> presupposes that what is at stake is not just the lawyer's own 'highly particular' beliefs or a personal 'need' to ease one's conscience, but a broader and more objective vision of the common good. (p 594)

Working that out may, at times, be easier said than done.

This detailed, carefully nuanced book may make trite answers a little harder to come by, but it is a rich contribution to a contemporary debate that is growing ever more complex.

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Hinduism and Law: An Introduction

Edited by TIMOTHY LUBIN, DONALD R DAVIS JR AND JAYANTH K KRISHNAN
Cambridge University Press, Cambridge, 2010, xiii + 301 pp (hardback £58) ISBN: 978-0-521-887861; (paperback £20.99) ISBN: 978-0-521-71626-0

The Spirit of Hindu Law

DONALD R DAVIS JR
Cambridge University Press, Cambridge, 2010, 208 pp (hardback £53) ISBN: 978-0-521-87704-6

As fillers in the fairly large gap among recent texts that aim to introduce Hindu law to a wider readership, these books merit a cautious welcome. Written largely by contributors based in the United States, *Hinduism and Law* constitutes something of a challenge to European scholars.[1] It demonstrates that Hinduism and law can be studied through multiple lenses and raises issues important in themselves and also for a wider study of comparative law. This desire to make Hindu law relevant to a wider discussion on comparative law is also evident in Davis' own *The Spirit of Hindu Law*.

The title of the collective work avoids the more generally used 'Hindu law'. For the editors 'Hindu law' represents a narrower field that concentrates on the study of the classical Dharmaśāstra textual sources and, presumably, the commentaries and digests that expand on this literature. They claim to look more broadly at Hindu traditions and how they link to and inform the study of law. The *Spirit of Hindu Law*, by contrast, has a narrower focus on the Dharmaśāstra textual

1 This challenge is identified by W Menski, 'Review of Timothy Lubin, Donald R Davis Jr, and Jayanth K Krishnan (eds), *Hinduism and Law: an introduction*', (August 2012), *Bulletin of the School of Oriental and African Studies* 28–29.

genre. The range of sub-topics covered by the contributors in *Hinduism and Law* reflects the editors' claim, as does the grouping of the chapters into three main parts on 'Hindu law', 'Law in ancient and medieval Hindu traditions' and 'Law and modern Hinduism'. Despite the bold choice of title, the editors acknowledge that the terms 'Hindu' and 'Hinduism' are somewhat problematic and attempt to contextualise their emergence early on. This is not unlike the situation of other writers on India who confront the fact that these imposed terms lack coherence and defy making any real sense to Indians. Yet, as the contributions to *Hinduism and Law* also reveal, writing by Westerners and their Indian imitators has not challenged to any significant degree this and other current nomenclature for studying Indian phenomena. Nor has the underlying framework giving rise to its existence, or the research questions conditioned by that framework, been much revised.

Through work that contextualises Western writing on India, we know that it has largely represented the Western experience of India and not the Indians' experiences of their own realities. That Western experience may be seen as framed by the Christian religious culture of the West, which has succeeded in stamping its own questions and answers upon the study of Indian culture to the degree that Indians have themselves adopted those same frameworks without necessarily being able to make sense of them.[2] It is unfortunate that the Christian theological underpinnings of the conceptual frameworks thereby established are barely questioned in either book. In fact, Indian legal studies both abroad and especially in India have yet to come to terms with the problem of being trapped in such a Eurocentric framework.

Thus the editors' introduction in *Hinduism and Law* follows Davis' *Spirit* with insistent claims: that Hindu law is characterised by its grounding in 'authoritative texts' (p 3), which provide it with a 'scriptural foundation' (p 6) as with the Abrahamic traditions; that there is a 'Hindu theology' (p 6); that 'Hindu law is a system of religious law, analogous to other traditions such as Jewish, Islamic, or canon law'; that Hinduism is a coherent unit of discourse (p 6); that Hinduism (and Buddhism and Jainism) are 'religions' (p 3); and so on. These 'findings' – they are more like hyperbolic and empirically untested claims generated by the framework described above – demonstrate that the compilers have adopted the Western conceptualisation of Indian traditions as being essentially 'religious' alongside their own religious culture, Christianity, as well as Islam and Judaism.

