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**From Dharma to Law and Back?  
Postmodern Hindu law in a Global World**

by

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# **From Dharma to Law and Back?**

## **Postmodern Hindu law in a Global World**

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### **First Dieter Conrad Memorial Lecture<sup>2</sup>**

**In memoriam Dieter Conrad (1932-2001)**

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In his time, Dieter Conrad made significant contributions to the study of South Asian laws which remain valuable in their own right. A collection of his articles from 1970-1990 appeared in 1999 in Volume 184 of the *Heidelberger Beiträge zur Südasiensforschung* under the title 'Zwischen den Traditionen'. In this volume, one finds two excellent introductions by Jürgen Lütt und Mahendra P. Singh which summarise the contributions made by Dieter Conrad towards three major themes of comparative legal study and South Asian law. Today we are able to build on such pioneering contributions and, in the light of new political and legal realities, can expand our horizons further. The recent emergence of postmodern Hindu law, the

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<sup>2</sup> This is a slightly revised version of the original text of the lecture. The lecture started with a German introduction which is not reproduced here. The introductory remarks highlighted the rather solitary position of South Asian legal scholars like Dieter Conrad, but emphasised the strength of ongoing links between the South Asia Institute in Heidelberg and SOAS, University of London. These went back to the times of Professor J. Duncan M. Derrett at SOAS, under whose guidance Professor G.-D. Sontheimer completed his doctoral thesis in the 1970s. It extended to a former student of Dieter Conrad and Mahendra Singh, Dr. Martin Lau, who became a Lecturer in Law at SOAS soon after completing an MA (Area Studies South Asia) there. More recent students at SOAS have included Dr. Dirk Otto, now a practising lawyer, as well as Alexander Fischer und Malte Pehl, the new assistants of Professor Mitra at Heidelberg. Thus, even though at present Hindu law is only taught at SOAS, there are hopeful signs that Indian legal studies will also continue to be represented in Heidelberg.

main subject of this Memorial Lecture, constitutes such a new phenomenon in global jurisprudence and South Asian legal studies, though its antecedents were making themselves felt from the late 1980s onwards.

## INTERDISCIPLINARITY, INTERCULTURALITY, AND POSTMODERN LEGAL ANALYSIS

The academically necessary and prominent elements of interdisciplinarity and interculturality in Conrad's work have clearly been highlighted by Jürgen Lütt and Mahendra Singh in their respective 'Vorwort' (pp. v-vi) and Preface (pp. ix-xvi) to 'Zwischen den Traditionen' (Conrad 1999). Dieter Conrad's interdisciplinarity and interculturality was remarkable, but remained heavily focused on European traditions of legal scholarship, mixed with a good dose of indological input. This led to a pattern of analysis in which a German constitutional lawyer sought to assess the relationships and tensions between what Lütt calls 'premodern' Hindu and Muslim cultures, and the legal traditions implanted during the British Raj. This contest took place during the early post-colonial period, which formed the historical framework for Conrad's studies on South Asian laws.

As I know from my own struggles over finding an appropriate global perspective, being German helps to provide a sense of distance from British colonial perspectives. But I am more interested here in the interactions between supposedly 'premodern' Hindu traditions and the modern postcolonial Indian state, which is much more than just a continuation of the colonial regime. In other words, it is an observable fact now that Indian law has developed over the past few decades, away from the outwardly postcolonial and partly aggressively modernist presuppositions of the 1940s and 1950s, towards an embarrassed self-critical assessment of the present and an almost anxious vision of the future. This is what I portray here as a postmodern approach. The earlier, almost blind belief in modernisation and its inherent promises of progress has been replaced by a typically Hindu form of trust in the possibility of a better future, for which all concerned parties have to work. One might call this the *dharma* of postmodern Hindu law. It appears to me that we can see and understand this only if we are academically trained for this task and are, in a rather idiosyncratic political sense, willing to acknowledge that development in Indian law can and does include continued reliance on so-called ancient models and their fertile reconstruction in today's socio-legal environment.

Ancient traditions are not just a thing of the past, placed in more or less shallow graves by lawyers, but they are with us today as largely invisible, but still powerful cultural assumptions that evade law, and yet constitute a key element of it. Hence, the struggle between different types of traditions is not just a dualistic contest of Western modernity and colonial superimpositions, as Conrad used to see it, but constitutes a much more complex process of working out new solutions from a plethora of possible conceptual and practical offerings that mark out Indian legal and political history as an important separate field of expertise. Analysing today's

South Asian laws means more than observing the struggles between pre-colonial laws and received Western models. It also involves, and this is the most difficult part for lawyers, a necessary new attempt at understanding how the ancient cultural – and thus predominantly socio-religious – traditions of South Asia still manifest themselves today as centrally important legal ‘bricks’ for the reconstruction of postmodern Hindu law and the definition of postmodern Indian laws.

In this respect I seem to have taken a rather different academic perspective than Dieter Conrad. As a classically trained but socially-oriented indologist who now has to identify the legal perspectives within Indian and Hindu law, I find myself forced to argue from an almost schizophrenic basis. On the one hand, I emphasise the cultural importance of the ancient classical Sanskrit texts, but as a comparative lawyer I must vigorously deny their role as a direct legal source, because that is merely a construction imposed on Hindu law by the British colonial administrators, who simply could not handle the internal Hindu categorisation of *dharma* and its related concepts as much wider than ‘law’ in a narrow bureaucratic sense. I therefore see interculturality and interdisciplinarity in this field in a rather different mix than Conrad did, much less legally formal perhaps, more as a socio-cultural interaction, and hence more focused on deep analysis of political and legal concepts than the interpretation of dramatically manifest legal developments, such as emergencies and preventive detention. This is as much due to my academic training, which includes a basis in social anthropology from a time when the subject did not quite exist as yet, and an acute awareness of the importance of local cultures and individual input as contrasted with formal legal structures.

Conrad was of course not unaware of such problems. He clearly perceived and portrayed the inherent contradictions between economic constraints and socio-political reality on the one hand, and the wonderful constitutional construction of ‘rights’ as guaranteed fundamental rights in Indian law on the other. As a constitutional law expert, he was deeply conscious of the fact that in India such guaranteed constitutional rights only existed on paper, and their benefits and even knowledge of their existence did not reach most of the citizens. As a result, crucial questions about the nature of law and its functions needed to be asked. As a constitutional lawyer, Conrad spoke and wrote of the manifest failure of the *Rechtsstaat* in India with its dual legal system, and I would not wish to contradict that assessment. There is clearly a lot going wrong in the Republic of India, sometimes in the name of the law, and often outside that (Dhagamwar 2003). Conrad clearly saw the effective administration of justice as a crucial problem for Indian law (1999: 147).

