Introduction

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Law and religion have much in common as social institutions and as historical phenomena. Broad areas of overlap and even broader areas of complementariness between these spheres have been observed in Roman, Judaic, Christian, and Islamic societies, and have generated a vast literature. There is also a rich ethnographic literature on law in nonliterate societies, emphasizing dispute resolution, informal legal process, and cultural context. Yet India's potential contribution to this field has remained almost completely unnoticed, despite both the fact that the Hindu and Buddhist religions have produced vast and highly refined legal literatures, and the fact that the Hindu religious texts and Indian legal practices became the focus of intense scrutiny by European scholars during the centuries of colonial administration. This volume is intended to begin to rectify this oversight by offering an up-to-date and accessible analysis of the main features and periods of what has conventionally been called Hindu law, and of the interrelations between law and Hinduism more broadly, up to the present day. Furthermore, several of the chapters break new ground in developing interdisciplinary approaches to the study of Hinduism and law – for example, in examining the literary articulations or the ritual dimensions of law in Hindu contexts.

"HINDUISM"

Numerous stumbling blocks lie before the readers of this book. Its title itself displays two of them: "Hinduism" and "law." The term "Hinduism" is of modern coinage, and was not used by any Hindus themselves as a religious category until the middle of the nineteenth century, when they began to appropriate it from European usage. "Hindu" was initially more an ethnic label than a religious one. The Persians, and then the Greeks, used it to refer to the peoples living around and beyond the Sindhu River (which they

pronounced "Hindu"; "Indus" and its derivate "India" reflect the Latinized form of the Perso-Greek name). Indians (of whatever religion) do not seem to have applied the label to themselves until after Turkic rulers had established Persianate Islamic kingdoms in several parts of India, especially after 1206; late medieval works speak of "Turaka" or "Turuṣka," which designated ethnic Turks and Arabs, and only secondarily Muslims in general, much as in earlier centuries "Yona" (or "Yavana") was applied not merely to Ionians but to any denizen of "the West" (i.e., Persia and beyond). Vis-à-vis the "Turaka," "Hindu" meant simply Indian.

The period of British rule coincided with the emergence of the modern comparative study of religions, and consequently the classification of non-Christian religions into various "isms": Judaism, Muhammadanism, Buddhism, animism, and so on. In the seventeenth and eighteenth centuries, the adherents of India's indigenous religions were called "Gentoo," based on the Portuguese for "gentile," i.e., pagan idolator. But by the early nineteenth century the ethnonym "Hindu" (in use since the 1660s, spelled variously) had supplanted it, yielding the umbrella term "Hinduism." As the Victorian age progressed, Indians came increasingly to reflect on what made their religious culture distinctive in comparison with Christianity and Islam, and in so doing came to adopt the name Hindu and to reflect on what the name "Hinduism" might properly or essentially refer to. During the last quarter of the nineteenth through the middle of the twentieth century, a reformist, modernizing view of Hinduism dominated the discourse, particularly among Anglophone Indians. At the same time, certain elements of traditional piety were celebrated as central to Hindu cultural, social, and civic life, and thus as the natural foundation and justification for an independent Indian polity.[1]

As a result, although it has become commonplace for historians to speak of "Hinduism" as a purely modern conception (or "invention"), there are at least two ways – one "emic" and one "etic" – in which it makes sense to retain the label. First, for all the diversity of beliefs and practices among Hindus, the notion of a unifying core or thoroughgoing thread has ancient roots (including careful philosophical justification), and the idea has increasingly been embraced and appropriated by Hindus over the last two centuries. Today, many self-described Hindus bristle at the suggestion that Hinduism is a modern contrivance or an artificial amalgamation. This is a justification based on contemporary self-perceptions among Hindus, but, even from the perspective of the detached outsider, there are reasons to

[1] "The result of contact with foreigners has always been a revival of Hinduism" (Burnell 1878: 604).

accept (with appropriate caveats) the heuristic utility of the concept of "Hinduism." Even if the religious traditions grouped under this name lack a consistent minimal set of shared distinctive features, a cluster of "family resemblances" is discernable: assertion of the existence of divine persons, in many cases said to emanate from a single supreme unity (or pair), more abstractly conceived; techniques of mental or spiritual culture commonly involving the repetition of mantras, fasting, and meditation; worship involving offerings of food and other prestations before a physical embodiment of the deity (although a few movements have rejected or criticized image-worship); allusion to or citation of authoritative texts in Sanskrit (even if those texts are not the central focus) – the juristic literature going by the name of Dharmaśāstra is an example; and more generally a distinctive range of styles of devotion and expression quite unlike that of other religions found in India. These family resemblances may be enough to justify our speaking of the family as "Hinduism."

