



## Flying Kites in a Global Sky: New Models of Jurisprudence

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## FLYING KITES IN A GLOBAL SKY: NEW MODELS OF JURISPRUDENCE

Werner Menski\*

*Taking a legally pluralist stance which reflects global socio-legal reality, this article first identifies significant mental blockages for legal scholars in theorising legal pluralism. It then argues that a socially responsible approach to law teaching, not only in India, cannot ignore society, culture and competing value systems. If law is everywhere dynamic and internally plural, even if not immediately visible, acknowledging pluralisms becomes necessarily a highly dynamic activity, comparable to the challenges of kite flying: One wrong move, and the subtle structure crashes. Unless law teaching takes pluralism seriously, legal education will empower only a few privileged actors, capable to manipulate law and its multiple power-related uses. Socially conscious approaches to law teaching must problematise that while we need law to avoid chaos, everywhere it risks constant exploitation and misappropriation. Improved teaching about legal pluralism and choice making in Indian law schools offers hope, but many challenges remain.*

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### I. THE PERILS OF DEFICIENT THEORISING

Writing on the interface between law and society faces major irritations, to put it mildly, if one wants to approach this subject from a legal perspective. There is simply no agreed global understanding on what is meant by law,<sup>1</sup> not to speak here of society and ‘culture’. Law is all around us, and a recent study suggests rightly that law is everywhere ubiquitous.<sup>2</sup> Lawyers, however, continue to waste much energy on defining law, instead of acknowledging that the internally plural phenomenon of law has everywhere fuzzy boundaries and manifests itself in

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<sup>1</sup> WERNER MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA 34 (2006). See also Brian Z. Tamanaha, *Law*, in THE OXFORD INTERNATIONAL ENCYCLOPAEDIA OF LEGAL HISTORY: VOL. IV 17 (S.N. Katz ed., 2009), who reports that despite continuous conversations about the nature of law since the ancient Greeks, and probably before, “theorists have not been able to agree on how to define or conceptualize law”.

<sup>2</sup> EMMANUEL MELISSARIS, UBIQUITOUS LAW (2009).

different culture-specific forms over time and space. The key question thus ought to be what kind of law a particular phenomenon might be, rather than agonising over whether something is law or not. Unless lawyers admit this conundrum of understanding their subject and change their introspective obsessions, they will remain unable as legal academics to make analytical contributions to globally valid scholarship on law and society. The time is right for this now: Several new high-profile interdisciplinary research projects in Europe, linking law, culture and religion, are creating cutting-edge scholarship.<sup>3</sup>

Major contributors to debates on the concept of law continue to insist polemically (often with an eye on scholarly profiling) that ‘law’ is an identifiable entity with boundaries that lawyers and scholars respect, and should know.<sup>4</sup> Oddly, while claiming correctly that law is dynamic, such writing belittles Eugen Ehrlich’s (1862-1922) well-known ‘living law’ concept.<sup>5</sup> This may just be a dubious claim that US legal scholarship is a world leader, rather than Old World expertise. But if scholars engage in such vain shadowboxing, rather than making serious contributions to global knowledge, further questions must be asked about notably persistent silencing of legal voices from the global South.<sup>6</sup> In postcolonial conditions, the risks of relapsing into colonial patterns are ever-present. Politicised euro-focused bickering over the nature of law strongly confirms that state centrism is far from dead. Interdisciplinarity may be praised, but is not practised with sufficient vigour and commitment, while Area Studies, the interdisciplinary development of culture-specific areas of globalised expertise in today’s world, are becoming ever more critical in making sense of diversity and difference, but typically tend to sideline law.<sup>7</sup>

Positivistic obfuscations about law and vain searches for globally uniform models of governance do not assist anyone, least of all law students in places like India, to understand their complex field of study and thus ultimately their role and purpose in life. This is a form of academic

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<sup>3</sup> See *Recht als Kultur* in Bonn, [www.recht-als-kultur.de](http://www.recht-als-kultur.de) and *RELIGARE* in Leuven, [www.religareproject.eu](http://www.religareproject.eu).

<sup>4</sup> Brian Z. Tamanaha, *A Vision of Socio-Legal Change: Rescuing Ehrlich From “Living Law”*, 36(1) L. & SOC. INQUIRY 297 (2011).

<sup>5</sup> See, however, ROGER COTTERRELL, *LIVING LAW: STUDIES IN LEGAL AND SOCIAL THEORY* (2008); MARC HERTOIGH, *LIVING LAW: RECONSIDERING EUGEN EHRLICH* (Marc Hertogh ed., 2008).

<sup>6</sup> Werner Menski, *Beyond Europe*, in *COMPARATIVE LAW: A HANDBOOK* 189 (Esin Orücü and David Nelken eds., 2007). See earlier BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION AND EMANCIPATION* (2nd edn., 2002).

<sup>7</sup> See Nicholas B. Dirks, *South Asian Studies: Futures Past* (2003), <http://repositories.cdlib.org/uciaspubs/editedvolumes/3/9> (last visited March 3, 2011).

violence that recent perceptive writing by non-lawyers identifies as a major source for the malaise of current political culture and prevalent methods of governance.<sup>8</sup> Such observations may have particular relevance in India today, given current evidence of massive corruptions and the entrenched presence of a post-colonial adversarially oriented political culture that constantly risks losing credibility. Failed state models are closely situated nearby, but are enough lessons drawn from how not to deal with law?<sup>9</sup> There is again growing recognition today, also in India,<sup>10</sup> that legal education is lacking academic coherence and serious commitment to social values or what may be called 'higher public interest'. Are Indians edging towards another Emergency-style catharsis? After colonially influenced beginnings, studying law is today again a hegemonic activity, a training ground for sharks of various kinds. This has the potential, as Upendra Baxi would express much more elaborately, to impair ultimately the future of human rights,<sup>11</sup> and to destroy carefully constructed composite nations like India, with adverse implications for mankind and the entire globe.