But my more socially-centred perspective yields a different outlook, which is no less critical of Indian legal claims and developments. It is perhaps a little less negative because it brings cultural factors into the legal equations in a different way than Conrad could do. My methodology assumes an almost inconceivable, broad-based complex interactional pattern, which Conrad did not consider in some of his work. Perhaps he was too solidly based in the field of legal positivism, though he certainly also acknowledged the importance of cultural factors. It appears to me that an individual scholar may well be taking one methodological

approach in one aspect of his work, and then another in a different field. Whether this leads, at the end of the day, to a consistent pattern of analysis is a question that all academics need to ask themselves.

Taking a different methodological approach, like taking another look at the proverbial Indian elephant from a different angle, may allow conclusions that another perspective would not easily permit. It appears that I am adding two additional elements to the scholarly framework of reference when it comes to analysing Indian and in particular Hindu laws. First of all, in reliance on Masaji Chiba (1986, 1989), a Japanese jurist whose important work is gradually gaining more respect, I have begun to refer explicitly to the main distinction of legal inputs as ‘official law’ and ‘unofficial law’, to which need to be added the rather diffuse ‘legal postulates’ of Chiba’s tripartite model. Secondly, as indicated, I perceive the ancient key concepts of Hindu cultural and religious traditions not merely as an element of the past, but as ingredients in the current contemporary attempts to devise new sustainable models for the development of Indian laws, heavily feeding on Hindu concepts without ever turning into legal hinduisation, given the dominance and skilful use of India’s secular approach.

In Chiba’s model, the official law is not only composed of positivist law made by the state, but also includes all those rules that originated in society or religion, but have been co-opted, as it were, by the state. The state claims them as its own rules, keeping quiet about the fact that these elements of law were not created by the state in the first place. Many of these rules are now administered as state law or part of the official legal system. In the South Asian legal scenario, this is a most instructive difference to make, since the personal law systems as a whole fall under this particular category and thus straddle the official and the unofficial, as we shall see in a moment. Where there are different family laws, in particular, for Hindus, Muslims, Christians, Parsis and Jews, not to speak of Sikhs, Jains and Buddhists whom Indian law has declared to be Hindus, the official law itself takes on a pluralistic shape that differs significantly from what we assume about legal structures and processes in most European legal systems.

Chiba’s ‘unofficial law’ comprises all those rules applied by people in their socio-cultural environment, but not recognised by the state as legal rules. This seems at first sight like a sensible distinction, but the borderlines between ‘official’ and ‘unofficial’ have remained unclear and somewhat fuzzy and they may constantly shift, as new patterns of behaviour develop, and formal legal systems react to them. Chiba himself recognised this and warned that much more would need to be said about this aspect of his analysis.

In Chiba’s model, however, there is another level of law that transcends the legal, and yet needs to be counted into the equation because it influences the operation of legal systems in more substantial ways than most lawyers are prepared to recognise. Some legal scholars appear to have serious problems with this pluralistic perspective. Brian Tamanaha (1993, 2001) has vigorously protested that to define everything non-legal as law is nonsense and is a ‘folly’, a foolish misrepresentation of the nature and concept of law.

In Chiba's (1986: 6-7) own words, a legal postulate is 'a value principle or value system specifically connected with a particular official or unofficial law, which acts to found, justify and orient the latter. It may consist of established legal ideas, such as natural law, justice, equity, and so on [...] sacred truths and precepts emanating from various gods in religious law; social and cultural postulates [...] political ideologies' and the list goes on. Chiba emphasises the pattern of constant interaction between the elements of his tripartite structure, recognising very clearly that while a certain degree of consonance with one another would be required or at least be desirable, 'complete consonance cannot be expected' (id.) and the potential for conflict is high.

A deep analysis of Indian law and its recent developments, or indeed of Hindu law, would therefore at all times need to be conscious of this interactive pattern. To restrict scholarly analysis to a binary model of 'law and society' would manifestly be too simple. To perceive struggles between different types of traditions throws light on the right field of analysis, but is unlikely to pick up the finer strands of conflict. There is more to consider in this analysis than the simplistic bipolarity of 'tradition' and 'modernity', which many lawyers remain so fond of.

I have found Chiba's analysis useful as a methodological basis for understanding how Indian and Hindu law, in fact all laws, have been developing conceptually and practically. However, what we read so far in our law journals and in new books does not take Chiba's tripartite model seriously enough. I think the main reason for this remains that legal scholars are afraid of legal pluralism and its consequences for their work. So they pretend to behave like lawyers, applying the dominant positivistic premises. Since they tend to be too deeply influenced by legal positivism and the resulting legocentric assumptions, they prevent themselves from promoting a full analysis of the law, especially when it comes to foreign laws. I was quite excited to find that Ugo Mattei (2001: 254) has forcefully suggested that legal positivism itself may be the key problem for our lack of understanding for legal plurality and complexity. He wrote:

[...] legal positivism is *the enemy* of understanding in the law. It is a reductionist perspective that artificially excludes from the picture the deeper structure of the law (things like legal culture, language of legal expression, revolutionary moments and so on) as well as (in typical postmodern style) the decorative, and symbolic elements of it. Positivism, as a consequence, is unmasked as an inherently formalistic approach, in the sense that form prevails over structure in determining the law's domain. It *outlaws* (considers outside the law) deeper structural aspects.

So, here we are, facing the realisation that cutting out everything non-legal from the debates about law is not, and could never be, a productive methodology for deep analysis. If this is probably true for western law making, it is definitely an even more relevant basic premise for the analysis of non-western legal systems. Interculturality and interdisciplinarity are indispensable tools in global

jurisprudence. Next, let us now turn to how South Asian laws have been perceived from a variety of angles.

