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PROVINCIALISING *DHARMA*

STUDIES ON LEGAL ISSUES IN THE HIMALAYA

Edited by

Florinda De Simini
Domenico Francavilla
Axel Michaels

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The Department of Law of the University of Turin, to which the AIT-Asia Institute Torino express its heartfelt thanks, has also contributed to the publication of this volume, dedicated to the critical analysis of the various aspects that characterize textual traditions and the Dharma practice, particularly in the Himalayan context, edited by Florinda De Simini, Domenico Francavilla and Axel Michaels.

Irma Piovano

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Editors' Preface

The aim of this volume is to explore the local dimension of *dharma* focusing on the Himalayan context and considering both textual traditions and living practices. The contributions cover different epochs and different Himalayan areas, with a concentration on medieval and pre-modern Nepal, and are written by experts of South Asian traditions working in different research fields.

Preliminary versions of the contributions published in this volume were presented and discussed at the conference "Studies on Dharma in the Himalayan Region", held from 27 to 29 April 2022 at L'Orientale University of Napoli, and jointly organized by the ERC Project *Translocal Identities: The Śivadharma and the making of regional religious traditions in premodern South Asia* (GA 803624), the Heidelberg Academy of Sciences and Humanities and ISA, the Institute of Asian Studies at the University of Torino. We wish to thank these institutions for their support to the organisation of the conference and all the participants who helped to improve the final versions with their observations.

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Finally, we wish to thank the authors for contributing to this collective endeavour. This research perspective is extremely rich and comparatively less investigated. We are aware of the many limits of this volume, but we hope that it could be useful to deepen the understanding of *dharma* in the Himalaya and prompt further research on the Himalaya and other areas of South Asia as well.

FLORINDA DE SIMINI, DOMENICO FRANCAVILLA, AXEL MICHAELS

Provincialising Dharma*: An Introduction*

Considerable scholarship has delved into the multifaceted dimensions of *dharma* within the realms of both society and religion. Attempting to recapitulate or reiterate this vast body of knowledge here would be futile and impractical. Instead, our inquiry is directed towards uncovering the distinctive features of *dharma* within a specific geographic context, namely the Himalayas. Specifically, our exploration is centered on medieval and pre-modern Nepal, extending our gaze into more contemporary periods and encompassing regions like Chamba and Kashmir. Our investigation also encompasses the lesser-explored realm of the older Śivadharma system, dating back to the 6th and 7th centuries, where Nepal holds a wealth of untapped source material.[1]

Until the close of the 18th century, Hindu law predominantly operated at the local and regional levels, significantly shaping the Brahmanical norms found in Dharmaśāstra. This localised *dharma* is often characterised by broad and binding legal principles and customary laws (*lex non scripta*) that lack formal establishment or codification in written form by a legislator. Frequently, these legal norms are documented in vernacular languages rather than Sanskrit, despite their connection to Dharmaśāstra, which largely supplanted regional laws, although it frequently makes reference to specific and geographically limited legal norms.

An explicit illustration of this regional contrast can be found in the *Smṛticandrikā* (12th century), where, quoting from *Baudhāyana Dharmasūtra* 1.2.1-6, distinctions between the south and the north are emphasised:

> There is a difference (of usage) on five points, in the South and the North. Those which (exist) in the South we will expound: Thus this, partaking of food with one who has not had his upanayana performed, or taking food with the wife, eating stale food; in the North: the sale of wool, wine-drinking, trading (in

[1] Bisschop, Kafle, and Lubin 2021, 4; Mirnig 2019, 471-72.

> animals) with teeth on both sides, the bearing of arms, travelling by sea. (*Smṛticandrikā*, Gharpure 1946, 17).

Thus, in many contributions of this volume, this complex relationship between the Brahmanical Dharmaśāstra to the region-specific or "sectarian" characteristics of *dharma* is in the foreground.

The correlation between classical Dharmaśāstra and the *dharma* of various entities such as regions (*deśadharma*), villages, castes, families, and corporations is a well-established theme. Classical Dharmaśāstra extensively addresses the nuanced legal and ethical principles that govern these distinct entities, recognising the diversity of social, cultural, and geographical contexts. This comprehensive approach acknowledges that *dharma* is not a one-size-fits-all concept but is intricately intertwined with the specificities of regions, communities and societal structures.[2]

The recognition of the regional nature of *dharma* finds its roots in early legal texts. Thus, what sets the Himalaya apart, and is it a homogenous region? Strikingly, there are notable similarities among Himalayan regions, as highlighted in theories such as Zomia. Scholars like Willem van Schendel and James Scott depict the Himalaya as a multilingual, multireligious, multi-ethnic, and polycentric region. This area exhibits varying degrees of Brahmanical influence, low population density, historical isolation, statelessness, and a lack of writing systems.[3]

