sikh, Jaina or Buddhist religion”.<sup>56</sup> However, the Marriage Act goes into more detail and explains that the Act (Section 2) applies to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj. The Act also applies to any person who is a Buddhist, Jaina or Sikh by religion and, moreover, to any other person who is not a Muslim, Christian, Parsi or Jew by religion. But, those who convert to Islam and other castes are not anymore subject to Hindu Law. Today, in practice, the Hindu marriage law is probably the most fitting example of a customary ritual celebration of marriage (with legal

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52 Yet, it might be useful to understand that the relationship between law and the colonial empire in India was rather complicated. Imperial law was, importantly, also shaped by Indian legal culture. We might argue that in practice the imperial law had to negotiate with the indigenous Indian legal culture(s). See den Otter, Sandra, *Law, Authority and Colonial Rule*, in Peers and Gooptu (eds.) *India and the British Empire* 2014, p. 168.

53 Menski 2001, p. 7. Yet, the fact that Hindu law largely became unofficial does not mean that it would have lost its significance or as Shah (2015, p. 96) says, “Hindu law, or Indian traditional laws in general, as centrally composed of diverse...are constantly pushed into the ‘unofficial’ sphere...., as Chiba might say, where they continue to exercise their pull”.

54 Shah 2015, p. 95.

55 Yet, pluralism is itself a part of Hindu law. Cf. Cuniberti 2011, p. 386.

56 It is not the goal of this article to discuss the relationship between the modern Indian Constitution and Hindu law. However, there seems to be a point when Menski (2001, p. 6) notes that these two are not as incompatible as it may look at first sight, and instead there is an interactive relationship. Yet, it appears that Menski has quite an optimistic view, because on the one hand the fact remains that the caste system is deeply embedded in Hinduism, yet, on the other, according to the Constitution (Art. 15) discrimination on grounds of religion, race, caste, sex or place of birth is prohibited. It is hard not to see a clear problem in this. See also Cuniberti 2011, p. 406-407.

consequences) that functions outside the State-centric bureaucratic machinery.<sup>57</sup> However, this is not to undermine the normative importance of unofficial law or as *Teemu Ruskola* says: “Law matters, even terribly, but not always in officially sanctioned ways”.<sup>58</sup>

Another important dimension of Hindu law is the fact that it is, in a certain basic sense, Stateless law. In other words, Hindu law may sometimes be extraterritorial or transnational law as to its nature. This means, in practice, that the question of the application of Hindu law does not necessarily depend on the State jurisdiction in a narrow sense. For example, Indian case law shows that the nature of Hindu (marriage) law is understood to be something which does not cease to apply even if the married couple changes domicile.<sup>59</sup> What actually counts is not the country in question, but rather the fact that marriage has taken place according to Hindu rites and ceremonies between two Hindus.<sup>60</sup>

Although Hindu law is dealt with mostly in this article from the viewpoint of Indian law it is important to emphasise that Hindu law is, like global law, not restricted to any certain State or any certain State legal system. Even in India the situation is complicated, because it is a country with significant ethnic, linguistic and cultural diversities. Further, the legal pluralist model is not only an Indian phenomenon but can be found also in other countries typically in the field of marriage law. A good example is the Kenyan legal system and the Marriage Act (No. 4 of 2014), which recognises and regulates different forms of marriage that are Christian, Civil, Customary, Hindu, and Islamic marriage.<sup>61</sup> According to this Act (Art. 2), Hindu means a person who is a Hindu by religion in any form. The Act mentions specifically a Virashaiva, a Lingayat and a follower of the Brahmo, Prarthana or Arya Samaj. The Act also includes Hindus persons who are Buddhists of Indian origin or Jain or Sikh by religion. Part VI of the Act deals with Hindu marriage, and it stipulates that (Art. 46) it applies only to persons who profess the Hindu faith. And, a marriage under Part VI can be officiated by a person authorised by the Registrar and in accordance with the Hindu religious rituals of a party to the marriage (Art. 47). Kenya’s example shows, among other things, that Hindu law is not only an Indian thing, but it can be found also in other systems which are legally pluralistic. Consequently, Hindu law is undoubtedly a legal tradition, but it is not necessarily indigenous as to its nature.