Starting from such gloomy parameters of thought and action, the present article seeks to offer a constructive contribution to deeply disturbing legal debates that will probably never end. For law and legal scholarship are just not centrally concerned with offering ready solutions on a silver platter.<sup>12</sup> They seem at best ongoing efforts to contribute to better conditions and more effective strategies, striving for ultimate perfection, which lawyers tend to label 'justice' or 'the right law', often harmonising law and society. However, socio-legal studies now frequently involve embarrassed navel gazing of law as its own other and many legal scholars, claiming rationality, just close their minds in disgust when faced with perceived obnoxious evidence of social norms, particularly religio-cultural traditions that are supposed to be outdated or outlawed.<sup>13</sup> Lawyers dabbling in social science are becoming masters at peddling fictions and creating delusions, building castles in the air. Wanting to move beyond 'liberal' fundamentalisms and narcissistic scholarly voyeurism towards activist efficiency in terms of social justice, we first have to face some hard facts as legal scholars, particularly in socio-legal analysis, typically often phrased in terms of

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<sup>8</sup> AIDAN RANKIN, *MANY-SIDED WISDOM: A NEW POLITICS OF THE SPIRIT* (2010).

<sup>9</sup> Werner Menski, *Flying Kites in Pakistan: Turbulences in Theory and Practice*, 1(1) J.L. & SOC. RES. 41 (2009-10).

<sup>10</sup> See earlier PROF. N.R. MADHAVA MENON'S REFLECTIONS ON LEGAL AND JUDICIAL EDUCATION (Mohan Gopal ed., 2009). More recently, see Lovely Dasgupta, *Reforming Indian Legal Education: Linking Research and Teaching*, 59(3) J. LEGAL EDUC. 432, 432-49 (2010).

<sup>11</sup> UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* (3<sup>rd</sup> edn., 2008).

<sup>12</sup> See Werner Menski, *Introduction: The Democratisation of Justice in India*, in GURJEET SINGH, *THE LAW OF CONSUMER PROTECTION IN INDIA: JUSTICE WITHIN REACH* xxv (1995).

<sup>13</sup> A case in point is *REDEFINING FAMILY LAW IN INDIA* (Archana Parashar and Amita Dhanda eds., 2008).

limits of law.<sup>14</sup> Today, explicit recognition is needed that law as an internally plural phenomenon is a voracious multidisciplinary monster whose taming seems impossible. Justice is merely promised, not delivered.<sup>15</sup> Such violent images put off soft-hearted, well-intentioned law students who seek to improve the world and hope for a better future. So let us have no illusions: Law is innately dangerous, subject to constant abuse and studying law may corrupt the human mind further.

In lived reality, increasingly fashionable fantasising about human rights and the demands of corporate legal practice at highest levels seem irreconcilable to many people at first sight. Such contradictions must be addressed here, too, since we undoubtedly need the fuel of economics to engage in constructive thinking about the dynamics of law and society. How can there be development without profit? Vigorous debates among experts in micro-finance, for example, indicate that several views are possible. But are strategies of subsidised economic activity sustainable in the long run if constant outside funding is required to prop up systems, which may well become self-funding if one changed some rules?<sup>16</sup> Are welfare states a realistic option, or an elaborate fraud that leads to unsustainability? Currently, many ambitious western states realise that their state-sponsored social welfare systems are socially and economically damaging in the long run. That various new economic initiatives to empower erstwhile disempowered groups and individuals may upset local power structures and create new strains and stresses is richly evident from India's affirmative action policies; such class struggles are documented in multiple forms.<sup>17</sup> Similar conflict scenarios everywhere confirm that there will never be one single perspective on any one issue; plurality-conscious approaches deepen critical analysis.

If taking an anti-capitalist view often leads to destructive nihilism and joblessness, blunt capitalist manoeuvring tends to generate culture-specific and sector-specific forms of individual and corporate violence that also put off many law students. Is there a middle-ground? Can law contribute to social harmony and development without producing violence? The trouble is, we face deep disagreements not only over the meaning of law, but also over perceptions of violence. Value-systems, our basic ethics as human beings and our socio-cultural environments are very different, wherever we look in the world, creating competing perspectives. Diversity and difference are thus

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<sup>14</sup> See ANTONY N. ALLOTT, *THE LIMITS OF LAW* (1980).

<sup>15</sup> AMARTYA SEN, *THE IDEA OF JUSTICE* (2009).

<sup>16</sup> See VIKRAM AKULA, *A FISTFUL OF RICE* (2011).

<sup>17</sup> In this journal, see Annu Jalais, *Braving Crocodiles With Kali: Being a Prawn Seed Collector and a Modern Woman in the 21<sup>st</sup> Century Sundarbans*, 6 SOCIO-LEGAL REV. 1 (2010).

facts which academic analysis ignores at its peril. Lawyers are generally not very skilled in accepting such differences. Often blinded by ideologies, or simply suffering from delusions of power, they are constantly tempted to use law as a tool to impose their own values on others, or simply employ rationally constructed claims of sanctity of contract to exploit their own privileged position.

In such complex, ideologically charged and exploitative contexts, jurisprudence with claims to global validity must become an academic endeavour - ever conscious of its destructive potential - that builds on synergies between different academic disciplines and subject areas to promote deeper understanding of law itself. This enterprise cannot be built on denial of the critical relevance of legal pluralism. However, 'legal pluralism' remains today a dirty word for many lawyers. Notably, only fifty years ago, even 'jurisprudence' was treated as a dirty word.<sup>18</sup> Fussy discussions about how to name this manifest plurality, particularly whether one should call it post-modern or post-colonial, often merely reflect profiling ambitions among the debaters. What matters in substance, I suggest, is that various forms of colonialism and exploitation in the name of the law continue to exist, despite much smugness about having subjugated German Nazism and Japanese expansionism, and despite loud claims of international law everywhere to be the new power tool for securing 'the right law'. Current events in the Middle East show that social forces, and basic values of justice and fairness, have lost none of their potency even in the face of the might of state terrorism.

