A historical overview of Hindu law

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Hindu law has always existed within a broader pluralism of legal systems in India that to a greater or lesser extent overlapped with one another in both form and substance. Distinguishing the specifically Hindu element in the larger history of law in India is difficult because of the notoriously poor record of premodern legal practice. Still, the history of Hindu law is part of the history of law in India and by describing the latter we necessarily comment upon the former as well. I define classical Hindu law as "a variegated grouping of local legal systems that had different rules and procedures of law but that were united by a common jurisprudence or legal theory represented by Dharmasāstra" (D. R. Davis 2008: 225). Thus, while I consider Dharmasāstra, Sanskrit texts dealing with religious and legal duties, to be the distinctively Hindu element in Hindu law throughout its history, I am not concerned in this overview with its jurisprudence. Rather, I want to provide a skeletal history of legal practice in India that heuristically avoids Dharmasāstra by limiting, somewhat artificially, references to the scholastic tradition to instances of the texts pointing beyond themselves. The major factors I want to consider instead are broader historical trends and how these impacted the practice of law in India and, thus, also among Hindu communities. Because of the nature of the evidence, the history I give is more a hypothesis than a documented synthesis.

The principal legal actors or institutions that recur in the historical record of law in early India are corporate groups, rulers, and, later, temples.

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1 For this, see the chapters by Olivelle, McGon, and Lubin in this volume.
2 A more specific analysis of the history of Hindu law would thus require a detailed correlation of evidence of developments within the Dharmasāstra tradition with the broader historical trends examined here. The systematizing and scholastic nature of Dharmasāstra, however, tends to thwart such analysis, especially in the absence of critical editions and chronological details for most texts. For standard accounts of the history of Hindu law written through the lens of the Dharmasāstra texts, see Derrett (1968), Lingat (1972), and Kane (1968–75). Sarkar (1938) is certainly the best attempt to write a periodized history of Hindu law, but it too substitutes the history of the texts for the history of legal practice.
practice of law revolved around these three social agents. To place these agents in historical context, however, necessitates choosing a datable point from which to begin a description of the legal history of Hindu law. Several recent works have focused on the “between the empires” (Olivelle 2006a) period between the second century BCE and the second century CE as the formative era during which significant innovations in the social and political life of India occurred, including the political and financial solidification of the Buddhist monastic community; the early epigraphical and archeological evidence of maritime trade; the composition of culturally foundational Indic texts such as the Rāmāyaṇa and Mahābhārata epics, and the Laws of Manu, and, perhaps most importantly, the creation of a nonliturgical, literary use of Sanskrit and its close connection to the articulation of a cosmopolitan rulership (S. Pollock 2006).

In selecting a starting point, therefore, I will follow Pollock’s argument that the Junāgadh inscription of Rudradāman c. 150 CE inaugurated a new era of political discourse and self-presentation in India (S. Pollock 2006: 67–9). Pollock makes the sweeping thesis that a new literary use of Sanskrit, signaled by an explosion both of secular poetry and drama and of epigraphical panegyric, was intertwined with a uniquely Indic mode of rulership. Sanskritic literary and political culture eschewed administrative centralization in favor of a replication of mytho-political genealogy that allowed local languages, politics, and laws to coexist within a cosmopolitan discourse of rulership. We may thus affirm that in the early Indic world, “no uniform code of law was ever enforced anywhere” (S. Pollock 2006: 277). The poetic and rhetorical construction of cosmopolitan political power hindered attempts to promulgate a centralized law and legal system in practice, and effectively obviated the need to do so. But the lack of a uniform code at the level of practice did not inhibit the presentation of a grandiose, cosmopolitan legal system in the idealized texts of Hindu jurisprudence.