These shared characteristics underscore the uniqueness of the Himalayan region and its distinct socio-cultural and historical dynamics. The multifaceted nature of the Himalayan landscape, with its diversity in languages, religions, ethnicities, and governance structures, contributes to a complex tapestry that shapes the understanding and practice of *dharma* in this region. Anthropologist Sarah Shneiderman (2010) has criticised the Zomia theory, emphasising instead the coexistence of different forms of state sovereignty and loyalties within a multi-state space characterised by transregional trade and cultural contacts.

Similarly, there has been an early acknowledgment of the plurality of *dharma* (*anye dharmāḥ*). *Manusmṛti* 1.85-86 stands out as the classic reference for this concept, with Medhātithi's commentary noting that it is not the *dharma* that changes, but rather, that it is influenced by human behaviour. The authority

[2] Davis 2004; Derrett 1979; Jha 1930; Kane 1968-75, vol. III.2; Lingat 1973, part 2, ch. 2; Michaels 2010; Rocher 1979; Wezler 1985.
[3] Cf. van Schendel 2002; Scott 2009; Michaud 2010.

to decide the correct *dharma* is vested in elder individuals, Brahmins, and scholars, who make judgments based on distinct principles, even though they are encouraged to seek consensus. This recognition underscores the nuanced and diverse nature of *dharma*, acknowledging that interpretations may vary based on the perspectives of different authorities.

Given the expansive nature of the topic, we have refrained from committing to rigid definitional boundaries. Instead, we align with the perspective of the *Āpastamba-Dharmasūtra* (1.20.6), which asserts, "*Dharma* and *adharma* do not wander around saying: 'Here we are!' Nor do gods, demigods (Gandharvas), or ancestors say: 'This is the *dharma*, this is the non-*dharma*.'" Our approach to *dharma* is one that recognises its inherent breadth, extending beyond mere legal considerations. We view *dharma* as a comprehensive concept encompassing questions related to correct, virtuous, or redemptive behaviour (*ācāra*), shaped by the ethical standards set by the wise and learned (*sadācāra*, *śiṣṭācāra*). This understanding embraces the multifaceted nature of *dharma*, acknowledging its connection to broader aspects of righteous conduct.[4]

In the context of this necessarily broad understanding, the importance of *dharma* for the various local legal systems that have developed historically within Hinduism and, as regards more closely this volume, in the Himalayan area should not be underestimated. With reference to Nepal, many contributions in this volume present an analysis of particular aspects of the *Mulukī Ain*, the Nepalese code of 1854, which represents a prominent legal text in the Nepalese tradition (Khatiwoda, Cubelic, and Michaels 2021). In this code one can clearly observe a specific manifestation in time and space of the interaction between state, religion and society. The historical perspective also helps to understand some aspects of the evolution of the relationship between *dharma* and state law in contemporary times and to see how this relationship can now find different manifestations compared to the past but nevertheless can be understood as a recombination of elements that have always been present in the Nepalese context.

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The contribution of Fabrizia Baldissera ("Views on *Dharma* in Medieval Kashmir") explores intriguing insights into the adherence to *dharma* in medieval Kashmir by presenting excerpts from texts spanning the 8th to the

[4] *Āpastamba-Dharmasūtra* 1.20.6-8; cf. Wezler 1985.

13th centuries. These texts, representing diverse literary genres, include satirical compositions by Dāmodaragupta and Kṣemendra, stories from Somadeva's *Kathāsaritsāgara*, and episodes from Kalhāṇa's historical work. The situations discussed in these texts necessitated varied and often unconventional approaches. Examples include the deceptive teachings of bawds, instances of religious hypocrisy, and the controversial use of the practice of *prāyopaveśa* to seek redress—an ultimate recourse for the powerless, irrespective of their Brahmin *varṇa* affiliation.

