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COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA (2nd ed), by Werner F. Menski. Cambridge: Cambridge University Press, 2006. 694pp. Hardback. £85.00/\$150.00. ISBN: 9780521858595. Paperback. £43.00/\$75.00. ISBN: 9780521675291. eBook format. \$60.00. ISBN: 9780511166785.

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This is a sprawling, engaged and engaging study in comparative jurisprudence. It provides, as the title indicates, an extended comparative study of the legal systems that function in Africa and Asia, notably those of “Hindu law,” “Islamic law,” “African laws” and “Chinese law.” But it seeks to do much more than that. It takes on conventional claims in contemporary Anglo-American jurisprudence on the nature, sources and scope of law, and finds the dominant accounts of the concept of law within this jurisprudence flawed and incomplete. Relying predominantly on secondary sources, Werner Menski, a Professor at the London School of Oriental and African Studies, eruditely presents his material within the framework of what he terms “global legal theory.” His is a project that accepts the desirability (perhaps need) of transnational jurisprudential studies, but vigorously rejects the possibility of a singular or systematized universal legal order. To the contrary, Menski’s core thesis is that the search for a uniform set of rules for a global order is bound to be futile because laws embody and reflect the socio-cultural particulars and experiences of functioning societies, and which, although transmitted longitudinally within the society, are nonetheless complex, fluid and dynamic. Any adequate theory of law and of a legal order therefore must, among other considerations, take account of the particularized socio-political institutions of the society, that society’s belief systems, its politics and its history. The one universal characteristic of all legal systems, he claims, is thus the inherent tendency towards “plurality-consciousness.”

Menski’s arguments are advanced in two stages. The Introduction and first three chapters summarize contemporary “mainstream” jurisprudential claims about the nature and sources of law. He finds unpersuasive the rather facile view that “globalization” will lead to a standardized and uniform legal regime, whether at the international, supranational or national levels. Evoking anecdotal evidence, he demonstrates that efforts to harmonize legal rules even within societies such as Western Europe where the effective functioning of rules is reasonably well-entrenched, may generate such socio-political polarization that it may be too costly to proceed with; at least, not unless one is willing to do significant (and ultimately unacceptable) violence to social structures. This presents him with a launch pad for examining extant liberal theories on the nature of law. Invoking anthropologists and sociologists as readily as political [*714] theorists and legal philosophers, he in turn explores and rejects conventional conceptions of law as arising from “legal positivism,” “natural law,” and “sociological and historical jurisprudence.” These conventional conceptions of law he criticizes for being excessively “legocentric” – that is, for viewing law as an autonomous body of knowledge that can be rationalized within a defined sphere, and on the basis of a limited set of assumptions about human nature

and political institutions. These approaches all suffer from the hubris of believing that each alone can offer a complete and successful account of law. And each, he finds wanting for failing to explain some facet of law demonstrably present in a given society. Legal positivism (at least in its Austinian incarnation), for example, fails to account for the roles that religion and morality continue to play in post-industrial Western societies, let alone those that remain highly agrarian and tradition-bound. Natural law clearly provides inadequate explanatory basis for laws that flow as much from the exercise of material power and utilitarian considerations as from moral or religious concerns. And as for socio-legal jurisprudence, it hardly suffices to explain the basis for the role of the state in the lives of many inhabitants of so-called developing countries. These flaws of legal theorizing, he contends, can be dealt with only by an approach that sees law as necessarily “plurality conscious.” This means that, rather than viewing law through the lens of any of the conventional jurisprudential approaches, law should be conceptualized as the manifestation of numerous interacting forces within society that transcend and depend on temporal forces within a given society.