In this way, the cosmopolitan expression of political imagination in new, specifically literary, genres of Sanskrit must be supplemented by a contemporaneous and related innovation in the imagination of law and the state in Hindu jurisprudence. Especially after the composition of the Laws of Manu in the second century CE, Dharmaśāstra presents a divided image of dharma in which the localized, household-oriented dharma as detail for Brahmins are juxtaposed to the image of rulers as the protectors of law and promulgators of a state characterized by great political and administrative aspiration. The legal cosmology of Dharmaśāstra thus parallels the replicative cosmopolitanism of literary discourse. Dharma as law was in practice
to be negotiated and articulated locally under the control of a ruler, but its theological and political authority was part of the same cosmopolitan ethos - nonliturgical, replicable, and defined by an aspirational political theology rather than forcible practical implementation. In the Sanskrit cosmopolis, rulers protected and enabled the dharmas of the orders of life and caste; they did not forcibly legislate or promulgate that law.³

For the next thousand years, Sanskrit dominated the political discourse of South and Southeast Asia and with that domination went at least the rhetorical appropriation of the secular elements of dharma, namely, legal procedure, ideals of political administration, titles of law - i.e., rajadharma, the dharma of a ruler. The future course of Hindu law in practice was put in place by the linking of literary and dharmic discourses. Specifically, Hindu law was to remain until 1772 a resolutely local affair in the practical administration of legal norms, but also projected a capacious image of rulership that sustained the Sanskrit cosmopolitan style. Much like language and rulership, Hindu law superposed a cosmopolitan jurisprudence on separate and conceptually distinguished local legal practices. As with Sanskrit literary forms, or kārya, this cosmopolitan jurisprudence played an important role in the development of vernacular legal thought in later centuries. In fact, the cosmopolitan political imagination was partially articulated by means of Hindu jurisprudence and not merely by literary texts and epigraphs. The circumscribed legislative and administrative power of the ruler in practice, the value placed on local, especially corporate, substantive laws, and the restriction of jurisprudential reflection to a Sanskritic idiom were characteristics of Hindu law that persisted as part of the cosmopolitan ethos and the subsequent emergence of vernacular literatures and laws.

It is also during the period between the Mauryas and Guptas that the first sustained information on corporate groups and their impact on law emerges in the historical record. Among these groups, the best documented and perhaps most influential was the Buddhist monastic community known as the Sangha. The practical administration of classical Hindu law occurred primarily at this level of society. Corporate groups including merchants, traders, guilds, soldiers, religious renunciants, Brahmins, pastoralists, farmers, castes, and family lineages possessed a body of substantive laws that they generally administered to their own members (see D. R. Davis 2005). While most corporate groups were nonreligious in their orientation and structure,

³ Pollock makes a regular distinction between the "voluntaristic" cosmopolitanism of Sanskrit in South Asia and the "coercive" cosmopolitanism of Latin in Europe.
historical evidence of temple inscriptions itself indicates an innovative function of temples with respect to the law, namely record-keeping. Stone and copper-plate inscriptions, and later palm-leaf records, pertaining to the temple's property holdings are essential sources for understanding history in India, especially its chronology. Since most inscriptions are records of gifts, almost every inscription records a legal act of donation, in addition to other information. Other records describe legal arrangements for the maintenance of the temple staff and buildings and for various capital outlays, mortgages, and so on. Overall, Hindu temples introduced several new legal possibilities into medieval India by providing a centralizing physical space critical for imperial actions, increased adjudication, religious and legal propaganda, and record-keeping.

The proliferation of Hindu temples as perhaps the primary public loci of Hindu religious practice continued during the military incursions of Turkic Muslims from Central Asia beginning in 1000 CE, but consolidated politically only in 1206 in the form of the Delhi Sultanate. Turkic military practice, Persian forms of governance, and Islam itself had a major impact on Indian society, especially on its displaced elites. Muslim rulers of the regional sultanates introduced a variety of administrative legal terms, offices, and institutions that for the first time forged a closer link between state and law in India. This link emanates more from the traditions of rulership associated with Central Asia and Persia than from Islamic political theory, which insists on a rather clear separation of state and law, despite acknowledging and theorizing practical needs to the contrary. Thus, Islamic law in the sense of fiqh was never at the center of governance in the regional sultanates or in the Mughal Empire.