Astrid Zotter ("Writing Nibandhas in Nepal") focuses on Nibandhas, or compendia, that constitute a crucial textual category articulating visions of *dharma* in South Asian royal contexts from the 12th century onward. Despite their considerable volume, these texts and their interconnections have become a subject of growing scholarly interest. Her contribution highlights two groups of Nibandhas originating in Nepal, examining their composition and historical significance. The first group, from the late medieval Malla period (1482-1768), includes small-scale compositions on the use of flowers in *pūjā*, such as the *Puṣpacintāmaṇi* and the *Puṣparatnākara*, leading to a corpus of Nepalese flower texts found in around a hundred manuscripts. The second case study delves into voluminous digests under the early modern Śāha kings (1768-1846), addressing rituals for Navarātra, the pivotal festival in the Nepalese annual cycle. These texts, written within a forty-year span, reveal distinct interpretations of elite religion and *dharma*, reflecting a "neoclassical mode" in the late Malla period and a unique synthesis under the early Śāha. These historical lenses magnify efforts to actively define and shape ritual traditions for upholding righteous rule and promoting *dharma*. Beyond challenging the classification of Nibandhas into Dharmaśāstra and Tantra, the Nepalese Nibandhas prompt questions about the interplay between local and trans-local dimensions of *dharma*.

New and expanding regimes often seek to legitimise themselves by embracing what they take to be a compelling ideology of law and religion, one that sets the ruler up as lawgiver or reformer. As shown by Timothy Lubin ("Sacred Law as a Device of State-Building in Gorkhali Nepal"), since at least the 5th century, rulers based in "Nepal" (i.e., the Kathmandu valley) have periodically sought to emulate their powerful neighbours to the south by publicly embracing Brahmanical *dharma*. The contribution examines this practice by focusing on two decisive historical phases: the endowment charters of the Licchavis, and the decrees and policies of the Gorkhali kings. Lubin shows how these regimes sought (a) to participate in a prestigious Indian

cosmopolitanism imprinted with Brahmanical religious ideals of piety and kingship; and (b) to provide a template for intergroup relations in a culturally, linguistically, and religiously diverse realm. For the Gorkhali case, he offers an analysis of ideological features of the "*Divya Upadeśa*" (a compilation of what purports to be Pṛthvīnārāyaṇa Śāha's memoirs and instructions, preserved in a manuscript of ca. 1800 that alludes to earlier royal lawgivers), and then examines a number of royal decrees preserved as copper-plate inscriptions or paper documents. These records provide glimpses into how top-down attempts at putting a "sacred law" ideology into practice actually proceeded, responsive to the diverse interests and agency of the subject groups themselves.

Axel Michaels ("Between Love and Power: The *Dharma* Drama of King Raṇabahādura Śāha, 1775-1806") explores the fame and notoriety of King Raṇa Bahādura Śāha, primarily stemming from a tragic love affair. The king's third wife, Kāntivatī, a Brahmin widow from Mithila, led Raṇa Bahādura to violate established norms of Dharmaśāstra and the [*Mulukī*] *Ain* of 1854. Their son was deemed illegitimate. Despite this, the king abdicated to crown his son at the age of two, driven by his wife's fatal battle with smallpox. Drawing on previously unpublished material, this paper delves into the background and consequences of the affair, concluding that Raṇa Bahādura's transgressions against Dharma and subsequent erratic behaviour marked the beginning of the decline of the supreme power of the Śāha kings.

Slavery in Nepal, despite its significant historical presence, remains a scarcely explored subject. Epigraphical sources indicate its existence from as early as the Licchavi period until its abolition in 1925. The contribution of Rajan Khatiwoda and Manik Bajracharya ("Legitimizing Slavery through Brahmanical Norms: The *Ain* of 1854") examines how the Nepalese state, during the 19th century, regulated slavery through a codification process primarily grounded in Hindu legal scriptures such as Dharmasūtras, Dharmaśāstras, Smṛtis, Nibandhas, and more. The comparative analysis focuses on Nepal's inaugural legal code, the *Mulukī Ain* of 1854, exploring various aspects of slavery, including its definition, typology, societal implications, and processes of enslavement and emancipation. Additionally, the contribution explores contemporary legal and administrative documents to illuminate the institutionalisation of Brahmanical ideas about slavery within non-Brahmanical settings through the state's legal framework.

The *Ain* of 1854, orchestrated under Prime Minister Jaṅga Bahādura Rāṇā, is often scrutinised for its intricate caste hierarchy. Interpretations vary, viewing it either as a reflection of a pre-existing unitary social system or as a political

imposition to establish a more cohesive bureaucratic state and forge a national Hindu identity. As the text extensively addresses matters of purity, impurity, commensality, sexual relations, and status, initiating an analysis through the caste lens seems initially compelling. However, Simon Cubelic's paper ("The Code of Tribute: Law and Political Economy in the *Ain* of 1854") challenges the predominant caste-centric perspective by emphasising the political-economic context of the *Ain*. It contends that within the *Ain*, social codes of caste and pollution, akin to codes of lordship and honor, are subordinate to and guided by the overarching objectives of tribute extraction and rent collection, manifested in fees, fines, and taxes. These transactions occur within a complex network involving the crown, state, military elite, feudal nobility, priestly class, and fiscal intermediaries. To define legitimate and calculable modes of surplus appropriation and regulate social antagonisms arising from the struggle over surplus, the *Ain* integrates legal-bureaucratic rationality into Brahmanical notions of caste.