## PERCEPTIONS AND REPRESENTATIONS OF SOUTH ASIAN LAWS

Building on such complex methodological advice, we can now look a little deeper at our perceptions of South Asian laws before we come specifically to Indian and Hindu law. When I introduce myself as a specialist in Indian law, even among Indians the assumption is often that I must be a legal historian cultivating a more or less personal interest in India, because Indian law is just English law, isn't it? The enormous distinctions between Indian law and Hindu law are brushed under the carpet. In this way, Indian law is widely assumed to be just an inferior version of English law, a common law system which follows English law closely. The personal law system, which is so fundamental to understanding such types of legal systems, is not perceived as a crucial component of Indian laws.

However, these mythical assumptions about Indian law being like English law were never quite true, because what Macaulay and others did in the 19<sup>th</sup> century was largely to construct a tailor-made general Indian legal system, which has many civil law characteristics. This kind of law applies to all subjects, irrespective of religion or background. At the same time, the British did not dare abolish Hindu and Muslim personal law, as documented in the famous Warren Hastings Declaration of 1772, in which we find the assumption that Gentoos are governed by the *śāstra*, while Mohammedans were to follow the Qur'an. The British concentrated on what came to be called the 'general law'. So India today still has the old Penal Code of 1860, which was exported all over the Empire, while England still struggles with how to handle criminal law and certainly has not codified it. India has an amazingly complex Constitution, with borrowings from all over the world, and a good dose of *dharma* consciousness. But if you open a textbook on Indian law, it is likely that the author will try and tell us that the Indian Constitution is based on English law or, so the more fashionable argument recently, that it looks like American law. It is in English, so it must be English or American! The myth that so many people and scholars still believe in, therefore, is that Indian law as a whole is an old common law system that can easily modernise along Western lines. If only India was not so poor and backward! If countries like the UK, Germany or Holland have one law for all, so should India. Even if observers are aware of the existence of different laws for a variety of communities, sticking to the personal law system with separate Hindu, Muslim, Christian, Parsi and Jewish laws is widely treated as an anachronism that is nowadays even worse for women and children than it ever was, bad for human rights and virtually an infringement of international norms. In this way, observers define away not only the complexities of Indian law making and its maintenance in a complex scenario, but they also commit serious methodological errors.

First of all, is life really so simple that top-down law making on a national level, now even on a global level, is truly so beautiful? In Germany, people and scholars have been acutely aware of the subtle and constantly endangered balance between *Bund und Ländern*, between centralising forces and their opposites within a federal structure. The USA has a similar experience, jealously defending the freedom of states to make and apply their own laws. Somehow, when it comes to ‘developing countries’ like India, there is a notable centralising tendency, at the level of political as well as legal analysis. To make life simple, we tend to refer to ‘India’ as a singular, thus underplaying the complexity of any subject we may wish to take up. Linked to such scholarly techniques of convenient simplified presentation, we find evidence of a strong assumption that securing top-down and uniform legal provisions represents the final aim of development.

Strangely enough, in the West we are now engaged in all sorts of *multi-kulti* debates about cultural relativism and legal pluralism, often linked to the agenda of non-discrimination. Why do we not realise that these politicised exchanges are really also legal debates? Can we be so sure that taking account of cultural or religious factors is not also a matter of law? My observations in Britain with its *angrezi shariat* for Muslims (Pearl and Menski 1998) and its *angrezi dharma* for Hindus have clearly shown that everywhere in Europe new unofficial laws have been developing in ethnically and religiously pluralistic scenarios, irrespective of what the respective state law says. But the critical point is that these surreptitious developments have not taken place in total isolation from the respective state law. Rather, the ‘ethnic minority law’ – which is of course not supposed to exist as a legal entity – has, like a virus, embraced and co-opted the rules of the official law only to remodel them to suit the perceived needs of a particular section of the population. The end result is inevitably a hybrid composite whole that only legal pluralists seem to be prepared to perceive as a legal entity. It seems to me that in Europe and North America, we continue to operate the axioms of legal positivism almost unthinkingly, and have not noticed that the societies to whom we apply our laws have changed dramatically over the past few decades.

At the same time, and hence somewhat logically coherent, we continue to issue doctors’ prescriptions to Asian and African nations as patients who should abandon their inefficient traditional legal structures and should swallow and hence copy uniform, state-centred Western models as soon as possible. Legocentric, almost Napoleonic or Austinian thinking lies at the root of such political and easily politicised arguments, which evidently privilege the state and its law making powers. I shall explain below that this kind of approach and the resulting thought processes do not at all match with Hindu perceptions of the role of law. Realisation of this, emerging in India, but not so much in the Western world, has significantly contributed to the postmodernisation of South Asian laws, which is therefore conceptually well ahead of Western legal thinking on this matter, even if this is not expressed in so many words.

## IMPLICATIONS OF APPLYING A NEW THEORETICAL FRAMEWORK

My analysis could, at this point, go off into all sorts of current observations and debates in the West over discrimination against minorities. But that is not my topic here. We know that all legal systems have problems of one kind or another. We should long ago have understood that creating a European-style uniform legal system anywhere in the world is not a cure-all for the perceived problems of pluralism and diversity, even in Europe and America itself. From a British perspective and as a comparativist, I am amazed how stubbornly the Americans, in particular, are officially sticking to their myths of national uniformity when reality is so manifestly different and their judges, too, have to become experts to some extent in matters like Muslim law.

At the same time, we are only too aware that the colonial impact on Asian and African legal systems has not been all that positive. If all law is culture-specific, which I believe it is, then we as lay or academic individuals have to learn to live with plurality, and states must take account of plural scenarios. Legal pluralism is not a threat or an illness that needs to be combated; it is an asset for policy and law making. However, it must be used with due care. My next point therefore, closely linked, is that we need more interdisciplinary scholars like Conrad who can explain those cultural and religious specificities to a wider public and the various scholarly communities that have developed over time. In other words, we continue to need specialists in indology, or in African and Islamic studies, because otherwise the complex interdisciplinary legal analyses that are necessary for understanding the pluralistic global jurisprudence will not be possible. Coming from different disciplines, we are not enemies guarding our small cabbage patches; we are rather more like neighbours sharing air and water resources. So we must learn to create a sustainable and environmentally clean allotment of comparative law. As scholars of law in whatever orientation, we therefore have to respect what is defined as non-legal expertise. Above all, we have to learn to observe and analyse the culture-specificity of all laws, and we must prepare ourselves to interrogate the phenomena we observe with a view to assessing their likely contributions to a better future anywhere in the world.