Contrary to what many modernist scholars argue, it remains impossible to simply blame 'religion', 'culture', and various supposedly backward social norms for the ongoing ills of human existence. This kind of argumentation is often bad politics, disguised as serious scholarship. Critical studies cannot mean fussy selective criticisms based on highly subjective predilections. Much suffering and injustice is created by modern structures and institutions, often manifestly state-centred and state-controlled, and thus definitely legal, acting in blatant violation of most basic principles of justice. Are we paying the price for condoning excessive positivism and blinkered beliefs in human rights idealisms when, not only in South Asia, states and lawyers are prominent abusers of law? This is why genuine public interest litigation, not only in South Asia, will need to

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<sup>18</sup> MICHAEL D.A. FREEMAN, *LLOYD'S INTRODUCTION TO JURISPRUDENCE* 3 (7<sup>th</sup> edn., 2001).

remain protected as a tool for safeguarding better justice.<sup>19</sup> English law, too, generates examples of excessive state control, notably in relation to ‘ethnic’ marriages.<sup>20</sup> Acknowledging that everywhere lawyers risk falling into hegemonic traps may be painful for individuals seeking a ‘clean’ legal career, but no law is ultimately value-neutral.<sup>21</sup> If studying law risks mental corruption in today’s deeply troubled world, pluralist legal theorising remains a critical survival skill, but could itself become a dangerous tool subject to easy manipulation.

The article argues at various levels that unless lawyers accept an open-minded vision of legal pluralism as a fact,<sup>22</sup> they will not understand how to connect law and society effectively and realistically. For, law as its own other has multiple limits and is not just a miracle cure for perceived socio-cultural ills. Dreams of wanting to do good by becoming a lawyer may be rudely ruined unless one accepts such harsh realities. And since many others seek legal careers just for money, status and power, legal education needs to counteract such potentially violent endeavours with scholarly and activist vigilance. If nowadays various self-righteous claims to activist control become a motive in their own right, the potentially violent implications of such ‘activism’ also need to be addressed. If public interest litigation can be abused, so can human rights reasoning. It is indeed confusing for many well-meaning law students to navigate such competing expectations within the subject of their studies. The next section seeks to offer some hope and guidance by elaborating on methods of managing legal education as a plurality-conscious enterprise and activity.

## **II. Teaching law as a socially relevant and plurality-sensitive subject**

The article argues that taking a plurality-conscious approach is essential in teaching law as an academic subject. Otherwise law colleges would just produce semi-educated ‘plumbers of law’, advocates trained to fix some hole in any specific framework of regulation or administration. Clearly lawyers need to develop such plumbing skills too, but a strong case exists for educating lawyers and empowering them to reflect on the moral and social consequences of their practice. It helps students to be taught to understand why they find a particular decision or strategy right or wrong, and what other perspectives may be taken in assessing a scenario, case, statute, or

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<sup>19</sup> See Werner Menski, *Public Interest Litigation: A Strategy for the Future*, in Chapter 4 in WERNER MENSKI, AHMED RAFAY ALAM AND MEHREEN KASURI RAZA, *PUBLIC INTEREST LITIGATION IN PAKISTAN* 109 (2000).

<sup>20</sup> In *R. (on the Application of Baiai and others) v. SSHD*, [2008] UKHL 53, state demands for a Certificate of Approval for certain marriages were ultimately held to be disproportionate by the House of Lords.

<sup>21</sup> Pointedly highlighted by MASAJI CHIBA, *ASIAN INDIGENOUS LAW IN INTERACTION WITH RECEIVED LAW* (1986).

<sup>22</sup> This is very clear in John Griffiths, *What is Legal Pluralism?*, 24 *J. LEGAL PLURALISM & UNOFFICIAL L.* 1 (1986).

hypothetical situation. The academic stage of legal education needs to cover such wider socio-cultural and ethical contexts. Solid acquisition of practical lawyering skills is anyway best done ‘on the job’, in real scenarios, when suddenly the reality of pluralist navigations and the need for skilful operation of one’s toolkit are of immediate relevance. Indeed, many former students confirm that legal pluralism is immensely practice-relevant. But do we equip law students with the right tools; do we empower them to act as socially responsible individuals? Do we sensitise them adequately in finding ‘the right law’? This may be a peripheral issue in high street property conveyancing, but in many legal scenarios, competing concepts of law suddenly acquire deep relevance.

Preparing this article, one recent piece of writing from India caught my eye and forms the basis of the initial discussion. A young law lecturer from one of India’s leading National Law Schools highlights the continuing malaise in Indian legal education and considers ways to improve legal education, while warning that some attractive strategies might be counter-productive.<sup>23</sup> This particular article clearly identifies some major problems of managing and delivering high-quality legal education in India. More issues could have been raised by looking beyond the frog’s well of the Indian legal education system. Working in a global law school in London for several decades has certainly provided critical insights into how to educate young lawyers in preparation for the challenges of a career in which, hopefully, they would contribute to the larger social good.

Dasgupta first highlights the deplorable state of legal education in pre-Independence India and suggests that negative implications may still be felt today. Two main features are identified in this colonial scenario. As a direct consequence of early traditional English legal approaches, lawyers were earlier trained ‘on the job’ and academic legal education was basically non-existent. One learnt the law through practice and observation, partly by osmosis, not through formal study at law school. These are bygone days, but suspicion of academic legal education remains at least a subconscious ingredient of common lawyers’ psychological constitution. This carries several negative implications for Indian legal education today, where distrustful contempt for legal education remains an issue. Does one even need to study academic law to become a lawyer? Today, a growing number of top-end law firms in England recruit about half their intake of trainees from non-law degree holders, who are then sent off (and often sponsored) for a one-year conversion course, now called Graduate Diploma in Law (GDL). This highly intensive course, open to all

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<sup>23</sup> See Dasgupta, *supra* note 10.



undergraduate degree holders and offered mainly by specialised service providers, teaches in one year what ‘normal’ law students would learn in a three year LLB degree or a joint honours BA degree with law at university. This highly effective way of teaching the doctrines of English law leaves hardly any room for critical analysis or wider interdisciplinary legal study, however. Critical thought is discouraged by exigencies of time and focus on practice-relevance. One would not expect such students to be exposed to complex questions of legal theory or jurisprudence, nor would they be introduced to concepts of legal pluralism, though professional ethics are taught as a compulsory element. Such students are coached to be practising lawyers, remarkably similar to what their forebears experienced in earlier centuries. This method of legal education may be effective, but clearly does not educate such students about the plural social and moral dimensions of law.