One problem that remains is that other religions originating in India share many of these traits to almost the same degree, notably: Buddhism (almost extinct in India by the nineteenth century, but now represented by some modern converts and by immigrants such as refugees from Tibet) and Jainism. Sikhs, practicing a tradition that arose out of the religious ferment of broadly Hindu devotionalism in sixteenth-century North India, adamantly claim the status of a distinct religion, and several movements with similar origins are inclined to do the same. Some low castes have on principle rejected the "Hindu" label because they see it as inseparable from Brahmanical (Sanskrit) doctrine, which they regard as oppressive and corrupt.[2] (Indeed, acceptance of the authority of the Veda and respect for the religious prerogatives of Brahmins used commonly to be cited even by scholars as the single unifying feature of Hinduism.) In any case, it is still possible to find local religious communities, unheeding of cosmopolitan discourse – and conversely, learned reformers and spiritual guides – who prefer to describe their religion as Vaiṣṇava or Śaiva, or Ārya or Sanātana-Dharma, rather than Hindu. For legal purposes under the Indian Constitution, all of these groups count as Hindu today, which only helps blur the elusive, shifting boundary between "Hindu ethnicity" (or "culture" or "nationality") and "Hindu religion."

[2] Throughout this volume, the terms "high" and "low" in reference to caste are used heuristically, that is, as reflecting their conventional usage in both popular and official discourses. There is no intention to endorse their normative values or the theological doctrines that legitimize them. The same goes for other caste descriptors that impute inherent purity or impurity to particular groups.

Thus, the name "Hinduism" today covers a large number of historically related but often emphatically distinct traditions and offshoots. One of the common points of reference for most of these – whether they accept its authority or reject it – is the Sanskrit literary and scholastic (*śāstra*) tradition, which is the forum in which most classical religious expression appeared. Sanskrit textual production, spanning three millennia, has produced a vast body of works in many fields, religious (Hindu, Buddhist, and Jain) and secular. Such works were produced almost exclusively by members of the Brahmin caste or other elite groups such as courtiers or learned monks. As a result, the interests and concerns of such groups are disproportionately represented: Much of the religious and cultural life of other elements in society is either ignored or represented from an outsider's point of view, and much simply went unrecorded. For our purposes, this means that much of the legal affairs of Hindus (or of Indians in general) cannot be recovered.

Hence, in spite of both emic and etic defenses of Hinduism as a coherent tradition, the risk is great that "Hinduism" will remain a catch-all concept, by which any religious idea, practice, or institution that one cannot place in another tradition gets classified as Hindu by default. We feel that it makes sense to recognize that, for all the pluralism and regionalism of Hindu religious and legal life, widespread learned traditions – and Dharmaśāstra in particular – have wielded tremendous systematizing force and myriad forms of indirect influence that have defined the most widely recognized conceptions of Hindu orthodoxy and orthopraxy. This circumstance encourages us to seek a greater incorporation of law and legal studies into the study of Hinduism as a way of adding clearer contours to the discursive uses of the term "Hinduism."

DHARMA AND LAW

What we do have, and have in plenty, is scholastic material on law, most of which belongs to the field of Dharmaśāstra, augmented by Kauṭilya's *Arthaśāstra* (a second-century treatise on politics and civil administration, including legal procedure) and some literary passages depicting legal process or discussing *dharma*.

The word *"dharma"* is sometimes translated as "law," but this can be misleading. Both terms in fact have broad semantic ranges that overlap only in part. When we speak of law in premodern India, we face not merely a terminological problem but a conceptual one: Are the Indic phenomena to be discussed as law of the same basic sort as the phenomena included under that category in the West today? The English word "law" has several senses,

but the basic ones in *legal* usage are: (1) a body of rules considered binding on a particular political or social unit, and the principle of justice underlying it ("the law" = *ius*, *Recht*, *droit*, *diritto*, archaically, the "Right"),[3] or one of the individual rules thereof ("a law" = *lex*, *Gesetz*, *loi*, *legge*); (2) a code or canon of such rules, including constitution, charters, statutes, and decrees, but also documents such as contracts and deeds conforming to legal principles, and jurisprudence; (3) institutions and practices for the creation and application of such rules, and for the adjudication of disputes.