Following S N Balagangadhara,[3] I now refer to this as a process of '*anothering*', which is set in train by Christianity and involves depicting another culture as an erring variant of Christianity, and providing it with a foundation through which

2 S Balagangadhara, *'The Heathen in His Blindness . . .': Asia, the West, and the dynamic of religion* (Leiden and New York, 1994); S Balagangadhara and M Keppens, 'Reconceptualizing the postcolonial project: beyond the strictures and structures of Orientalism', (2009) 11 *Interventions* 50–68; R Gelders and S Balagangadhara, 'Rethinking orientalism: colonialism and the study of Indian traditions', (2011) 51 *History of Religions* 101–128.

3 Balagangadhara, *The Heathen in His Blindness.*

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its falsity is inscribed. The books under review follow this path, or at least give no indication that it is a problem to the fairly large gathering of Indologists, historians of colonialism and, indeed, researchers of contemporary Indian law. The kinds of smuggled-in (often now secularised) Christian theological concepts and philosophical assumptions referred to above are not isolated instances but permeate various contributions. We thus read of 'divine will' (the editors, *Hinduism*, p 11); 'Brahmanical theologians' and 'Brahmanical religiosity and soteriology' (Olivelle, ibid, pp 31 and 32); that Hinduism had 'its roots in Dharmaśāstra' (Williams, ibid, pp 112 and 118); and that the Dharmaśāstra provided 'codes governing human conduct' (ibid, p 123), that the Vedas provide 'commands' (ibid, p 130) and that texts found human practices (all McCrea).

The predominant assumption in both books – that pre-colonial Hindu law was based on a system of textual, codified laws upon which are founded human practices – entails considerable ambiguity in at least three senses: first, the position of Brahmins, who are said to have some kind of dominant position in the Hindu hierarchy and are presumably able to dictate to the rest of society what the rules are; secondly, the position of rulers who should presumably enforce those rules; and thirdly, the role of the rest of the social set-up. Neither the contributors to *Hinduism and Law* nor Davis in *The Spirit of Hindu Law* are able to endorse the stand taken by Menski,[4] who resists the temptation to read the Indian legal material from a positivist legal or religious standpoint, and recognises the predominance of custom and individual decision-making in socio-legal reality. In *The Spirit* Davis does mention his 'intellectual disagreements' (p ix) with Menski but does not say on which points.

This is not to say that some of the authors do not attempt to grapple with the question of the state–society relationship as depicted in the pre-colonial Hindu legal and other texts. Thus Michaels provides a brief description of the variations in practices of law in some of India's regional systems, including the Marathas, Kerala and Tamil Nadu, showing a great variety of such practices in kingly courts and other, customary fora.

Lubin distils from Dharmaśāstra writing the conclusion that:

> In spite of the fact that the Dharmaśāstra is intended to define the generally applicable rules of correct practice, one of those general rules directly confers authority on the standards of practice recognized as applying within particular social groups and organizations. (*Hinduism*, p 140)

Such a finding evidently leaves many a scholar in a quandary about how to assess textual sources that defer to the prevalent local practices. One can see this struggle

4 W Menski, *Hindu law: beyond tradition and modernity* (New Delhi, 2003).

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with Davis in *The Spirit* too, where he devotes a whole chapter to *ācāra* (broadly, customary practice) but then seeks to find the source of custom in 'norms accepted and imposed by the leaders of various social institutions' (p 146). This slippage, indicated by the desire to locate custom in some rule-giving structure or authority, betrays the attitude that, if it is not the Brahmins, there must be some other sort of top-down rule-emanating authority.