The second stage of the presentation consists of four chapters, each approaching and sometimes exceeding one hundred pages. Here, Menski outlines four non-Western legal systems and attempts to show that each and all manifest his claimed characteristic of law as necessarily being “plurality conscious.” Each chapter presents in contextually rich fashion descriptive material on the legal system under discussion. In each case, he begins by exploring through extant scholarship the distinctive attributes of the particular legal order. What, for example, is Hindu Law (or, for that matter, “African Laws”), and what makes it distinctive? Next, he presents the classical grounding of the legal order under discussion, and, with the exception of “African laws,” traces its development over time in chronological order. In each case, he shows the extent to which the legal order retained the influence of the past on it, while attempting to take account of evolving developments in the present. Engagements with European commerce and culture especially through colonization in all cases present an opportunity for a sharpened focus on the dynamism of these legal orders. The post-colonial period and the demands of modernity and contemporary globalization offer further opportunities for exploration. In each and all of these phases, Menski is keen to validate his core thesis by demonstrating the complex interactions of socio-cultural forces that shape the legal regime and the extent to which, while new forces bring their own influences to bear, the [715] past also continues to exert significant influences on the legal order. Throughout, he makes inter-temporal comparisons within the legal order, suggests comparisons between the legal order in question and the other non-Western legal cultures under study, and above all, seeks to demonstrate the ways in which the legal order in question operates to meet his claim of the phenomenon of plurality consciousness as an ineluctable attribute of a legal order.

“Hindu law,” writes Menski, “is, not as much as African law but similar to Islamic law, a family of laws rather than a single unit.” The key to understanding it as a “holistic system lies in concepts of Hindu culture, such as *dharma*, which are so diffuse that most analysts appear to have given up interpreting them, while they are so firmly internalised by Hindus themselves that they do not appear to warrant detailed explanation” (p.201). “It is crucial for a solid conceptual understanding of the Hindu system to distinguish at least four interlinked stages of conceptual development within ‘traditional’ Hindu law itself,” he writes. “[F]rom the macrocosmic universal Order (*rita*) of the Vedic system to the microcosmic self-controlled order (*dharma*) of classical Hindu law proper, and the deterrence-based stage of punishment (*danda*) and more or less formal dispute processing (*vyavahara*) in the late classical and postclassical system” (p.200). “Since both Hindu law and religion have always been extremely complex constructs, it has been quite appropriate to speak of ‘unity in diversity’. . . . Hindu law has always been a living socio-legal system marked by much dialectic dynamism, forever evading codification and, thus, the control of powerful men who might have wanted to dictate legal rules to all others. Had Austin been able to work with Sanskrit sources, and to acquire an internal perspective of Hindu law, he would undoubtedly have had to give up the theory that made him famous” (p.202).

He tries to fill the knowledge gap of the non-Hindu by extended discussions of Hindu culture, Hindu world views, religious beliefs and political structures. How satisfactorily the reader finds the filling of the gap will depend in no small part on the scope of the reader’s prior knowledge. For an interested but minimally knowledgeable reader like this reviewer, the going can be tedious and the sifting dense. Menski is clearly a scholar with interest in and seemingly profound understanding of the laws of South Asian societies, and his discussion of Hindu law appears to be as much about engaging with other scholars familiar with that terrain as it is to inform the lay reader or student. Happily, for most of the book, the abstruseness that one encounters in the discussion of core concepts in Hinduism is the exception rather than the rule. Indeed, Menski’s concurrent adoption of a chronological approach to the presentation of the intersections of law and society helps generate some lucidity even in his discussion of Hindu law,

as it certainly does with regard to Islamic law and the other legal systems covered in his text. [*716]

Dating Hindu law to the Vedic era (c. 1500-500 B.C.), Menski contends that it had in these origins “both religious and secular natural law characteristics.” This was followed by “classical Hindu law” which flourished between 500 b.c.-200 a.d. The core difference between the two periods, it would appear, was that concepts of social order and legal norms grounded on rituals of sacrifice and action under the Vedic system gave way to conceptions of order derived from *dharma*: “correct or ‘good’ action of all individuals.” “Hinduism now became a plurifocal way of life, and Hindu law experienced socio-legal reconfiguration as every individual was now held to account, giving rise to a shift towards socio-legal approaches rather than reliance on Nature” (p.209). There followed a “post-classical period” exemplified by a shift in emphasis from the internal goodness of the individual to the shaping of norms for resolution of conflict among individuals, notably those relating to property and succession. “In a sense, there is still no official Hindu law, if by that we mean legal rules made by the state. There is only a different type of literature on *dharma*” (p.237).