In reality, it has been rather too simple for us as scholars to rely on axiomatic understandings of modernist law and traditional society, ancient Hindu and Muslim traditions in the subcontinent, for example, and the modernising impact of colonial rule and later post-colonial reconstructions in Africa, Asia and South America. The world has moved on since the 1980s when Conrad produced most of his work. What earlier analysts have not built sufficiently well into our complex cognitive structures is the undeniable fact that ‘tradition’ tends to be with us as a presence, however resented and uncomfortable. Brazilians are now engaged in a reconstruction of their own basically colonial legal history and realise that the average citizen is *negro*, not *blanco*, so how can the perpetuation of borrowed ‘white’ legal systems lead to better governance? Indians have been engaged in similar processes of self-assessment and find that they, too, will not ever be able to

become white Europeans. They will stay, at best or at worst, brown Brits, of whom we now have many in London and elsewhere.

I am arguing almost obnoxiously like this to drive home the point that in the West we assume a little too easily that the whole world should or could become like us and should follow our models or wants to do so. Development specialists now acknowledge that there is no one chronological and ideational pattern underpinning developmental processes. This means there is no simple civilizational progression process either. Anyway, assimilation to western patterns of thought and action is not universally seen as a desirable form of progression. Some scholars and many common people in non-western environments have long understood that, and I am going to show in a moment what legal implications this may have in Indian law and in the reconstruction of Hindu law.

Let us go further, therefore, and analyse what then may happen in the legal field. Creating new official laws will have an impact on the official laws, but what happens to the pre-existing legal postulates whose potentially obstinate existence Chiba (1986) has so helpfully highlighted? In my scheme of interrogation, the legal postulates answer back by remaining active participants in current processes of law-making. The trouble is that such obstinate responses are often made in silence, a silence that indicates that the other side will not listen anyway, so what is the point of talking? While positivists may disagree, because they are manifestly not prepared to listen, a new law cannot just nullify legal postulates; it can challenge them, but cannot make them non-existent. People know that, and scholars overlook this basic fact at their peril. If direct opposition criminalises legal postulates and those who represent them, strategic silence is used as a tool to avoid the impact of the formal, official law, while constructing new unofficial laws. All of this means that positivism cannot, to use Mattei's terminology, successfully 'outlaw' legal postulates, provided we are able to see that law does not control the whole of society and law making is always a partial exercise in both senses of the word.

The inevitable result of top-down lawmaking is therefore not necessarily, as positivists argue, a modification or clarification of the existing law. The uncomfortable truth is that law reforms create more legal pluralism, not greater national legal uniformity. Somehow, South Asian law makers are more aware of this now than they were several decades ago, and they certainly understand this issue better than most western parliamentarians. One possible reaction is that they appear to have stopped making laws in certain fields, particularly in family law, leaving the development of legal processes to judges – again some confirmation that we have a common law type of legal systems in South Asia and need to spend more time researching the role of judges.

This particular issue surrounding the reformative power of law, of course, merely confirms my theoretical approach. If law is indeed made up of so many plural sources, and not just of state law or Chiba's official law, formal reform of any set of rules cannot simply abrogate the entirety of all rules in any particular field. Fascinatingly, this is currently being more clearly realised and admitted in Pakistan. The case of *Allah Rakha v. Union of Pakistan* was decided by the Federal Shariat Court in 2000 (Pakistan Legal Decisions 2001 FSC 1) and has since been

kept on appeal to the Supreme Court. The learned judges go as far as admitting that Pakistan has long had two types of Muslim law, the God-given *shariat*, and the state-made Muslim personal law of modern Pakistan. Where there is any conflict, as social observation confirms anyway, the Federal Shariat Court elegantly says in true Islamic spirit and without blinking an eye that *shariat* prevails. After all, Pakistan is trying to be an Islamic Republic.

The case of *Allah Rakha* confirms that in Pakistan, the modernist reforms of the 1960s have been kept as a reformist fig leaf, and at best an optional law for those who are either good Muslims or members of the elite that needs official documents for foreign travel. For the average Pakistani, *shariat* remains the official and dominant law. Modern law making has to a large extent been a smokescreen to disguise other agenda, which could of course be as much political as they are legal. We do not see this if we do not accept that traditional Muslim legal reasoning can be applied today.

Indian law, as we shall see, has chosen a somewhat different path, but is not on an entirely different route towards a better future. Here, too, politics and law are intricately intertwined, but the Indian approaches also incorporate economic, more specifically fiscal, concerns about the practical operation of the legal system as a whole. I would not say that Indian law making is politically neutral or uninformed by all kinds of ideological influences, but there are wider, culture-specific aspects of 'public interest' that influence the progression of postmodern Indian laws and postmodern Hindu law. So what is 'postmodern' Hindu law?

## POSTMODERN HINDU LAW

At this point, like Conrad, I need to go back to some basic concepts of traditional Hindu law to provide foundations for an interdisciplinary re-assessment. Conrad wrote excellently about *dharma* as *Eigengesetzlichkeit*, a concept that would undermine official law, like the Gandhian strategy of *satyagraha*, showing the other side that they might be politically dominant and legally superior, but they were morally in the wrong. Quite rightly, Conrad saw the Hindu element in this context of *dharma* as a legal input, but *dharma* is more than 'law' or 'religion', and the tree of *dharma* has a root and branches that go much deeper and extend much wider than many scholars have realised.

I have already indicated that I perceive the ancient key concepts of Hindu cultural and religious traditions not merely as an element of an allegedly religion-dominated past, but as a current legal factor that has been underrated as far as influence on law-making is concerned. Hindu traditions, whatever they may be in detail, manifest themselves in the form of basic concepts (not to call them Chiba's 'legal postulates') and thus become readily available ingredients in contemporary attempts to devise new sustainable models for the development of Indian laws. Since this process appears to be heavily feeding on certain understandings of the Hindu past, it is being alleged by many scholars that this is a dangerous return to chauvinistic, fundamentalist Hindu concepts. An attempted return there may be on

the part of some Hindus, but what was there before is not the same any more, it exists only in the forms in which it is represented to us. Ancient myths cannot just be turned into reality quite as simply as scholars from all kinds of disciplines seem to assume.