In British India, Dasgupta’s article shows, the category of advocates basically comprised individuals who ‘used their wits to make money’.<sup>24</sup> They learnt their trade on the job, and laid foundations for a legal profession not so much known for integrity and proficiency, but for corrupt practices, dilatory tactics and exploitation of clients. The colonial masters simply took no interest in local legal education, which might have woken sleeping lions. Indeed, those lions were awoken when the Indian elite began to take up places at the Inns of Court in London as focal points for formal legal education of barristers. There, quite evidently, young future leaders of India learnt that the British were not practising in their Empire what they were preaching in their law schools. Morality and fairness flew out of the window when the colonial masters manipulated race, class and other elements to consolidate and maintain their rule over substantial parts of the globe. Whether on the streets of London or in South African trains, awareness of difference was strategically exploited as part of the colonial master plan. Young Indians exposed to this formal British legal education system largely benefitted in terms of status acquisition. They also learnt something about ‘the law’, but this was their masters’ law. Gradually it dawned on such individuals that they were just privileged pawns in a wider colonial project, just as overseas students in the UK today may realise that they help finance the British education system and, in most cases, learn little of direct relevance to legal practice in their own jurisdiction. This does not mean, then as now, that such education is useless. Transferable skills, including the enhanced ability to argue one’s case, were to

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<sup>24</sup> Dasgupta, *supra* note 10, 433.

have historical implications of global relevance, contributing eventually to India's Independence and subsequent legal and political reconstruction.

Once the Indian legal (and political) scenario became dominated by such foreign-trained lawyers, an elite class of their own, prejudice against local legal education was further re-enforced over time. Dasgupta overlooks the socio-cultural aspects in this context and only highlights a preference for part-time legal education, a cheapskate method that suited many stakeholders.<sup>25</sup> While this impacted significantly on the quality of law teachers, repressed interest in legal research and curtailed exposure to critical thinking, few people seem to have realised that this constant structural impoverishment would deprive most Indian law students of the cognitive and practical skills necessary to effectively practise law.<sup>26</sup> Indian legal education developed many different structures under colonial domination, but only after Independence was corrective action demanded to improve the quality of Indian legal education. This effort to intervene came rather late in the day and brought too little change to make significant impact. While it would have been too early in the 1940s to start arguing for development of a culture-specific postcolonial jurisprudence, this also would have gone against the grain of modernity. So, inevitably, further deterioration ensued.

The first Indian Commission appointed to advise on higher education generally, in 1948, made specific far-reaching recommendations.<sup>27</sup> These focussed on staffing issues and tenure matters, recognising the critical importance of dedicated teachers of law. The relevance of research was realised and, as Dasgupta highlights well, '[t]he Commission clearly wanted research and publication to supplement not supplant teaching'.<sup>28</sup> She reports, however, that this focus on teachers' needs was largely ignored and standards of legal education remained appalling. A familiar pattern was perpetuated, as '[t]he best minds stayed away from legal teaching and the lack of good law teachers kept the quality of instruction low'.<sup>29</sup> Such self-flagellating comments reinforce today's sense of doom and intellectual stagnation.

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<sup>25</sup> Dasgupta, *supra* note 10, 433.

<sup>26</sup> Dasgupta, *supra* note 10, 433.

<sup>27</sup> Dasgupta, *supra* note 10, 434.

<sup>28</sup> Dasgupta, *supra* note 10, 435.

<sup>29</sup> Dasgupta, *supra* note 10, 435.

Subsequent co-ordinated ameliorative efforts of the Bar Council of India and the University Grants Commission sought to tackle curriculum development, ignoring the needs of law teachers and the synergies identified earlier between law teaching and research. Reformers merely pushed for structural reorganisation of legal education, eventually by establishing National Law Schools, starting in 1986 with NLSIU in Bangalore, which took in students from 1988. These were significant developments, but the overall assessment of Indian legal education today remains rather negative. Partly from direct experience, I know that such criticisms are particularly justified when it comes to identifying gaps and deficiencies in research and teaching related to Indian socio-legal studies and especially topics such as personal laws, family law and jurisprudence.<sup>30</sup> Colonial mindsets, intellectual hubris, and remarkable lack of concern for Indian traditions and local issues in many law schools contribute to the current depressing picture. More recently, it has become deceptively easy to jump straight towards the bright promises of international law ideologies, now a prominent feature in the leading Indian law schools.

A familiar feature of education reform processes in developing countries is the involvement of foreign consultants and international funders. To what extent such individuals and agencies have been sensitive enough to the respective socio-cultural realities is questionable. Evidently, such issues were not even a major agenda item. Research confirms the strong influence of the US Law School model in the 1960s and early 1970.<sup>31</sup> In a Cold War context, there were surely other agendas as well. Moreover, in this pre-Emergency period, neglect for social concerns and strong belief in instrumentalist reforms were major factors. Dasgupta reports, unsurprisingly, that this particular reform strategy backfired; she also explores some of the reasons.<sup>32</sup> Next, an Indian expert, none other than Professor Baxi, played a key role in identifying the need for sound technocratic legal education, which is socially relevant.<sup>33</sup> He highlighted that ‘blindness to contemporary conditions

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<sup>30</sup> The assumptions that personal laws are a thing of the past and that the Uniform Civil Code would become a reality seems to have held back academic teaching in the personal law field. See Werner Menski, *Slumdog Law, Colonial Tummy Aches and the Redefinition of Family Law in India*, 30(1) S. ASIA RES. 67 (2010). Evidence of ‘colonial minds’ is amazingly obvious, with significant decline of Hindu law scholarship in India, while students are basically taught to worship Hart and Kelsen.

<sup>31</sup> See Jayanth K. Krishnan, *Professor Kingsfield Goes to Delhi: American Academics, the Ford Foundation, and the Development of Legal Education in India*, 46 AMER. J. LEGAL HIST. 447 (2004); Jayanth K. Krishnan, *From the ALI to the ILI: The Efforts to Export an American Legal Institution*, 38 VAND. J. TRANSNAT’L L. 1255 (2005).

<sup>32</sup> Dasgupta, *supra* note 10, 438.