The post-classical era is followed by “medieval Hindu law,” and from here, the material becomes a lot more accessible, and I think for any comparativist, a good deal more fascinating. Hindu society becomes subject to Muslim rule, and a culture (or group of cultures) that has cohered more or less continuously for almost three millennia has to confront an identifiably different world view that is no less coherently organized. How Hindu law maintains its distinctiveness while accommodating or being forced to accommodate Muslim rule is worth reading. It is of course a scenario that was, in that it had again to confront the arrival of European adventurers, merchants, soldiers and viceroys. Indeed, this is the scenario that unifies all four legal systems extensively discussed in this book.

According to Menski, “far from being forced to exist on terms dictated by the now dominant Muslim law, Hindu law became itself part of the official law, but largely on its own terms, so the result was an emerging pattern of strong legal pluralism” (p.237). The Muslim rulers of Hindu societies, he says, “learnt fast that it would be impossible to impose Islamic law on all subjects,” the vast majority of whom were rural. Muslim rulers applied Islamic law to themselves and co-religionists, but otherwise took a “detached, secular approach towards their subjects of different faiths, letting them carry on their own affairs within their own communities” (pp.237-238).

The cohabitation of Hindu law and the English legal order in India was not quite so *laissez-faire*, but neither is it an unremitting history of conflict and confrontation. In reality, the details, as lucidly related by Menski, reveal a complex and dynamic orchestration or legal ordering among ideas and institutions familiar to the ruler, and institutions and practices familiar and necessary to the ruled. As early as 1772, for example, the British Governor of Bengal ordered that “in all suits regarding inheritance, marriage, caste and other religious usages and its [*717] institutions, the laws of the Koran with respect to the Mahomedans, and those of the Shasters with respect to the Gentoos, shall be invariably adhered to” (p.241). On its face, the order appears unexceptional; but why limit the application of indigenous rules and norms to this class of suits? Would it matter whether the traditional method for resolving disagreements about “inheritance” necessarily involved “suits?” And would a disagreement between two brothers about ownership of property or the rights of a related widow be governed by this order? Finding the place of Hindu law within India’s colonization was thus not simply a matter of what colonial rulers proclaimed, but also of what Indians and colonial administrators did. Even if the colonial ruler is willing to accommodate through the text of laws indigenous practices, it does not necessarily follow that actual institutional practices achieved the asserted purpose. But in many ways, the 1772 declaration was indicative of the themes of accommodation between indigenous and colonial laws that were to follow. Areas of personal and family life, however imprecise the definition, were often regulated by indigenous legal systems, while areas of substantial commerce and public or criminal law were often within the bailiwick of colonial legal order. Nor was Indian colonial law tantamount to English statutory (or even common) law. And this raised yet another area of conflict. Even if the relevant legal order was reasonably predictable in matters affecting transactions among the “natives,” which legal order regulated dealings that crossed religious or ethnic groups? The answer to this question, even if officially decreed, was not necessarily stable across time and space. Often, the answer, far from being officially decreed, was negotiated among the participants themselves, a reality that is in keeping with Menski’s claim of law as necessarily “plurality-conscious.”

A perceptive question would be to ask about what happened to this complex amalgam of legal regimes following the end of colonial rule. After all, India (as much, and indeed given its bloody path to independence, more than most other

decolonized societies of Asia and Africa), embraced the notion that its post-independent identity as a nation state had to be embodied substantively and formally in a Constitution that explicitly guaranteed equal citizenship to all. Menski does not contend that a formal dual or tripartite legal order survives decolonization. What he does argue is that notwithstanding this guarantee, Hindu norms permeate the ways in which post-independent Indian laws, like its political institutions and social practices, have been shaped and interpreted. The central argument here, he says,

is that, over the past few decades, the indigenous nature of modern India's Constitution has gradually become more obvious and has visibly and invisibly been reinforced. . . . Equality has not been achieved, poverty has not been abolished, justice is still not safely guaranteed; the state itself (in its various manifestations) continues to be the biggest violator of law. After initial euphoric assessments, a hard look at reality during the 1970s showed that the entire legal system faced a fundamental crisis. This culminated in Indira Gandhi's Emergency from 1975 to [*718] 1977, a momentous and cathartic phase of Indian national development, during which Indian constitutional law was dramatically restructured, occasionally by explicit reference to Hindu concepts, which one can interpret as injections of Hindu-inspired self-cleansing mechanisms. (p.260).