I see a constructive use of awareness about ancient Hindu concepts in today's secular Indian context, a productive employment of selected aspects, not a reinstatement of a past which tends to be perceived as ideal and even 'golden'. I do not accept that the current process of greater awareness of Hindu cultural concepts is bad in itself. What is wrong with India seeking to rely on its own cultural concepts, rather than borrowed western ones? Those who oppose this deny in effect that there is anything useful to learn from India's past. That is not only a blatant refusal of 'tradition' for the sake of modernity, it is an even more brutal attempt to assimilate India to western models, to de-indianise and of course de-hinduise the whole system. That is today being resisted more openly than in Gandhi's time and manifests itself in a variety of ways. Since this process involves neither blind copying of the West nor an equally blind turning towards militant *hindutva*, the ongoing process of legal reconstruction in India will in my assessment never be turning into legal hinduisation. Could you imagine that some outsiders would dare tell the Germans to forget about their cultural traditions when planning for new laws? This is what legal scholarship and much writing about women and the law is imposing on current Indian developments. I need to explain this further.

Ancient Hindu law from its Vedic beginnings was not a western-style legal system with codes and cases that bind through the principle of precedent, but respected at all times the situation-specificity of justice. Ancient Hindu law, like Greek law, was based on natural law principles. Law did not start with the Hindu pandits or with the British. This is immediately evident from the first principle of *rita*, macrocosmic Order, with a big O, a concept which today's Indians seem to have forgotten. Law, in this case, is found outside the realm of the human, but there is a subtle link between cosmic order and human existence, found in the Vedic system of elaborate sacrifices to maintain the Vedic vision.

However, even if that is not a subject that interests lawyers, and it seems to belong into religious studies rather than law, the foundations of Indian legal concepts are buried here, under the roots of the Vedic tree. More evident linkages between appropriate human action or *dharma*, the effects of that action through the *karma* concept, and their intricate co-ordination are found when we turn to an analysis of the key concept of *dharma* itself. This term neither denotes just 'religion' or 'law', but the idealised duty, placed in the classical period, well before Christ, upon every individual, to contribute to macrocosmic as well as microcosmic order. In other words, the central expectation is that an individual will strive to do the right thing at the right time and will give his best. Appropriate action, following one's duty, is the aim of life, not just *moksha*, as even leading Hindu law textbooks try to argue. Just as a sideline, one can look at Article 51-A(j) of the Indian Constitution of 1950, which reads that it shall be the duty of every citizen, 'to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement'.

Nobody can tell me that this is not a suitably rephrased secular way of saying that every citizen of India should follow his or her *dharma*. But what is this *dharma* if we translate it as ‘appropriate action’? Given the situation-specificity of Hindu law, there is no one prescription possible for this. It is a very wide concept, something like ‘rule of law’, into which one can fit ideal democracies as well as dictatorships, as Hans Kelsen found to his horror when the Pakistanis abused and defiled his wonderful theory of ‘pure’ law.

In Hindu law, the famous battle scene of the Bhagavadgītā in which the warrior Arjuna is tormented by scruples about killing his relatives on the other side tells us through Krishna that a warrior’s *dharma* is to protect order and to kill, if necessary, never mind terrible emotional upsets and the resulting bloodshed. Order, both macro-and microcosmic, has to be protected, and if need be, this has to be done by violent means. Hindu law is one of the non-Western legal systems that justify the killing of a bad ruler, like Chinese law and many African laws. Indira Gandhi, I am sure, knew this when she imposed her infamous Emergency, which provided a fairly recent, much-misunderstood example of how to protect a larger order in the long term by imposing an emergency, when in fact she was acting like an ancient Hindu ruler. As we know, she soon faced political death as a democratically elected politician because her Emergency was in turn abused, and real death almost inevitably followed, as she could not control the forces that threatened to rip the country apart and was herself blamed for being a divisive element.

Dramatic struggles over good and bad, over justice and righteousness hide deeper issues in the operation of Hindu law, in ancient times as well as today. The Hindu system of *dharma* was a theoretically beautiful but practically untenable method of self-controlled ordering. It was clearly too idealistic, as it did not work in practice. The ancient texts tell us quite clearly why: People are bad and selfish, they need to be put under control, otherwise there will be chaos. The very same texts that speak about the golden age of *dharma* like a strong bull with four solid feet, also indicate that in the degenerate era, the *kaliyuga* in which we seem to be forever living, there is no self-controlled dharmic order any more, but merely what I call ‘assisted self-control’ through the threat of punishment, conceptualised as *danda*, the stick, the ruler’s punishing rod, or the donkey’s stick rather than the carrot (Menski 2003).

Hence, I am now saying that it was probably never a historical fact that there was a Golden Age of Hindu law. It appears that the realisation struck very soon that self-controlled order would merely allow the big fish to swallow all the small fish, and would ultimately lead to disaster even for the sharks. To avoid ‘shark rule’, which is what the classical term *mātsyanyāya* actually means, a scenario of ‘give and take’ needed to be promoted. This is precisely where the key concept of *danda* comes into the picture.

The quick assumption by Orientalists and colonial legal historians has been, and continues to be, that *danda* is about punishment, cruel punishments comparable to the even more ‘barbaric’ Chinese, and the Muslims with their hacking off of hands and feet. It suits us and some Asian and African dictators, to take such perspectives. Such interpretations also help us, in the West, and assist

members of the Indian elite, too, to perceive Asian jurisdictions and legal systems superficially as primitive, barbaric systems of suppression. From this, as we shall see in a moment, flows then the political argument that therefore Asian legal systems should long ago have copied Western models to come up to scratch, perhaps most prominently voiced in human rights terms and in demands that India should implement a uniform civil code along western lines to secularise and uniformise the nation. In this way, the maintenance of personal law systems in virtually all Asian and African states is treated as a medieval relic, to be got rid of as fast as possible. The Garden of Eden, as Professor Derrett in his reformist euphoria called it in 1957, smells of culture-neutral neocolonial medicine, not of Eve's apple blossoms (Derrett 1957).

Two issues arise here in relation to the issue of punishment, which looks like state involvement in people's lives. The first, narrower point is that we need to understand that *danda* is not necessarily about physical punishment, but constitutes a deterrent threat. Thus it is the threat of punishment, or the fear of being punished, that maintains and strengthens the self-controlled order system of *dharma*. It is not a carte blanche for the government to make laws and regulate every conceivable issue in the world. *Danda* is about accountability at every level, not the power to make laws.