<sup>33</sup> Dasgupta, *supra* note 10, 439.

makes Indian law teachers' lessons devoid of critical analysis, dry and insubstantial'.<sup>34</sup> Demanding that Indian law teachers should teach critical thinking, should force students to think laterally and should inspire them are clearly well-sounding ideals, difficult to implement in practice, particularly if one has highly deficient facilities, masses of students and much else to do than teach, not to mention research. Teacher training was almost forgotten. Ambitious plans for a National Institute of Legal Education or a legal Pedagogy Institute were floated, but apparently not implemented. How teachers of law would acquire the key skills they were expected to convey was neither thought through nor explained.

In practice, interdisciplinary teaching of law was actually delegated to pre-law teachers within the new five-year law programme structures. That this is not entirely satisfactory is increasingly evident, as the urgent need to revisit that approach, discussing afresh how interdisciplinarity may be cultivated more effectively in India's law schools, has meanwhile emerged. My tentative observations match those from European law schools: Social scientists of various descriptions do significant damage by constantly putting 'law' into black boxes as a separate science rather than focusing their efforts on analysing the fuzzy boundaries between subjects. Protecting disciplinary boundaries seems to be a more important concern than cultivation of plurality-conscious, interactive and interdisciplinary methodology. This problem is certainly not unique to Indian law schools.

The new era of Indian law schools with its NLSIU flagship model has certainly led to some measurable successes. As an outsider, I see much effort to secure the administrative autonomy of the new law schools, rather than working assiduously towards strengthening of critical awareness about the links between law and society in relation to Indian conditions. This is typical of lawyers and also reflects tendencies to protect one's domain. Meanwhile, however, these top law schools have become recruitment pools for corporate law firms, both in India and increasingly abroad.<sup>35</sup> These are now global sharkpools teeming with bright youngsters eager to be snapped up by the highest bidder, rather than training grounds for a future generation of better Indian lawyers and law teachers. A reinforcing factor in this perhaps originally unintended development is certainly the increasing popularity of international law and human rights teaching. Indeed there is growing

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<sup>34</sup> Dasgupta, *supra* note 10, 440.

<sup>35</sup> This is confirmed by Dasgupta, *supra* note 10, 443.

evidence and awareness today that these young lawyers often cannot handle the complex pressures of global legal practice, because their legal education was not complete enough. While they may know international law, they fail to connect to local realities and lack sensitivity to situation-specificity. In effect, they are simply not skilled enough in the complex navigation of pluralities, which would empower them to compete with the best in the world. For both teachers and students, one suspects, the ultimate focus on finding lucrative ‘international’ jobs has overtaken the desire to be fully educated. So partial visions are traded as excellence, while a remarkable silence about the pluralist challenges of globalisation is loudly heard even in top law schools, where trends towards global uniformity have apparently sidelined awareness of the ‘glocal’,<sup>36</sup> thus largely ignoring the socio-cultural realities connected to deeply plural legal activities.

It is difficult to suggest easy remedies. However, my recent involvement in several law schools in Kerala has instantly led to much critical thinking and exploratory discussions about rejuvenating Indian legal education. Current debates in India indicate concerns over measuring efficiencies and outputs also of law teachers, a somewhat obnoxious bureaucratic trend that also makes its presence felt in Europe now. While Dasgupta finds a relative silence in India about the sustained and deliberate connection of teaching and research,<sup>37</sup> her final warnings about giving too much emphasis to research output and ignoring individuals’ efforts in teaching excellence are pertinent. This is borne out by my own observations of how legal academics strategise academic activities and ‘focus only on their own research and aggrandizement through publication’,<sup>38</sup> at the cost of teaching. Calling for a holistic approach in this regard seems idealistic and underplays the extent of the challenge to be excellent in everything one does. Are Indian law teachers aware of Article 51-A(j) in the Indian Constitution and its explicit expectation of a duty ‘to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels’? This demanding expectation is certainly not culturally alien in Bharat aka Guruland. Reality in most Indian law schools seems far removed from such lofty ideals, however. In the next section, an effort is made to indicate strategies to challenge law teachers and their students to fly high in the skies of excellence by becoming more aware of the need for effective teaching that combines research and classroom work.

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<sup>36</sup> On these concepts, *see* the various articles in GLOBAL MODERNITIES (Mike Featherstone, Scott Lash and Roland Robertson eds., 1995).

<sup>37</sup> Dasgupta, *supra* note 10, 445.

<sup>38</sup> Dasgupta, *supra* note 10, 449.

### III. Introducing the kite model of law as a tool to propel excellence

The global study of jurisprudence or legal theory is presently experiencing a marked revival. Everywhere in the world, more lawyers realise that the methodologies of comparative law can contribute to best practice at the highest level. The realisation that ‘good laws’ are alive, as highly dynamic and ever-changing entities, marked by internal plurality, is hitting home. The risk of falling into the trap of replacing monist state-centric claims with global uniformisation agenda was sharply highlighted by a sustained critique of law in relation to globalisation.<sup>39</sup> Today more scholars turn towards recognition of legal pluralism as an admittedly difficult but reality-focused tool kit for making appropriate decisions and seeking better forms of justice. Maybe we are just re-inventing ancient wheels of justice in this confused search for ‘the right law’, which is forever elusive, just as justice remains always ‘in the making’, as Jacques Derrida famously said, and Amartya Sen has recently endorsed.<sup>40</sup>

In my legal theorising, until 2006, I left international law out of the picture, going as far as talking about ‘monsters’.<sup>41</sup> By 2007, however, the earlier triangular model of law,<sup>42</sup> based on the Japanese theorist Masaji Chiba, turned into a structure with four corners, into which international law had now been added. This illustrates that law always needs to be navigated between four competing corners, namely natural law *and* positivism *and* socio-legal norms *and* international norms. Law, being internally plural, is then its own ‘other’ all the time, causing constant conflicts and tensions. This kite model has meanwhile become a powerful tool of legal education. It puts on the table – or floats in the air, if one prefers that image – four different types of law, namely (1) at the top, natural laws in the form of ethics and values, which may be religious and/or secular; (2) on the right hand side, socio-cultural and socio-economic norms, and thus mainly people’s customs and ways of doing things; (3) on the left hand side, state law and its various kinds of rules, which may of course not have been made by the state, but were accepted by it on various grounds of expediency from the other corners;<sup>43</sup> and (4) in the bottom corner, international law and the various forms of human rights, collectively perceivable as new natural laws.