Nevertheless, the model of arrogating old administrative and taxation practices to the state and creating new ones in the regional sultanates set in motion a continuation of the process by other Indian states, including Vijayanagara and the Marathas, not to mention the Mughals. Indeed, most of the later British administrative vocabulary was adopted from the Persian terminology used in the sultanates and later in Mughal domains. What is not yet appreciated is the more encompassing process at work in the transformation of the language of administration by the "language of political Islam," namely the centralization of key aspects of law by the state. Put differently, both the Delhi Sultanate and the Mughal Empire

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7 For studies of the influence of Islam and Islamicate ideas and institutions on India, see, recently, Asher and Talbott (2006). Eaton (1993: 28–50) and Subrahmanyan (2005: 45–79) describe the development of "Pero-Islamic civilization" in Bengal.
promoted the use of a new language, Persian, that served both documentary and expressive purposes (Alam 2004: 115–40). In relation to law, what occurs strikingly in the flourishing of Persian in India is a novel adoption of a documentary language of administrative law, the law that describes and governs the relationship of the state to the people. Sanskrit and Indian vernaculars possessed a great deal of administrative vocabulary, but a centralizing use of any language by a state for administrative documentation and dissemination occurred only after the introduction of Persian by the sultanates. In fact, the use of Persian for government documentation appears to have created the conditions under which the first truly centralized state in Indian history could emerge. The formalization of Persian as the language of administration occurred later in the sixteenth century during the reign of Akbar, but the spread of Persian and the realization of its political and legal utility long preceded the Mughals.

By this time, however, practices of legal documentation transcended geographic boundaries and, throughout the Eurasian world of commerce, cultural exchange, and migration, new forms of law and new legal institutions were rapidly shared across large expanses of Asia and Europe. In other words, the move to increased documentation of the law cannot be attributed solely to the precedents of the Delhi Sultanates and their use of Persian. They must also be explained in part with reference to new intercontinental forms of cultural exchange, especially over time those associated with European colonialism to be discussed shortly.

Contemporaneous with the expansion of Islamic political power in India, and not entirely independent of it, was the development of new linguistic valences for vernaculars in the subcontinent and beyond. The governmental documentary model of Persian set a precedent that was subsequently followed by every major polity in India, in many cases by adopting the Persian terminology itself. An early example of the increased use of vernaculars for legal documentation in connection with a state is the Lekhapadelhati, a

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8 Recent scholarship neglects the fact that documentary uses of language are as constructed and non-natural as literary uses. Documentary uses of language are generally taken for granted as part of the obvious communicative function of language. However, administrative language existed in Sanskrit and Indian vernaculars without the formation of systematic government documentation for any administration.

9 I offer this as a tentative supplement to the forms of “connected history” identified by Subrahmanyan (1997) for early modern Eurasia. When read in relation to Benton’s analysis (2002) of the connections between colonial legal regimes in the same period, the plausibility increases that legal documentation in particular constituted an important material vector of the early modern “world system.”

10 The best examples of this process outside India are the Dhammasastra texts of Burma and the Thammasat texts of Thailand. See Lingat (1973: 266–72) for a basic discussion.
collection of exemplars for executing various kinds of legal documents used perhaps in Caulukya and Vaghela states in Gujarat. The multiplication of legal documents occurred in many “princely states” as well, such as the Travancore kingdom, not to mention the massive Peshwa Daftar of the Marathas. In Nepal, Persian terminology of land revenue and taxation was incorporated into the practical law of the area, which also made use of laws emanating from Hindu jurisprudence.11