In the India of today, modern Hindu law carries and develops the tradition of Anglo-Hindu law. Modern Hindu law is a similar type of personal legal

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57 Menski, 2010 b, p. 21.

58 Ruskola 2013, p. 37.

59 See e.g. the Bombay High Court’s judgement in *Sondur Rajini v Sondur Gopal*, 2006(2) HLR 475. The determining factor was that the nuptial knot was tied under the Hindu Marriage Act.

60 See e.g. the Bombay High Court’s judgement in *Naveen Chander Advani v Leena Advani* 2005 (2) HLR 582. The fact that the couple was married in the US was not decisive.

61 This Act repealed the earlier Hindu Marriage and Divorce Act (1960). In fact, the Marriage Act of 2014 consolidated seven different earlier marriage laws in Kenya.

system along with equivalent system for Muslims. So, even though there is change and mutation, there is also continuation and evolution of the Hindu legal tradition. As *Werner Menski* rightly points out: “there will always remain an element of dharmic foundation in the legal system applying to, and being applied by, Hindu people”.<sup>62</sup> Accordingly, the Westernisation of Indian law and Hindu law may only be a surface phenomenon.<sup>63</sup> However, it must be stated, that in order to understand the modern Indian law and legal system one does not necessarily need to know much about Hindu law. However, to understand Hindu law as a form of legal thinking and legal tradition some kind of knowledge of the dharmic foundation is absolutely necessary.<sup>64</sup> And it is here where the genuine significance of Hindu law for a non-Hindu legal scholar probably lies.<sup>65</sup>

However, the situation in India is far more complex than the above description allows us to understand. The role and weight of Hindu law has not always been highly regarded, and after independence India sought to follow Western legal models. However, in the twenty-first century it seems that Indian lawmakers do not anymore believe in the superiority of Western legal models. This has led to a development in which India has started to “remember some of their own fragments of legal history and conceptual elements that are now reconstructed as building bricks for postmodern Hindu and Indian laws” as *Menski* points out.<sup>66</sup> Moreover, if we look at Hindu law from the point view of Stateless law it is crucial to notice that originally Hindu law never really accepted the dominance of the State, and in this sense Hindu law seems theoretically able to tolerate legal pluralism even though some modern views of Hindu law may today deem otherwise.<sup>67</sup> And, if we follow *Menski*’s line of argumentation, the fact that Hindu law is a part of formal State law does not mean that much older understanding of “law” does not exist in the form of “internalised expectation of self-controlled ordering among Hindus and today’s Indian citizens”.<sup>68</sup> In conclusion, for a Western legal scholar Hindu law offers a curious example of how legal pluralism, State law and ancient legal-philosophical discourse can live side by side and interact with each other.<sup>69</sup>

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62 *Menski* 2001, p. 30.

63 *Cuniberti* 2011, p. 421.

64 *Cf.* *Tamm, Ditlev and Letto-Vanamo, Pia, Oikeuden maailma – näkökulmia oikeuskulttuureihin*, Helsinki, Suomalainen lakimiesyhdistys 2015, p. 192.

65 Interestingly, *Ruskola* (2013, p. 11) points out that the empirical basis of legal Orientalism is beside the point: “It is a discourse of legal reason rather than of factual truth”. Similarly, discourse on Hindu law is also a discourse of legal reason – and this is why it is potentially relevant for such notions as global law or Stateless law.

66 *Menski* 2004, p. 19.

67 *See* *Menski* 2010 b, p. 8. *Menski* points out that there was not even a proper word for secular State in early Sanskrit (*ibid*, p. 9).

68 *Menski* 2010 b, p. 11.

69 It is a quintessential basis of legal pluralism that it rejects the idea of State-centred legal centralism, *see* *Griffiths* 1986, p. 3.