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<sup>39</sup> WILLIAM TWINING, *GLOBALISATION AND LEGAL THEORY* (2000).

<sup>40</sup> SEN, *supra* note 15.

<sup>41</sup> MENSKI, *supra* note 1, 13.

<sup>42</sup> For the triangular model, *see* MENSKI, *supra* note 1, at 612.

<sup>43</sup> This was persuasively put forward by CHIBA, *supra* note 21, 5-6.

But this is only the first level of legal pluralism, clearly a form of ‘strong legal pluralism’ in the terminology of John Griffiths.<sup>44</sup> Yet another level of legal pluralism exists, however, leading me to speak of law as a ‘plurality of pluralities’, in short ‘pop’. In reality, every one of the four corners of law identified above represents a variety of hybrid forms of this particular kind of law. Clearly, there is no single uniform natural law, no one type of custom or state law, nor is international law just one identifiable entity. All four are deeply plural entities in themselves, with their own internal conflicts and tensions.

The above brief and almost commonsensical representation summarises what intellectually demanding pluralist legal theorising involves today. Graphical descriptions and illustrations of the reality of these co-existing and constantly competing legal concepts were not allowed here, but are available.<sup>45</sup> Law, this illustrates, is not just this *or* that, but it is a lot of different things *at the same time*, in effect mainly four kinds of law, with many hybrid combinations in the daily lived experiences of people all over the world. While we teach and study these various concepts, necessarily one by one, just as we write a story or produce a text word by word, we must not miss the whole picture and students must be taught to think creatively and contextually. It really is so simple: Once we put the whole jigsaw puzzle together and place it in its wider global context, we have a kite, a structure with four corners, as a methodological tool to analyse any type of legal conflict.

Historically, as a super-diverse legal environment for thousands of years, India skilfully used different strategies of pluralist navigation to manage and balance the complex relationships between law and society.<sup>46</sup> This plurality consciousness is hidden within the umbrella term *dharmā* and its practical form, *sadācāra*, but is also found under well-known concepts like *danda* and *vyavahāra*. For example, even the legal keyword of *vyavahāra* is now sidelined by fashion labels like ADR and no longer part of Indian law students’ vocabulary. This Sanskrit term never signified just formal court-based dispute settlement, as Hindu law experts assumed far too long, but comprises a

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<sup>44</sup> Griffiths, *supra* note 22.

<sup>45</sup> For illustrations, see now Werner Menski, *Fuzzy Law and the Boundaries of Secularism*, 13(3) POTCHIEFSTROOM ELECTRONIC L.J. (2010), at <http://ssrn.com/abstract=1752910>.

<sup>46</sup> Werner Menski, *Sanskrit Law: Excavating Vedic Legal Pluralism*, Paper No. 05-2010, SOAS SCH. L. RES., <http://ssrn.com/abstract=1621384>.

huge variety of different methods.<sup>47</sup> Such ‘traditional’ socially-rooted dispute settlement processes span across all kinds of formal and informal, physical and metaphysical spaces. Why are such key concepts absent in Indian law schools? Should one suspect that, along with Indian legal traditions, they are treated as inferior to foreign concepts?

As a plurality-conscious analyst, I began applying the kite of law as a model to examine contested issues, particularly in Indian family laws. We soon found that this methodology also works well in commercial transactions, especially the multi-million, multi-jurisdictional deals that give leading law firms their huge profits. In today’s heavily regulated legal world, with increasing intervention of international laws, it is necessary to realise that methods of self-controlled ordering can still function as an important stabilising element. In practice, this means that people and other legal actors should not be encouraged to rush to courts or tribunals. States as well as international law have limited reach and capacity in settling disputes. Self-controlled ordering remains a dominant expectation in many legal and social situations. Formal adjudication mechanisms everywhere still need to rely on people’s sense of righteousness, for which many different terms exist – prominently *dharmā/dhamma* in Indian legal traditions - to assist kite flying. Legal action and management, this shows, is never just a monolithic, value-neutral activity, but continues to require active consideration of cultural and social norms. At first sight, a major international commercial transaction is a very different category of law from an individual making a self-controlled decision, but the basic building blocks are actually the same.

Regrettably, many Indian lawyers and numerous academics who discuss Indian legal developments have been mentally so thoroughly colonised that various ideological blockages prevent deeper analysis of Indian legal phenomena. Indian law is simply equated with backwardness, linked to caste and discrimination; in a few sentences, the entire Indian legal system is stigmatised as something to be ashamed of and reformed. How such law is linked to various social processes is often not even recognised. Writing on Hindu law, I showed that such severe lack of historical and socio-cultural awareness is deeply problematic.<sup>48</sup> Basic concepts of ancient Hindu law can still be felt as pulls of the Indian kite of law today. These ‘traditional’ values are hidden

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<sup>47</sup> Werner Menski, *On Vyavahāra*, 33 INDOLOGICA TAURINENSIA 123-47 (20007).

<sup>48</sup> WERNER MENSKEI, *HINDU LAW: BEYOND TRADITION AND MODERNITY* (2003).



behind certain words and phrases in the Constitution of India, but law students are not taught to pierce those smokescreens to understand their own legal system as a plurality of pluralities. The systematic deracination of traditional cultural concepts from Indian legal discourses leads to elitist self-denial of useful elements of one's own identity and heritage, amounting effectively to a violent act of self-harm. Infused with modernist belief, much of Indian legal education appears deeply complicit in the gradual marginalisation of 'traditional' socio-cultural elements, maybe because of colonialism, but more likely as a result of excessive positivisation of legal concepts and fervent belief in modernist rationality.