In the West, legal rules have come about in various ways, taking various forms. Some begin as divine commandments, embodied in scripture, especially the "Law of Moses" or "Jewish law," or the "Old Testament," and elaborated into a code (such as Talmud or canon law) through exegesis and authoritative pronouncements. This notion of law has since been extended to apply to the rules and codes of other religions. Apart from such elements of sacred law, legal rules may be instituted through legislative acts and institutions of a state (civil law), or they may emerge as more or less explicitly formalized standards derived from the customs or usages of a society or particular groups therein (common law), standards that may often remain unwritten but are no less binding for that.

Hindu India has known all three sorts of legal institutions, and all three came into play in legal practice at least up to the colonial period. "*Dharma*" is the term most closely associated with sacred law, both as an abstract notion of righteousness or justice, and in more concrete terms as the collective name for specific rules of social conduct and ritual action laid down in (or considered to be implicit in) revealed scripture ("the Veda"). Although it is part of the "*dharma* of the king" to enforce such laws, the ultimate sanctions and rewards entailed by such rules transcend all human agency: the impersonal law of karma, and the possibility of divine interventions. The legal institutions of premodern Indic states include the facilitation of legal process (*vyavahāra*) and the judgments and ordinances (*śāsana*) of the king. Customary law (*ācāra*), mostly unwritten, was probably the legal regime that governed the majority of the population, and both the Dharmaśāstra and royal inscriptions recognize the broad validity of customary law, at least within its proper jurisdiction. Indeed, the Dharmaśāstra explicitly encompasses all of these spheres of law, subordinating all elements to the transcendent standard of *dharma*. And although in principle the chief source (or "root," *mūla*) of *dharma* is supposed to be the sacred words (*śruti*)

[3] Thus Lord Coke declared that "when an act of parliament is against common right or reason ... the common law will controul it and adjudge such Act to be void" (1777, vol. VIII, 118a).

of the Veda, in practice the system relies mainly on *smṛti*, the collective remembrance of Vedic *dharma* embodied in the teachings of the great sages, and the customs (*ācāra*) of properly trained upper-caste Hindus – together constituting something quite like the rabbinic notion of "Oral Torah."

"HINDU LAW" VERSUS "HINDUISM AND LAW"

Having considered the separate terms of our title, we now turn to their juxtaposition. By "Hindu law," we refer primarily to both the theoretical and the practical law described in Dharmaśāstra literature. By this definition, Hindu law is a system of religious law, analogous to other traditions such as Jewish, Islamic, or canon law. Religious legal traditions have a textual canon, often relatively open, and a scholastic commentarial tradition, which together serve a remarkably stable religious vision and support a distinctively religious understanding of law's purpose, form, and content. Hindu law would have been just one of several coexisting legal or normative orders at any given place and time in India. To characterize any historical legal system or order as an instance of Hindu law requires a demonstration of its connection to the Dharmaśāstra tradition as its scriptural foundation. Such a connection to Dharmaśāstra is the *sine qua non* of categorizing a legal system or legal order as *Hindu*.

By "Hinduism and law," in contrast, we seek to erect the framework of a new field of study on the model of other work in law and religion that focuses on the mutual connections between particular religious traditions and particular legal systems.[4] Hinduism, despite being notoriously difficult to define or circumscribe, is a sufficiently cohesive and identifiable religious tradition that exhibits both the influences of and the influences upon legal orders and systems of several kinds. Abstract juxtapositions such as law and Hindu theology or law in Hindu epic literature are, in this view, both possible and academically sound, as are more concrete comparisons such as Hinduism and old Javanese law or Hindu temples and modern Indian law. Also possible, of course, is an investigation of Hindu law and Hinduism. The point here is that it is imperative that we attend to the possibilities opened up by examining Hinduism's relationship to legal ideas, institutions, and practices as a separate, or at least separable, matter from any examination of Hindu law.

[4] See, for example, Witte (2008) for an exploration of the impact of Christian ideas and institutions on the development of the Western legal system.