Commencing with the intricate construction of the individual delineated in the *Mulukī Ain* and the organisation of juridical statuses along diverse identity axes, Chiara Correndo ("Women's Layered Identities and Property Rights: Dowry and Women's Wealth in the *Ain* of 1854") directs attention to the portrayal of women as envisaged by the code. Employing the analytical perspectives of property rights and dowry, the contribution delineates various legal frameworks governing women and underscores how these are influenced by intersecting factors such as caste, widowhood, and the moral conduct of women. Through this analysis, the contribution reveals how the code mirrors the patriarchal, Brahmanical values from which it originated, drawing parallels and comparisons with the shastric tradition.

The authorisation for a widow to conceive a son through intercourse with a designated male, typically the deceased husband's brother, is termed "*niyoga*" in Dharmaśāstras, commonly translated as "levirate" in English. While the latter specifically refers to a man's actual marriage to his deceased brother's wife, *niyoga* has received scholarly attention for its historical prevalence in the Indian subcontinent. However, scholars have seldom connected it to the formulation and application of laws. Ramhari Timalsina's detailed exploration of this topic ("The Practice of Levirate in 19th-Century Nepal and the Dharmaśāstric Discussion of *Niyoga*") can provide insights into the historical context of this practice in the subcontinent and illuminate aspects of legal practices in Nepal. The contribution delves into the features of 18th to 19th century Nepal, where widow remarriage was prohibited, widow burning was practiced among ruling

castes, and polygyny was socially accepted. In this society, the levirate custom served as a safeguard for widows and their children, as women were dependent on their husbands and considered as family possessions.

In 1873, the Kashiraj Dharma Sabha of Varanasi issued a ruling (*vyavasthā*) that addressed the right of succession in the West Himalayan kingdom of Chamba (Himachal Pradesh, India). The Sabha's decision favoured Prince Suchet Singh (1841-96), who had been banished from the state in 1870, thus challenging the British Indian Government's choice to place the appellant's half-brother on the throne. The contribution of Arik Moran and Csaba Kiss ("In the Name of *Dharma*: A Himalayan Prince's Response to Colonial Oppression, Chamba 1870-74") examines the context and implications of this event in shaping the evolving conceptualisation of *rājadharma* in Himalayan Rajput polity. The pandits' involvement in a matter seemingly beyond their mandate exposed and subverted the negative bias of the colonial regime, underscoring the blurred boundaries between "religious" and "secular" authorities in British India. While the ruling did not produce a resolution, the details of this episode shed light on the sources of authority and juridical arguments advanced by Himalayan nobles to legitimise sovereignty during that period. It reflects a shift from pre-colonial emphasis on ritually enacted kinship ties, publicly endorsed social status, and popular expressions of political support to an increasingly narrow interpretation of kingship based on British-sanctioned legal agreements (*sanads*) endorsing Rajput rule.

The contribution of Domenico Francavilla ("Child Marriage in Nepal: Dharmaśāstra, Customs and State Reforms") analyses the rules regarding the age for marriage in the Nepalese context by considering on the one hand the Dharmaśāstra tradition and the *Mulukī Ain* of 1854 and, on the other hand, more recent state reforms, aiming to understand the interaction between social, religious and state rules in a dynamic perspective. Child marriage is a highly controversial subject in Hindu law. The contribution adopts a law-in-context approach that could be useful to place Nepal's law in the complex and various landscape of the Hindu legal tradition. In addition, it considers recent legal reforms and the transplantation in Nepal of new conceptions and rules concerning marriage law, and their impact on society and on the self-understanding of Nepalese law**.**

After the significant overhaul of *dharma* as a system of rules defined and enforced by law, Nepal witnessed a surge in literature that explored *dharma* as a code of good conduct. The concepts of purity, impurity, caste status, and associated obligations, previously eliminated from the legal framework in the

1950s, found expression in numerous booklets written in Nepali, primarily by Brahmin male authors. This examination by Marie Lecomte-Tilouine ("Understandings of *Dharma* in Nepal After 1950") seeks to analyse the transition from Hindu law to Hindu good conduct, particularly by considering the criticisms of *dharma* that emerged in response to this shift.