Law, then, became also in Indian law schools a monist entity, simply state law, replacing as in Europe the earlier dominant natural law concepts with their risks of 'irrational' religious *diktat*. Law, not only since Weberian discussions about various kinds of rationality, also turned into a secular entity, a body of formal rules, imposed on people in some form of unequal contract. This reasoning also rejected the entire socio-legal sphere, to which some lip service may still be paid as 'the people'. More recently, we are witnessing also in the law schools of India, the growing fashion of treating law predominantly as international norms and conventions, now with agenda to control state laws. From such perspectives, the entire Indian legal system risks becoming perceived as an obstinate permanent offender of modernity and international norms. The post-Holocaust soft laws of international institutions now make increasingly uniformising global claims and deny legitimacy to Indian law. If such observations are even partly correct, Indian legal education has again become complicit in what used to be called 'civilising mission'.

All along, we see jurisprudence not being allowed by such mono-visions to develop a pluralistic image. How, then, do we account for the continued presence of earlier forms of law in India which still impact on the current system? As recently put to me by a senior law lecturer in a leading Indian law school, should we today not presume that international law has superseded all other forms of law? Such presumptions indicate the deep dilemma of Indian legal education in a climate where an ill-understood concept of secularism (which is itself a conceptual plurality of pluralities) combined with claims of rationality and objectivity acts as an indoctrinating force that rejects all forms of 'tradition' as extra-legal, causing intellectual havoc in Indian legal education. The further implications of resulting tunnel visions are already visible: There is now hardly any space for studying Indian family laws within the personal law structure and in most law schools, it is seen

as politically questionable to analyse matters of personal law by taking account of ‘religious’ aspects. In such adverse circumstances, how can a deep analysis of Indian laws and societies be cultivated?<sup>49</sup>

Or have we completely lost the plot and peddle entirely wrong foreign assessments? Some Indian lawyers have been trying to tell me authoritatively that all Indians register their marriages. When asked whether their own marriages are registered, the vast majority confirm in fact the absence of such registrations. This schizophrenic picture is a powerful indication of the prevailing muddled thinking among Indian lawyers. If this is found even among practising lawyers who deal with common people and their social norms every single day, something is seriously wrong. Such individuals know the powers of social norms, which indeed they mostly follow themselves. But when speaking as lawyers, this element of social norms has vanished from the image they portray. Now, is this convenient fiction, or am I the one who is missing the plot?

It puzzles me that Indian lawyers should be so short-sighted, imprisoned by positivist imaging and mental blocks. Working on Hindu law theories over many years, I found that explicit recognition of older Hindu natural law concepts, right back to the Vedas and before, and of course also of people’s customs, remains today conceptually present and crucial as a legal input. The presumption that Hindu (or Islamic) law is only about religion is actually another popular faulty axiom, with deeply damaging side effects among lawyers. Difficulties in anxiously searching for the dominant kind of law can be likened to examining where the string of the kite of law is attached. In a well-prepared kite, the string links all corners and thus allows the kite flyer to navigate. The skilful interconnectedness of all corners of the kite mirrors theories of interlinkage and interlegality proposed by major legal thinkers like Chiba, Twining and Santos. Again, we see how closely theory and practice are interlinked.

Faced with multiple intellectual turbulences, how does a pluralist law scholar teach about such subjects and controversial issues? My experience at SOAS has been that the sooner one raises them, the better for the intellectual development of law students.<sup>50</sup> Law students are mostly bright young people, they can handle many more intellectual challenges than their teachers imagine. The

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<sup>49</sup> A prominent topic are the continuing misrepresentations of the Shah Bano case of 1985 and its aftermath, until and beyond the non-debates of *Danial Latifi v. Union of India*, AIR 2001 SC 3958 : 2001(7) SCC 740.

<sup>50</sup> MENSKEI, *supra* note 1, 75-81.

problem is, rather, that most law teachers, and many study programmes, do not allow for such intellectual challenges to be brought into classrooms in the first place. In most law schools, jurisprudence is still taught as a finishing touch to legal education. The first year comparative jurisprudence course at SOAS simply starts with fundamental questions about law, shaking students out of the comfort zone of positivist positioning or the idealistic dream world of human rights, forcing them to acknowledge – in their own lives as well as in legal study - the reality of constantly dynamic plural interactions of various competing perspectives on law. The initial shock effect, every year, works miracles for student performances, as brains are switched on with lightning speed and kites are soaring into the sky.

Unfortunately, much of India's legal education does not prepare young lawyers well enough for this challenge of flying high in the skies of law. Basic legal concepts – almost always a plurality of pluralities in themselves - are not studied in sufficient depth. Rote learning prevails, overteaching is the norm and students are not encouraged to think for themselves. Dasgupta correctly identifies the fears and potential risks of offering law students seminars, which may end in politicised slinging matches, since even the basics are not clear and there is no common language.<sup>51</sup> At SOAS, we dare offer seminars already in the first few weeks of the first year of a three-year programme. This is a painful challenge, for teachers and students alike, but it works. A wonderful by-product is that I learn from my students by challenging them with questions to which I have no answers. Thus synergies develop and teaching law turns into fieldwork and becomes akin to participant observation.

Unfortunately, in many classrooms ideological indoctrination has replaced serious legal analysis, today prominently by romanticising international law and neglecting - even outlawing and punishing - cultivation of indigenous legal concepts and the social dimensions of law. Lawyers and the general public remain thus confused about the roles of law and of the state; educational standards and legal literacy suffer. While Indian law as an internally plural construct has many reasons to be proud, many issues remain contested, not only in family law.<sup>52</sup> The colonial experience confirmed that transplanting foreign laws will never just result in carbon copy transfer. It remains a major challenge today to what extent India should accept international legal norms as

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<sup>51</sup> Dasgupta, *supra* note 10.

<sup>52</sup> See WERNER MENSKI, MODERN INDIAN FAMILY LAW (2001).

part of the domestic legal order. Fierce legal debates arise: Should all marriages in India be formally registered? Can all child marriages below a certain age just be declared void? Legal navigation strategies require constant rethinking to produce appropriate and sustainable solutions. One wrong movement, and the kite might crash. Will future generations of specialists in Indian law manage to handle the continuing challenges of super-diversity in Indian laws?