However, we as observers, misguided by lots of myopic scholars, and a bad current reality (for example, India has one of the most corrupt bureaucracies in the world), have lost the bigger picture. We have become so focused on certain legal axioms that we have not noticed that Hindu law and Indian law, together with many other Asian and African systems, are not just a Western-type law. The assumption that law is something that can just be made by a state and imposed from above, Tony Blair style, is only one way of looking at law and law-making, which may be dominant in the world, but was not part of classical Hindu law. In other words, traditional Indian laws are not based on such positivist assumptions. The proof lies in the fact that the *rājā* was a servant of *dharma*, and his major two obligations were to protect his realm from outside aggression and to ensure that his people lived together peacefully and in a way conducive to the *rita/dharma* complex. He did not have the right, even, to prescribe how his people should live.

How do we know? One could go into much detail here on the key concept of *sadācāra* as a source of *dharma*. In short, as Derrett et al. (1979) told us a long time ago and other scholars confirm, the major element in defining situation-specific justice in any one situation is an assessment of what is 'the done thing', of what peers and one's own family and community consider appropriate. Classical Hindu law, having started from natural law roots, thus gradually metamorphosed into a legal system that proponents of the historical school of law like von Savigny and Eugen Ehrlich would easily recognise. Hindu law was, like African laws, based on socially operative normative orders and did not need a state legal system to maintain order at the local, individual level. The *rājā* and the whole system of dispute settlement, encompassed in the multi-faceted term *vyavahāra*, which immediately conjures up images of courts, wigs and lawyers, were at one extreme

end of dispute resolution mechanisms, they were not at the centre, and were certainly not directly involved in every dispute.

But indologists and legal historians alike have presented developments in Hindu law as though the situation-specificity of the traditional law was at some point replaced by codes and state-made laws. Robert Lingat in his excellent but too legocentric detailed study of the classical law of India (1973) saw a transition from *dharma* to law – hence the title of this lecture. Even Lingat did not argue that the classical Hindu law was or became the same as a Western-style civil law system, or common law as the British knew it. So what is or was Hindu law? To what extent did it know and use the methods and techniques of legal positivism and codification of laws?

I researched this aspect in detail for the past few years for my new book on Hindu law (Menski 2003). As expected, I found that the concept of a ruler making law was of course known, but a ruler who overstepped his limits would clearly risk his life. He could not impose the Hartian ‘primary rules’, but was more closely associated with making ‘secondary rules’ in Hart’s terminology, which emphasises rules about rules, such as evidence and procedure. Classical Hindus were left to ‘assisted self-control’ with rather minimal state involvement, which was everywhere in the traditional Asian and African legal worlds turned into an expensive and potentially disastrous and hence undesirable technique of making law or solving disputes. Classical Hindu law, in other words, remained anti-positivist in its basic orientation, and even the state itself, not surprisingly typically termed as a ‘soft state’, did not demand that it should be involved more than absolutely necessary in legal processes. Everywhere, rulers were told to leave the customary laws of their various people intact, and to deal only with grave abuses of order that could not be resolved by localised negotiation.

The positivist construction of ancient Hindu law can be traced back to the early British pioneers like Colebrooke and Jones in the 18<sup>th</sup> and 19<sup>th</sup> century. It is evident that Colebrooke himself reconstructed Hindu law so that, at the end of the day, it was found mainly in two codes, the *Dāyabhāga* and the *Mitāksharā* (Menski 2003, chapter 4). During this reconstruction process, the *rita/dharma* complex was defined away as ‘extra-legal’, perhaps religion, certainly tradition, not custom, because that caused the British a lot of trouble, but certainly not relevant for law.

Significantly, Indian scholars fell in love with this colonial representation of post-classical Hindu law as proper law. At least, Hindu law appeared to be respected as a system of law. It is important to note that the pandits who worked with the British until 1864, and knew better, were simply shut up by authorities like Colebrooke and others, who found the classical texts too cumbersome and were abhorred that the pandits seemed to give them different advice in every case. The indigenous experts may not have understood the British conceptualisation of law, but one suspects that they maintained a strategic silence, knowing that their methodology would not be accepted by the new rulers. Colebrooke surely understood what Hindu law was really about, but he was so focussed on creating a formal legal system of regulation along positivist lines that he did not have time for the finer points of Hindu jurisprudence and behaved like a bull in a china shop.

The resulting failure of communication between pandits and representatives of the Raj is therefore easy to explain. The British judges asked about the law on a particular point, while the pandits answered with an exposition of the *dharma* of that particular situation. The British wanted certainty and precedent, while the pandits remained concerned to protect situation-specific justice. As the Nelson episode from Madras shows (Derrett 1961), the British were not ready for self-critical legal analysis, and the pandits were not confident enough that they could persuasively guide the British towards enlightenment about Hindu law. No miracle that the pandits and maulvis were sacked in 1864.

After that, the British had even more discretion to construct Anglo-Indian and Anglo-Hindu law. The familiar story resulted, in the famous words of Derrett (1968, chapter 9), in the ‘hybrid monstrosity’ of Anglo-Hindu law as a ‘bogus legal system’, which was neither English law nor Hindu law. We know well that the precedents of Anglo-Hindu law were not always in line with what common Hindus thought, but once the law makers had taken charge, they overpowered virtually everything and everyone. They paid lip service to customs, for example, but made it so difficult to prove customs that their scope was further restricted. While the British thought they were doing a good job in uniformising and streamlining the traditional Hindu law into a system of rules that could be used in courts, the living actual Hindu law largely went underground and became more of an unofficial than an official law.

In the late colonial period there was much talk of the need for codification and modernisation of the Indian legal system. I found that much of this discussion was not actually about Hindu law, but about dissatisfaction with the gradually outdated earlier codifications of general laws, which were, after all, also important tools of colonial hegemony.

In the postcolonial period, building on some earlier reform projects such as the outlawing of *sati*, allowing widow remarriage and the restraint of child marriages in 1929, the new rulers of India felt that Hindu law needed to be reformed and modernised to facilitate the development of India in every respect. Modernist models were praised as virtual model solutions to many perceived problems and Dr. Ambedkar as well as Jawaharlal Nehru spearheaded the argument for more law and social engineering through law. Some remarkable reforms were indeed put on the statute book during the codification of Hindu law in the 1955/56 Acts, such as the criminalisation and abolition of Hindu polygamy as well as a new regime of succession rights for Hindu widows.