As a result, it is really in the period between 1500 and 1750 that extensive legal documentation became the norm for Indian states. The concomitant shift to vernacular political discourse of an expressive variety bolstered this expansion of documentary uses of vernaculars for political and legal purposes. There is almost no value for the label “Hindu” to describe any distinctive aspect of this massive transformation of legal practice in India, and yet the impact of the change on practical Hindu law was unavoidable—law gradually moved away from the domain of corporate groups and temples into the purview of political states, none of which made religious law central to their political identity or power. Perhaps the most we can say for the moment is that some ideas of Dharmaśāstra were, probably for the first time, consciously adopted by state-based institutions, on the model of the adoption of Persianate for other, different kinds of law. Prominent here was family law, including most of what would later be called “personal law,” i.e., marriage, inheritance, adoption, and so on.12

A related phenomenon of this period, and one directly linked with Hindu law as a tradition, was the creation of a limited vernacular jurisprudence, i.e., Dharmaśāstra not in Sanskrit. Translations and original works of Dharmaśāstra began to appear at least in South Indian languages as early as the thirteenth century.13 Persian translations are known from the seventeenth century.14 Sanskritic jurisprudence, too, became both more regionally conscious and influenced by regional legal terminology and practices. The idea that legal reflection could be written in a language other than Sanskrit was completely new and signals at least some diminution of the hegemony of Sanskrit in academic discourse, on the one hand, but also an

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11 See the chapter by Michaels in this volume. 12 On this, see Sturman’s chapter in this volume.
13 Ketana’s thirteenth-century Telugu translation of Vijnāneśvara’s Mitakṣara is found in Vasundhara (1589); Alakīn Perumal’s fifteenth-century Tamil rendering of the same was published by Rajagopalan (1960).
14 Supriya Gandhi kindly made me aware of several Persian manuscript translations of the Mitakṣara, e.g., Lal Bihari Bhopuri, Aḥkām-i aṣāmīr va nāvāb-î maḥāb-î hunūd (1618 CE), Aligarh Muslim University, Univ. 144 Rel. and Sufism.
increased valence for Dharmaśāstra rules and ideas in the practical legal systems of newly formed states.

The next major historical change to the Hindu law tradition came, of course, through the European colonies established in India beginning in the sixteenth century. Prior to 1772, the impact of colonialism was less direct in the area of law because of the more limited political role played by the various "trading companies" of Portugal, Holland, France, and England. Still, transformations associated more generally with "early modern" Eurasia resulted in changes in legal practices in India as well. Notably, as just suggested, the long-distance commerce characteristic of the period necessitated the creation of expanded documentation to keep investors apprised and assured of the security of their investments. Legal documents thus became an important tangible material of colonialism, perhaps its most important artifact or by-product.

The direct impact of colonialism on Hindu law may be dated to 1772, the year in which Governor-General Warren Hastings announced his Judicial Plan. The relevant decree in the Plan declared that Dharmaśāstra would be the sole basis for Hindu law as administered by the British. At the time, none of the British knew Sanskrit. By 1776, however, Hastings had commissioned a digest of Hindu law that appeared as the Code of Gentoo Laws, a curious work that consisted of Nathaniel Halhed's English translation of a Persian rendering from an oral Bengali paraphrase of a Sanskrit original compiled by twelve pandits employed by Hastings. The Calcutta-based Orientalists, especially Jones and Colebrooke, who guided the early development of what came to be called Anglo-Hindu law relied exclusively on Dharmaśāstra as the source for practical Hindu law in British courts, essentially meaning that the translations provided by the Orientalists became a uniform basis for positive law among Hindus throughout the British-dominated regions of India. With this appropriation, Dharmaśāstra became completely enmeshed within the colonial state and its traditional standing in the realm of civil society was translated into British legal discourse and ossified through it.15

However, the British did not accept every aspect of Dharmaśāstra into the colonial legal system. Rather, primarily matters of religious relevance, meaning laws that attached to personal identity rather than civil identity, were placed under British jurisdiction. This is the foundation of the personal-law system in India today in which certain areas of law, namely marriage, divorce, adoption, inheritance, and maintenance are differentially