The structure and organization of this volume reflect this important conceptual distinction that we make throughout, namely to differentiate the narrower tradition of Hindu law and jurisprudence from the larger historical and thematic connections of Hinduism and law. Part I of the volume is devoted to Hindu law. The contributions trace both the history of the practice of Hindu law and the development of its textual foundations. Parts II and III are devoted to Hinduism and law, with the first focused on premodern sources and the latter on colonial and postcolonial materials.

OVERVIEW OF THE PARTS

Part I

Accordingly, the first part of the volume presents a detailed chronological survey of Hindu law in various phases: from its early origins and the formation of the Dharmaśāstra canon, its recanonization under the British, and its partial survival in contemporary Indian "personal law." In the first chapter, Donald Davis offers a comprehensive overview of the history of the practice of Hindu law, considering the important political, religious, economic, linguistic, and literary changes that have affected it from the fourth century BCE until the present. By design, the chapter looks beyond textual developments in Dharmaśāstra, both because those are discussed in the next chapter and because a concern with practical law forces us outside these texts. The idea is to offer a way of describing Hindu law in general terms that can be substantiated through an examination of historical change, drawing on evidence from both within and beyond Dharmaśāstra.

In Chapter 2, Patrick Olivelle turns our attention to the classical literature of Dharmaśāstra, characterizing the various genres that emerged – the aphoristic *sūtra*s, the verse *śāstra*s, and the medieval commentaries (*bhāṣya*) and anthologies – and identifying conceptual and legal trends that appear in them. He notes the contributions, at an early stage, from the tradition of political science, especially parallels with the *Arthaśāstra* of Kauṭilya (second century CE). Axel Michaels, in Chapter 3, follows this up by assessing the sorts of materials available for documenting legal practice in South Asia prior to the sweeping changes that came with the advent of the colonial powers. This evidence includes inscriptions recording the edicts and rulings of kings, decisions of Brahmin or other caste councils, endowments, and legal titles; legal formularies (e.g., the *Lekhapaddhati*); and court records of the Maratha state. The royal legal codes of Rāṇa-period (nineteenth

century) Nepal and French colonial records of the Tamil choultry courts (eighteenth to nineteenth century) are considered as two examples of Hindu law in transition as European models of law transform traditional patterns.

The fourth and fifth chapters trace the reconfiguration of Hindu law under British colonial administration. Rosane Rocher first describes the creation of "Anglo-Hindu Law." In its formative period, *c.* 1772–1815, the British attempted, with the guidance of Orientalist scholars, to identify and translate fundamental treatises of Dharmaśāstra. In this effort, the aid of traditionally trained Brahmin scholars (pandits) was enlisted to bring authoritative native expertise. Rocher shows how the colonial decision to administer Hindu law was the mainspring for Sanskrit studies by Westerners, and how, from the 1770s to the 1820s, the search for consistency in law decisions moved away from reliance on pandits as sources and custodians of Hindu law, first to trust in foundational texts, then to Orientalist authority in the field, and finally to adherence to a system of case law based on precedents.

Rachel Sturman's chapter, "Marriage and family in colonial Hindu law," examines how and why issues relating to marriage, gender, and the family came to form the core of colonial Hindu law, both in the everyday adjudication of the courts and in the heated public debates concerning the morality of Hindu practices that marked the late nineteenth and early twentieth centuries (for example, on the issue of child marriage and the age of consent). Highlighting the colonial treatment of Hinduism as a legal system, Sturman explains the relationship between colonial Hindu law (which formed a branch of civil law) and secular civil and criminal law. Finally, she considers the implications of the colonial system of Hindu law both for creating a secular legal system and for the lives of Hindu families.

The first part closes with Rina Verma Williams's study of the reformulation of Hindu law in independent India ("Hindu law as personal law"). The creation of independent India as a secular state required a reform of the colonial-era "personal laws" (those applicable to such matters as marriage, adoption, and succession). Ultimately, this process detached the legal category of "Hindu law" from its traditional roots in Dharmaśāstra. Williams analyzes the 1950s Hindu Code Bills debates to trace two interrelated transformations: Gender became the site *on which* modern Hindu law (as personal law) has been constructed; and the modern state became the institution *through which* modern Hindu law (as personal law) must be negotiated. As the links to classical/textual Hindu law receded, Hindu law as personal law became progressively more embedded in discourses of community, identity, and modern state power.