Yelle poses a brilliant challenge, not only stating that the Dharmaśāstra would once have been an oral tradition of maxims or proverbs that circulated and changed, much like early Jewish law, but also noting the 'close association between the poetic form of many ancient laws and their function in an oral culture' (*Hinduism*, p 191). As such, although prescribed in written texts, he says that the formulas regarding ordeals were meant to be spoken to impress an audience consisting of both the literate and the illiterate alike. This performative dimension of the Dharmaśāstra underlines a view of Hindu law's textual sources as constituting not a 'command structure' but a set of legal heuristics. McCrea concedes, 'What one gets from these texts comes to sound less and less like an unshakably authoritative and oracular voice of truth and more and more like an interminable, and ultimately irresolvable, argument' (*Hinduism*, p 136).

The position of rulers is also ambiguous. The development of their role and their deployment of punishment measures (*daṇḍa*) are dealt with less clearly than by Menski[5] but important observations are made here and there. Cox struggles beautifully to explain the portrayal of the ideal ruler in a Dharmaśāstra commentary on the one hand, and in the poetic (*kavya*) tradition on the other. He makes important observations about the rulers' paramount duty of legal adjudication or supervision of legal transactions (*vyavahāradarśana*). Davis in both books acknowledges that punishment is imposed not just by rulers and often takes the form of ordeals (*prāyaścitta*). On the general law-making power of kings, Lubin says:

> There seems to be hardly any example of a king publishing a generally applicable law on his own authority, let alone promulgating an entire code. Rather, it seems to have been assumed that his general role was executive and judicial: to hear and adjudicate civil suits, to judge criminals, and to assign punishments for the guilty. (*Hinduism*, p 151)

While adjudication occurs in many locations, and not just as made by kings or their delegates, the Austinian model was not in use among pre-colonial Indians.

Several chapters in *Hinduism and Law* (Sturman, Williams, Rocher) provide some detail on the mismanagement of Hindu law by the British rulers. We

5 Menski, *Hindu Law*.

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have almost no details on the Muslim, Portuguese and French practice, although Olivelle suggests that more work needs to be done on the increased production of Hindu law digests as a result of the Muslim influence. Some well-known issues are reintroduced: the initial acceptance of the British rulers that some local legal practices would have to be acknowledged; the turning to pundits to discover what the Hindu law was; the choice to codify aspects of Hindu law; the allure of custom, which, ultimately, was also codified or written down in texts and recognised in the case law, all at the expense of knowing about ongoing practices. Scholars of legal pluralism will appreciate Sturman's observation that 'The colonial form of legal pluralism involved an abridgement of earlier forms of legal pluralism that had previously prevailed both in Europe and in the now colonized regions, and their replacement by a state-centered legal order' (*Hinduism*, p 91). As she notes, even the proponent of customary law, Henry Maine, eventually called for codification of Indian law 'upon the best European models' (ibid, p 95). All this was part of an overall enterprise that Rocher describes as retrieving the essence of a once glorious civilisation from its foundational texts. Far from rejecting wholesale the indigenous tradition, as Jakob De Roover has recently shown, the liberal toleration of the colonial state was driving to purify that tradition of its pagan elements.[6]

In a recent interview, Bharat Gupt is stated to have 'expressed disappointment that modern education has made us think that shastras written in Sanskrit are forms of "backwardness" and for pundits only and "several generations have been raised to look down upon the classical texts, particularly the Shastras or Smritis"'.[7] He was speaking of the science of performing arts genres, the Natyaśāstra, but what he said could well apply to the contemporary view of Dharmaśāstra conceived of not as a set of texts but broadly as the Indian science of law. The books under review may provide some indications for fruitful endeavours in rediscovering that science, but they fail to provide a broader framework for making it relevant to twenty-first-century Indians. This is despite the coverage of contemporary developments in some chapters that remain focused on a group of questions seemingly interesting for Western researchers. Perhaps their questions are ultimately too far removed from being able to address Indian realities and one may wonder then what the effort was for.

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6 J Roover, 'Secular law and the realm of false religion', in W Sullivan, R Yelle and M Tausig-Rubbo (eds), *After Secular Law* (Stanford, CA, 2011).

7 *The Hindu*, 31 August 2012.