There is space here only for one telling example. Ongoing debates over further reforms to Indian child marriage law demonstrate the risk that too ambitious following of international norms will create serious turbulences and problems in Indian society. The colonial *Child Marriage Restraint Act* of 1929 was replaced by the *Prohibition of Child Marriage Act* of 2006, but this new Act does not nullify all child marriages. Making them voidable, it leaves it to the parties concerned to decide whether they want to remain married or not. I find this highly impressive and clearly plurality-conscious, as the 2006 Act skilfully gave a voice to society (particularly to children) in this sophisticated legal kite flying exercise, ignoring and upsetting state-centric modernists and international lobbyists.<sup>53</sup> More recently, after activist pressures, the Indian Law Commission produced a 2008 Report on Child Marriages, which suggests that all Indian marriages shall be registered,<sup>54</sup> and all child marriages involving parties below the age of 16 years shall be void *ab initio*.

These suggested reforms may sound good at first sight, but are built on dangerous culture-blind international templates. This is evident from the proposal to make 18 years the common legal minimum age for husbands and wives, claiming that there is no rational reason for different ages. Implementation of these Law Commission proposals would surely have brutal consequences for many individuals, as a perceptive High Court judgement noted in 1997.<sup>55</sup> Automatic nullification of all under-age marriages would not necessarily be the best possible management strategy for India. Judges should bear in mind the ongoing struggles in European jurisdictions to control under-age sex, early pregnancies, so-called ‘forced marriages’ and now, as we see in the UK, the fashionable, highly discriminatory supervision of ‘vulnerable adults’, leading to new abuses of state law.

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<sup>53</sup> For such perspectives, see JAYA SAGADE, *CHILD MARRIAGE IN INDIA: SOCIO-LEGAL AND HUMAN RIGHTS DIMENSIONS* (2004).

<sup>54</sup> On the expectation that all marriages should be registered, see *Seema v. Ashwini Kumar*, [2006] DMC 327 SC.

<sup>55</sup> See *V. Mallikarjunaiah v. H.C. Gauramma*, AIR 1997 Kant 77, 81.

Focusing only on state-centric laws and human rights arguments (corners 3 and 4), while ignoring people's values and society's norms (corners 1 and 2) may not be an appropriate or sensible method of legal management anywhere. Cutting out any one of the legal corners swiftly leads to perceptions of injustice. Rigid nullification of child marriages in India, demanded by those desiring to follow international norms, and reiterated by the Law Commission in 2008,<sup>56</sup> would undoubtedly cause grave harm in Indian society, as Indian judges advised during the 1990s and even reformers like Sagade accept. Press reports repeatedly criticise the non-implementation of many Indian Law Commission Reports. However, an institution like the Law Commission is just as much subject to gusts of wind as other kite players. It needs to be deeply conscious of being (ab)used for specific political agenda. If such a body makes unrealistic and unsustainable proposals, lack of implementation should not be surprising. Huge and internally diverse, the Indian system of family laws will remain constantly challenged to react to conflicting pulls and expectations. To keep this large structure afloat, to ensure that the composite nation called Bharat prospers as a whole, culture-sensitive legal management techniques are required. Nowadays, maybe as a result of postmodernity, we increasingly realise and acknowledge again that value systems of various kinds are everywhere connected to law and that law and society cannot be neatly separated. Pluralist analysis thus confirms that the close linkages of laws, social norms and values cannot be ignored by reformers. Good law teaching cannot ignore such basic facts.

#### **IV. Conclusions**

The article first theorised the pluralist challenges faced in our postmodern age and then demonstrated that legal activity, in particular law teaching, has indeed become a highly sophisticated exercise in constant navigation, akin to flying kites. The existing fuzzy boundaries make law inevitably an interdisciplinary discipline. Law remains everywhere internally plural and is not just a simple one-dimensional tool. As a result, law teaching must become more attuned to interdisciplinarity; respect for legal pluralism and plurality should be treated as a fact of life, which has to be built into law teaching to connect academic study and social reality. Overlooking this internal plurality of law to push for certain 'modernist' unifying reforms, however desirable they may appear to certain legal players, produces fictions that may create dangerous crash scenarios. Activist attempts to assert the primacy of state law, for example through compulsory registration of

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<sup>56</sup> Law Commission of India, *Proposal to Amend the Prohibition of Child Marriage Act, 2006*, Report No. 205 (2008).

all marriages and nullification of child marriages, may create more problems than they aim to solve – in Europe none of these issues are perfectly regulated.

Following outdated Western models, or simply supposedly dominant new international standards, may not be the best possible management strategy, especially for Indian family laws of the future. I am hopeful that Indian judges will continue to be able to navigate the kites of law with sound skills, conscious of the need to develop the nation's internally plural legal identity in a harmonised or converged manner.<sup>57</sup> I am less confident that Indian legal education has presently the right conditions at its disposal for sustained cultivation of the necessary skills for legal kite flying. Detailed, culture-sensitive expertise in Indian laws should become a central component in the tool kit of Indian legal educators, but this is easier said than done.

My key argument has been, then, that there is an urgent need for syllabus updating and reform in Indian law schools, plus strengthening refined teaching methods in accordance with earlier reform proposals. In particular, the connections between pre-law teaching and the main three years of study in the five-year LL.B programmes of India need to be re-examined. It is critically important that from the first year onwards, law students receive the best possible legally-focused interdisciplinary education. This may well be delivered through law-related subjects, such as History, Political Science or Economics, but those teachers have to be trained properly, too. In every case the intrinsic and dynamic connections between different aspects of law and life should be highlighted as soon as possible within the teaching programme to empower those skilful young kite flyers to sail at the highest possible level. Personal politics of law teachers must not override plurality-conscious assessments of the wider public interest and the necessity to give respect to recognition of diversity and difference. Since law itself is internally plural, in today's post-modern conditions, failure to convey this to law students amounts to a dereliction of professional obligations.

Just as justice in India cannot be seen as blind-folded, Indian law teaching should face the existing legal super-diversity with open eyes and open-mindedness. My suggestion that teaching law through kite flying is feasible in practice is not built on ideological conviction, but on long-term,

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<sup>57</sup> A good example of such skilful kite flying is the decision by Katju, J. of the Indian Supreme Court in *D. Velusamy v. D. Patchaiammal*, (2010) 10 SCC 469. This judgment ignores none of the corners of the kite.

intensive practical experience. As a Dutch student found recently, after I had advised him through e-mail to test the kite methodology in his dissertation, ‘it works!’ What more can one say?