But the new legal reforms constituted an intricate compromise. First of all, the personal law system was maintained, so that it did matter whether a person was a Hindu, or a Muslim, or anything else. The perceived remedy for that kind of legal pluralism and the resulting conflicts of law was perceived to be the introduction of a uniform civil code. Dr. Ambedkar wanted this to be a fundamental right, while it ended up as a Directive Principle of State Policy in Article 44 of the Indian Constitution. This has remained an excellent example for ‘Waiting for Godot’. Article 44 provides that ‘[t]he State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India’ and seems to assume a

programme of development in which, ultimately, there is no room for the personal law system. But what has happened is that there is still not – and there never will be – a uniform civil code in India. Apart from a lot of politics, there are at least three major reasons for this.

The first reason is that greater legal uniformity has gradually been created by judicial interventions as well as legislative measures that have reconstructed the personal law system in such a way that the system itself remains intact, but disparate and openly discriminatory rules have been streamlined. For example, the right of a Christian wife to ask for divorce on the basis of simple cruelty, which was denied to Christian women under the Victorian provisions of the Indian Divorce Act, 1869 was given from 1995 onwards in a variety of High Courts. Meanwhile, the Indian Divorce (Amendment) Act of 2001 has created a large number of divorce grounds for Christian spouses in India, roughly parallel to the provisions under Hindu law.

The second reason for holding back about the uniform civil code is that as soon as the BJP came into power in the late 1990s, it struck the loud modernists that a uniform civil code made by an allegedly Hindu fundamentalist party would lead to hinduisation of Indian laws as a whole, as though that was not already the situation in many different ways.

The third reason is most interesting here. Indian law makers, in Parliament, in the executive and among the judiciary, began to see more clearly that pushing for legal uniformity, to take just one prominent example, meant imposing identical state law from above on all Indians, thus applying straightforward positivist methodology in reforming Indian laws. It was beginning to be realised, as some judgements very subtly disclose, that this implied potentially that through the modernisation process Indian law was meant to be de-culturised and more specifically de-hinduised. I believe that it is this realisation which has acted as a major force towards the creation of postmodern Hindu laws, a process which has obviously had major implications for the Indian legal system as a whole.

I have shown earlier how deeply Dieter Conrad was involved in debates about the interplay of ‘tradition’ and modernity in the shape of colonial and early postcolonial legislation. Focusing on the synthesis of ‘pre-modern’ Hindu and Muslim cultures, as he saw them, with colonial legal models, he missed an element of continuity of this synthesis which has become ever more prominent in the recent past. For various reasons, Conrad and his colleagues have not given the emerging postmodern developments in South Asian laws and specifically in Hindu law the importance that they have now clearly claimed. It was perhaps too early in the 1990s to write about this in terms of postmodern legal analysis. My own efforts to explain and analyse this complex field reflect the fact that it is only in the 21<sup>st</sup> century that we as scholars began to understand better how the most recent developments need to be interpreted. Conrad somehow stopped with the negative assessment of a huge discrepancy between legal promises and socio-legal reality. But Conrad’s life work has significantly prepared the ground for deeper analyses of postmodern developments in Indian and Hindu law that we can pursue today.

What I am seeking to argue here is that the earlier conversations and observations about the debates over ‘tradition’ and modernity have now metamorphosed into a scenario of postmodernity, in which the earlier perceived clash of the binary pair of tradition and modernity has become more of an intricate give-and-take, live-and-let-live scenario, in which conceptually competing forces have been made to realise that adversarial competition would be suicidal. There is no real hope of declaring any winner in the head-on contest between ‘tradition’ and modernity. There is a strong but mainly unspoken realisation that politicised rhetoric has driven too many debates and was simply not good enough to offer constructive solutions for the burning socio-legal problems of huge nations like India, Pakistan and Bangladesh. This has led, in postmodern Indian law, to an explicit recognition of the fact that intricate compromises will continue to be necessary. To take only the most evident example, Indians can live with the Indian Constitution, but recognise now more clearly than before that it does not safeguard the very fundamental rights it so vociferously promises. What is the point of having a wonderful set of guaranteed fundamental human rights if hundreds of millions do not know what has been guaranteed to them (and not just a literate elite) and thus cannot claim their legally protected and guaranteed rights. This is not only an issue of lack of legal literacy, which is a universal problem. The closely related problem of lack of accountability of those who do know the law and can operate and manipulate it is a key element in this context. Police officers in India, and really all over South Asia, can still arrest and rape women (and men) as they please, without much fear of punishment. Husbands and mothers-in-law can murder newly wed wives and can rely on strictly applied rules of criminal evidence to escape conviction.

But there are significant changes. Much has recently been written about the Shah Bano case and its aftermath in terms of communal politics and the protection of the rights of divorced Muslim wives in India. What has not been brought out clearly as yet is that all Indian ex-husbands are now responsible for the maintenance of their ex-wives. This means that once he marries a woman, the Indian husband of whatever description has now potentially shouldered the burden of lifelong maintenance for his wife, even after he divorced her, because the law, already in 1973, amended the definition of ‘wife’ to include ‘divorced wife’. This protective rule for women is now without any specified financial limits, it used to be 500 Rupees. Today, at least on paper, what a divorced woman will get from her ex-husband depends on the facts and circumstances of every case, which should remind us of situation-specific justice in the traditional Hindu law system. Our analysis of this evidently gender-sensitive legal change can be carried further, though, and then comes to see this rule as a clever device by the almost non-existent and certainly impoverished Indian welfare state to protect the state’s coffers against millions of claims by destitute wives and children. So, it seems, postmodern Indian law, inspired by Hindu concepts of marriage as a sacrament, has rediscovered the family, and its protective obligations are now being used to protect fiscal agenda in the context of social welfare.

Further, Hindu husbands for whom polygamy was banned in the Hindu Marriage Act of 1955, could until recently simply argue their way out of prosecutions by claiming that certain essential traditional rituals had not been performed. But more recently, although bigamy remains outlawed for Hindus, the courts have begun to regulate it, seeking to protect women and children involved in such polygamous arrangements. Applying a presumption of marriage, even though the polygamous marriage is legally void, the courts are treating women in such cases as entitled to the benefits of marriage. Hence they do not send the husbands to jail, but make them work for both sets of spouses and any children there may be.