Part II

The second part of the volume examines the relation of Hinduism and law in premodern historical periods from two perspectives. First, this section addresses cases in which Dharmaśāstra has had an impact on, or been impacted by, other Hindu traditions such that legal ideas and institutions are connected to Hindu ideas and institutions and vice versa. Second, the section shows how Hindu expressions of legal norms may be approached in theoretically novel ways. The purpose of Part II is thus to open new lines of thought within Hindu studies that point to the crucial role played by law in the tradition, but also to propose new ways of understanding Hindu law by viewing it through distinct theoretical lenses.

Contributions to this section further point to a new academic horizon, namely the possibility of legal studies of Hindu traditions that move beyond Dharmaśāstra. While each chapter still engages directly or indirectly with this hegemonic textual genre of Indic law, the very possibility of "law and hermeneutics," "law and literature," "law and performance," or even "law and religion" in premodern India outside Dharmaśāstra suggests perspectives on a whole range of social facts in India that have been neglected until now.

For example, the elaborate hermeneutical system developed in the Pūrva-Mīmāṃsā for the complex sacrificial rites of the Vedic tradition has been appropriated almost everywhere in later scholastic traditions of India. Lawrence McCrea describes how Mīmāṃsā subserved Hindu law texts by providing the theological and philosophical foundations for law as well as technical rules for its interpretation, but he also shows how these two traditions had surprisingly few authors in common until the sixteenth century. More importantly, he nuances the changes in the textual formats for Dharmaśāstra (metrical rule-texts, commentaries, and digests) in relation to the sometimes fierce debates over Mīmāṃsā's construction of textual authority.

Timothy Lubin's chapter is an experiment in comparative jurisprudence, asking how Indic legal traditions conceived of what in the West is called "authority." The materials examined range from scholastic definitions (such as the śāstric notion of Vedic authority elaborated by McCrea) to formulations more closely attuned to the practice of the law. He finds that two influential Indic concepts – *pramāṇa* and *adhikāra* – largely cover the same ground as "epistemic authority" and "practical authority" in Euro-American jurisprudence, although in practice *pramāṇa* can do double duty, that is, as "proof" and as "authorization."

Ananya Vajpeyi investigates the still difficult question of caste in India through a study of seventeenth-century texts that focused in a newly intensive way on the usually despised figure of the low-caste Śūdra. She provides a careful study of the philological, historical, and philosophical reasons behind the emergence of this new thematization of the Śūdra as an important subject of *dharma* and law. The timing of this emergence, as well as its substance, challenges conventional social histories by showing caste in a contested and dynamic discourse, not a simple, hegemonic, and static theory that had no relation to social reality.

In what may be the first serious law and literature study of premodern law in India, Whitney Cox extends recent work on the politically constitutive role of Sanskrit literature (*kāvya*) in classical and medieval India by relating it to the constitutive work performed by Hindu law texts. In the end, he suggests that these two textual forms both served important political functions that differed from, but also related to, one another. His concluding suggestion – taken from the Kashmiri author Kalhaṇa – that, in some cases, the linguistic expression of the judge should be the moral model for the poet inverts the usual law and literature presuppositions about the possible ethical influence of literature on law.

Revisiting some of the most enigmatic portions of Dharmaśāstra, Robert Yelle examines the semiotic functions of poetic devices in Hindu law, such as hyperalliteration, folk etymology, and chiasmus. In so doing, he reveals the rationality underlying the at first incongruous performative elements of these texts. By interpreting these parts of the texts in terms of or in the imagined context of performance, Yelle makes sense of the nonsensical and, in the process, offers performance studies as yet another underexplored approach to law in India.

Part III

The final part focuses on the intersection of Hindu practice, legal ordering, and political cleavages during the colonial and post-Independence periods. These issues, tied to social, political, economic, and administrative pressures, have determined the subsequent development of Hindu law in the attenuated and novel form in which it persists today. The chapters in this part also address matters of Hindu religious practice within the modern secular legal system. It is inevitable that, due to the vast contrast between the sources available for premodern periods and those available for developments since 1750, Part III focuses considerably more on legal practice than is possible in Part II. Nevertheless, these two sections are unified by their