He thus attributes the vigor of current Indian public litigation around issues of health, socio-economic justice and the environment, not as a "me too" adoption by Indian lawyers of practices pioneered in the West, but the practice of norms derived from Hindu (or at least local Indian) culture (p.268). (Perhaps not entirely by accident, the distinction between being Hindu and being Indian here becomes blurred in Menski's exegesis.) "Using such borrowing from the legal past in the garb of modern constitutional rhetoric, it has become possible for modern Indian constitutional law, within a framework of outward secularism, to develop a new culture-specific style of plurality-focused legal positivism influenced by Hindu principles," he assures the reader (p.270).

The interrogation of Hindu law just illustrated is carried out with equal vigor to the legal systems embodied in Islamic law, African laws and Chinese law. In their particulars, these systems differ, of course, from Hindu laws; but many of the same themes as those canvassed above recur in Menski's treatment of them. Their origins clearly are different. Islamic law was based explicitly on religion, while the grounding of Hindu, African and Chinese laws in religion can be fiercely debated. And one can question whether in fact each of these legal systems is properly classifiable as a coherent unitary legal systems; an issue that Menski confronts head-on, especially in the context of African laws. Moreover, to be sure, the emphasis of issues among these legal systems varies. African laws, for example, in their grounding in oral tradition (rather than written texts) and concepts of the proper balance of relationships between human beings and their natural environment, more closely approximate Vedic Hindu law than do Islamic and Chinese laws. Chinese and Islamic legal systems appear to have had more formalized institutions for ascertaining and interpreting the law as text, but they differed significantly in the extent to which the text was seen or presented as divinely ordained. All had to negotiate involuntarily their survival in encounters with the European political order and legal systems. Pakistan as an explicitly Islamic state, no less than India as a multi-confessional "secular" state had to confront the tensions between the postmodern constitutional guarantee of equal citizenship to all members of the polity and the professed grounding of the polity in religious norms. Even within an ostensibly same legal system, those responses could vary dramatically. Thus, while both Turkish and Pakistani societies may have rooted their indigenous legal orders in Islam, their responses to modernity, as exemplified in their encounters with Europe, were anything but identical. Meanwhile, despite the vastly different economic, religious and cultural circumstances of Northern Nigeria and India, both societies related in intelligibly similar terms to the process of colonization by "indirect rule." And there can hardly be [*719] any doubt that in all four cases, the responses to interactions with Europe were influenced directly by their past experiences as Islamic societies. What explains the heterogeneity of these responses? The answers surely must be complex. It is in part a pleasure of Menski's book that one can review these responses, query and test his interpretations against one's own, and feel enriched at the end of the process.

It should by now be evident that this is not a "Comparative Law" text in the standard form. It is not a more or less dispassionate or even discriminating compilation of primary and secondary sources intended to provide the reader with the basis for making independent, if directionally focused judgment. Rather, this is a sustained argument for a particular perspective about jurisprudence carried on by a well-read scholar across legal systems. While each of the last four chapters can be read independently, reading them as a unit, and against the backdrop of the first three chapters immeasurably enhances their intellectual worth.

For whom then is this text intended? Menski is clear that, at least for this second edition, his aim goes beyond the marginal student of “comparative legal education” to include those of mainstream comparative law. And, I would include Comparative Jurisprudence. It is, he says, an alternative reaction to the dominant approach in legal education in the West of viewing globalization as calling for the standardization and uniformization of law across cultures, and for doing so on Eurocentric terms. At the time of the first edition in 2000, his project must have appeared quixotic. It is, I think, a fitting testimonial to the correctness of his core premise of the amazing capacity for dynamic adaptation in and survival of legal regimes, regardless of the seeming odds measured in material power and wealth, that events on the ground today are more likely to support the prescience of his approach. Teachers who are genuinely interested in arming their students with effective long-term tools with which to deal in a heterogeneous world, as it in fact is, has been, and will likely remain, should find this book very helpful.

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