Earlier, nothing seemed to work in India for women, children, bonded labourers, all the poor and deprived. Today, there are hopeful signs that the courts, in particular, are concerned to make sure that the law is not misused by privileged sections, among whom we must count first of all men as opposed to women. Due not only to the patriarchal orientation of Indian laws, but the whole spectrum of illegalities condoned and promises unkept, the Constitution and with it the whole 'rule of law' model lost much credibility, as the formal state law could not, and did not, fulfil its legal promises of equality, non-discrimination and protection of basic rights. It is this realisation, in particular, beginning to be expressed since the early 1980s by activist judges like V. R. Krishna Iyer and others, that has weaned Indian legal policy makers away from positivist presumptions of superiority. In turn, this has led to a reconsideration of some aspects of Hindu legal history that might help in alleviating the current problems. The result of this re-orientation is, in my view, the emergence of postmodern laws in India that I began to illustrate above.

## THE POSTMODERN SCENARIO

I know too little about political science to pronounce on the extent to which also in that field of academic analysis and observation of practical realities postmodern trends are visible. Clearly, postmodernity as a phenomenon is so complex that there are multiple postmodernities in different fields. From a theoretical as well as applied legal perspective, the complex term of postmodernism has been helpfully summarised by the Kieler jurists Peters and Schwenke (2000: 801-802):

Post-modernism is a highly ambiguous term, whose meaning depends on the discipline [...] in which it is used, and on the prior notions of 'modernism' and 'modernity'. Roughly speaking, post-modernist thought considers as basic the experience of plurality and difference. It points out that there are highly diverse forms of knowledge, systems of morality, personal plans of life and behavioural patterns. Post-modernist theory welcomes these heterogeneous positions and finds their discordance absolute. It protests against the totalising monopolisation of certain types of rationality and against universalist concepts that raise false allegations of absoluteness.

Postmodern perspectives suggest that legal scholarship needs to look with more vigour for evidence of legal pluralism and of opposing trends to Euro-American globalisation (Legrand 1996), matching the comment by Patrick Glenn (2000) that there are now a number of globalisations. Indian law makers have simply lost faith in the alleged superiority of western models; they have begun to remember some of their own fragments of legal history and conceptual elements that are now reconstructed as building bricks for postmodern Hindu law and Indian laws. Typically, therefore, these postmodern laws tend to manifest themselves in complex processes that involve reconstruction of today's laws by reference to presumably indigenous norms and values as well as Western models. It looks messy and inconsistent, but there is a deeper sense of purpose behind individual developments. This means, then, that the earlier exclusive reliance on modern western models has had to give space for a renewed and vigorous hybridisation of Indian laws and other legal systems.

Leading legal scholars have sought to declare this process impossible, assuming the death or displacement of indigenous laws. This had been argued, for example, by Marc Galanter in his earlier work. Even recently, Galanter and Krishnan (2001: 285) simply reiterate, relying on Galanter's old assertions, that 'there is no evident support for the restoration of traditional Hindu law' and suggest that 'there is at least a slight leaning toward dissolution of the personal law system in favour of uniform territorial law, together with a "secularization" or de-sacralization of the law of the largest community, and there is no indication of any inclination to devolve the administration of personal law to the religious communities' (*ibid.*: 286-287).

In my view, all of this reflects wishful thinking rather than a faithful summary of the current position of Hindu law. This looks to me like deliberate stalling of any progress in research on contemporary Hindu law. The system of Hindu law is simply declared outdated, defunct and dead. There is no need for lawyers to study it any longer. If any legal historians wish to take it up, that is fine, but proper lawyers need not bother, there is nothing more to study about Hindu law. So far, then, the dominant signs are that Western *hubris*, purported overload of information within national legal systems, and lack of knowledge about Hindu law or modern Indian laws generally impede and prevent processes of free-flowing exchange in the global arena, even mainly within Euro-America. The Indians are invited to learn something from us, but there is nothing left for us to learn from Hindu law.

However, in Indian law, and especially in Hindu law today – and really already since the late 1970s - the recognition that law and reality are in danger of moving even further apart has been very strong, as I have explained. Seen from this angle, the rethinking of Hindu law and Indian laws generally is also an attempt to bring the official laws and unofficial laws of Chiba's scheme closer together. But where are the 'legal postulates' of Chiba's three-level structure of law?

The postcolonial Indian legal system as a whole found itself in crisis, as we saw, and as Conrad noticed decades before us. This was a deep crisis, elaborately discussed but not solved by Upendra Baxi (1982), the current doyen of Indian

academic lawyers. A deep gulf had been created by unfulfilled expectations and broken promises, and indeed the picture is only slightly better today than it was in the 1970s. But something is different today compared to the situation a few decades ago. In the late 1970s, as Conrad's work confirms and I also showed here, we still see a strong belief in 'development'. Dieter Conrad's work on basic needs, *Grundbedürfnisse*, contributed some useful thoughts. I was a student during the early 1970s and became increasingly aware of these debates about frustration of even the most basic needs. Going to India was not so much a shock as an early confirmation that the best paper rights are not implemented and thus defunct in practice. Of course, I did not know then that eventually I would be researching and teaching Hindu and Indian laws, but the shadows of deep disappointment with top-down legal regulation began to be cast. In Conrad's work from a slightly later time, the 1980s, there are early indications that, for example, public interest litigation as a remedial tool for deprivation of fundamental rights might be useful, but the state-made law would never just 'solve' such enormous problems.

#### CONCLUDING COMMENTS

I feel privileged to have remained part of such debates over decades, and strongly believe that classically trained indologists like myself have much scope, and in fact a professional obligation, to contribute to the ongoing conversations about legal developments in India, and Hindu law in particular. Only scholars who are able to act as interdisciplinary analysts and as intercultural interrogators can make sense of what is going on in postmodern Hindu law today. Only they can assess what impact these partly backward-looking influences will have on the legal future of that huge elephant called India.

Postmodern Hindu law and postmodern Indian laws are today found in an ongoing process of reconstruction. This is nothing new in itself, since we should long ago have learnt to see all laws as dynamic processes. What is new, however, and thus difficult to comprehend for some, is that 'tradition' and Hindu traditional concepts as legal postulates, for that is what they are, should have become so critical as ingredients of postmodern law making in India. In a global context, this means that Hindu law is neither dead nor defunct, but it has the potential to serve as an instructive model of how postmodern laws are created and operate in practice.

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