15 Rosane Rocher's chapter in this volume treats this subject.
defined according to religious affiliation. Hindu jurisprudential views of contract, crime, tort, procedure, and property were wholly ignored by the British. The adjudication of Hindu law in British courts was facilitated with the help of pandits appointed to the court to assist judges in determining the relevant law. The system was cumbersome and the order to consult Dharmaśāstra as positive law was frustrating both for the British judges who had no direct access to the law they were applying and for the Hindu court pandits who had to cope with this novel use of Dharmaśāstra in the context of a power dynamic that placed them in an inferior and structurally suspect position.

The year 1864 is the next notable date in the history of Hindu law because it was the year in which both Hindu pandits and Muslim maulvis were dismissed from their official service to the British courts in cases of Anglo-Hindu and Anglo-Muhammadan law respectively. With this dismissal, the last vestige of Hindu jurisprudence, its traditional living source, was disconnected from any formal legal recognition in British India. From then on, Anglo-Hindu law was determined and adjudicated on the basis of existing case law and textbooks that systematized it. It is also in this decade – under the influential views of Henry Sumner Maine – that the British formally assumed a new attitude to the proper source of Hindu law, shifting its primary source away from Dharmaśāstra to customary law. Especially in recently acquired areas of British India such as the Punjab, massive government collections of customary law were undertaken in order to ascertain the law in practice, including relevant aspects of Anglo-Hindu law.

Efforts to modify and/or codify some or all of the Anglo-Hindu law began as early as 1850, but the culmination of those efforts did not come to pass until after Indian Independence in 1947. In the 1950s, as part of the constitutionally mandated efforts to work for a uniform civil code and after heated debates, a series of bills was passed by the Indian Parliament that partially codified what is now known as modern Hindu law. In this way, continuities with the colonial personal law system prevail in the post-Independence system. Since this partial codification, Hindu law has generated little legal interest because of a perception that, for better or worse, it

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16 See the chapter by Williams in this volume.
17 See Derrert (1963: 617–31) for the text of ten legislative acts passed by the British to amend Anglo-Hindu law as it was being applied in the courts. Only two were put in place in the nineteenth century, namely the Caste Disabilities Removal Act (1850) and the Hindu Widows Remarriage Act (1856). The remaining legislation began from 1928 onwards and is more indicative of the codification sentiment that resulted in the Hindu Code Bills of the 1950s.
18 See the chapter by Williams in this volume.
is largely a settled matter. The one recurring area of legal and political debate in which Hindu law is still considered is the question of Indian secularism. A complex understanding of secularism, as constitutionally mandated, has emerged that accommodates the existence of the personal law system, though not without criticism. Recent political movements associated with Hindu nationalism have reignited the debate over secularism but so far with little impact on the practice of Hindu law itself. For the moment, it appears that Hindu law’s primary public valence will be to act as one charged example in a political struggle over the proper direction for Indian secularism. In this context, however, we should not expect any serious engagement with the details of modern Hindu law or any aspect of its long history.

This historical overview of Hindu law has been necessarily cursory; some may even think it to be premature. Fortunately, several of the periods examined here are dealt with in greater detail in subsequent chapters. My attempt here has been primarily to describe the history of Hindu law in practice in such a way that one can begin to see how changes from one “period” to another also entailed the preservation of existing legal practices. Over the long timespan considered, however, classical Hindu law and modern Hindu law appear very different (though hardly more different than Roman law from modern civil laws). The starkness of the difference derives from a failure to seek out a history of law in between the timeless and synchronic jurisprudence of Dharmaśāstra and the radically different construction of Hindu law during and after the colonial period. The overview given here will hopefully make a first step toward better historical descriptions of the transformations and trajectories of Hindu law and the broader legal pluralism in which it has always existed.