## 5 Concluding Thoughts

Despite the continuing criticism against comparative law's intellectual pedigree we can see that today comparative law has lost much of its earlier intellectual heritage. For example, vain dreams about a uniform global law that would follow Western legal culture have been buried; pluralism is flourishing. In a situation where the role and weight of the State law is diminishing we may learn from the insights into those old legal traditions that Western legal thinking abandoned long ago when it constructed its own theoretical foundation relying on the exclusiveness of the State law. In practice, today, the value of Hindu law for the Western legal scholar or comparative lawyer is mainly in the rich and subtle theoretical argument which it embodies. At best it provides a counterhegemonic legal discourse to Western legal imperialism and its notion of global law. This means that it offers an aspirational example that may be useful as a reflexive endeavour where the Western academic legal community understands itself and its relation to the Other law.<sup>70</sup>

Viewed from a wide angle we can draw some parallels to the evasive notion of global law. One of the ideas behind so-called global law is that it is able to spread throughout the world. However, the case with Hindu law is perhaps radically different. As noted by Glenn, paradoxically, Hindu law could be exported and universalised but this “would somehow seem contrary to the point of it”.<sup>71</sup> This, however, does not make the case of Hindu law less interesting or less relevant. Of course, this requires that our focus is on the transnational legal discourse and not on the substantial rules of Hindu law as such.

Hindu law seems, in regard to the contemporary debate concerning global law, to be able to provide interesting ideas, as like global law it finds itself in an ongoing process of construction and reconstruction.<sup>72</sup> In practice, the key point with Hindu law and the debate over global law or Stateless law is in the fact that the ancient Sanskrit texts of Hindu law seem to contribute to our present discussion because they are so open about internal plurality, and they do not try “to fit into purportedly uniform global models”.<sup>73</sup> The lesson of Hindu law might as well be that it reminds us that law is not simply the creation of the Sovereign State, but rather it receives its meaning from the crossroads of legal and other social systems – and this is certainly true also for

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70 In this, clearly, Hindu law comes theoretically close to global law as it is described by *Neil Walker* in his book *Intimations of Global Law*, Cambridge, Cambridge University Press 2015. Walker underlines the epistemological role of global law.

71 Glenn 2010, p. 315.

72 See *Menski* 2004, p. 20.

73 *Menski* 2010 b, p. 14. The learning experience might be even more extensive than concerning only Hindu law, and so *Menski* (*ibid*, p. 32) points more generally to the various legal traditions of Asia and Africa when it comes to the specific legal mentality which can tolerate even deep legal pluralism.

global law or any other form of Stateless law.<sup>74</sup> Put differently, it is not only about applicable rules or hierarchies but also about the legal discourses crossing the limits of time and space.<sup>75</sup> And, pertaining to time, Hindu law has an astoundingly long history and does not show any signs of disappearing whereas other more recent forms of Stateless law, like for example global law, are taking their very first baby steps under the watchful eye of the inherently anti-pluralist and State-centred tradition of Western legal thought. Correspondingly, we may think that our Western notion of “rule of law” is an age old discussion, but in relation to dharma it is hardly even a new-born.

Nevertheless, none of this prevents perceiving “law” as a critical transnational discourse, which paradoxically gives rise also to those oppositions it tries to manage.<sup>76</sup> In the end, whether we deal with global law’s “rule of law” or Hindu law’s dharma does not really count as much as we tend to assume. What really counts is that the Western scholars start conceiving that our legal categories, notions and concepts are not universal even when they might be globalised as a result of the legal imperialism of Western law.<sup>77</sup> For future debate and discussion about global law or Stateless law insights from the Other law may be more fruitful than we are prepared to acknowledge at this moment.

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74 See Menski 2001, p. 4-5 (quoting a key passage from Dhanda and Parashar).

75 Obviously the pluralistic and tolerant mode of legal thought can be easily detected from the classical texts. See e.g. what The Laws of Manu (ch II, 14) say about conflict between legal sources: “But when two sacred texts (Srutis) are conflicting, both are held to be law; for both are pronounced by the wise (to be) valid” (The Laws of Manu, translated by George Bühler, *Sacred Books of the East*, Vol. 25).

76 Cf. Ruskola 2013, p. 234 (speaking specifically of legal Orientalism).

77 Cf. Ruskola 2013, p. 15.

# **Case Studies**

## **Fields of Law**