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FABRIZIA BALDISSERA

Views on Dharma *in Medieval Kashmir*

1. *Different ideas on* dharma[1]

Thinking of medieval Kashmir, what first comes to mind is the extraordinary flowering of intellectual activity in different fields of religious-philosophical thought, where great scholars produced extensive literature on the concept of *dharma* as at least three religious-philosophical currents contested each other in learned debate. Here, *Śaiva* and *Śākta* thinkers vied with the *Vaiṣṇava*s and Buddhists to support their own religious current and refute the tenets of others.[2] But outside these learned circles, how did the people of Kashmir fare, regarding *dharma*, and again, what might the uninitiated – often referred to as "cattle", *paśu*, or *adṛṣṭamaṇḍala*, "one who had not seen the *maṇḍala*"[3]– think of the peculiar ways of the initiated?[4]

In Brahmanical orthopraxis one would imagine that concepts of *dharma* – "the norm", both divine and human, and *svadharma* – "one's own *dharma*, one's special norm", understood as the set of rules of behaviour, as well as duties and privileges, pertaining to one's social group, were the same in Kashmir as elsewhere in India. However, *dharma* includes both ethical-religious and legal concepts, as well as the administration of justice, creating

[1] The translation from Sanskrit of *Rājataraṅgiṇī* is by Aurel Stein, *Arthaśāstra* by Patrick Olivelle, *Kālavilāsa* by Somadeva Vasudeva and *Kuṭṭanīmatam* by Csaba Dezsö and Dominic Goodall. The others are by the present author. In translation, double meanings are resolved by putting the two renderings next to each other, separated by a diagonal bar (/).

[2] This descends from the ancient tradition of learned debates described also in Amartya Sen's *The Argumentative Indian*.

[3] Or rather had not been exposed, during a special initiation ritual, to the deities installed by Mantras in the *maṇḍala*.

[4] Here I shall only refer to those who followed the Brahmanical, or the tantric way, people who today would be broadly called Hindus, and concentrate on the *Śaivas* rather than the *Vaiṣṇava*s.

local peculiarities and problems, frequently pointed out in Kashmir medieval texts.

In relation to *dharma* and its interpretation, medieval Kashmir presents a rather mottled landscape. Next to works of extremely learned *paṇḍit* circles, belonging to different *Śaiva* currents,[5] and some *Śivadharma* texts, other types of Sanskrit literature were focused on exposing the frequent deviations from dharmic behaviour of different groups of people, who by their profession and/or creed were at least supposed to follow their *svadharma*. These alternative descriptions and considerations are found in different literary genres such as Somadeva's *Kathāsaritsāgara* (*The Ocean of Stories*, from now on *KSS*), composed at the end of the 11th century; in some earlier satirical writings dating from the 8th and the 11th century by Dāmodaragupta and Kṣemendra; and in the first historical text of Kashmir,[6] Kalhaṇa's *Rājataraṅgiṇī*, (*The River of Kings*, from now on *RT*), dating from the middle of the 12th century. In this study I particularly focus on two recurring and sometimes interrelated themes and briefly on a third, minor one.

The first theme of this study is suicide and I have compared the way it was conceived in normative writings with its presentation in the medieval Kashmir literature. I found that, notwithstanding the interdiction on suicide presented in several *dharma* treatises, such as *Mānavadharmaśāstra* 5.89, *Jajñavalkyasmṛti* 3.6, *Apastambadharmasūtra* 1.28.17, *Gautamadharmasūtra* 14.12, Kashmir texts of the Middle Ages record an extraordinary abundance of suicides and even mass suicides. These were carried out in different guises, often undertaken as solemn fasts to the death (*prāya*, or *prāyopaveśa*). The latter were staged both by individuals and by large, organised groups of people. The faster/fasters upon beginning their fast made a public declaration of intent (*saṁkalpa*) to kill themselves if their demands were not met.

Some types of suicide had always enjoyed dharmic praise,[7] especially the voluntary death in fire of old ascetics, or the *satī* or *anugamana* of spouses of *kṣatriya*s, "warriors/landowners", who let themselves be burned on the funeral pyres of their husbands. The dharmic prestige enjoyed by women committed to

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[5] It should be noted that esoteric forms of *Śaivism* and *Śaktism*, prevalent in some Kashmir traditions, adopted forms of behaviour that were purposefully contrary to orthodox Brahmanical norms.

[6] The older *Nṛpāvālī* (*"Line of kings"*) composed by Kṣemendra according to Kalhaṇa was not a reliable source as it had not been composed on historical data.

[7] Some *dharma* texts, in fact, admit exceptions, cf. F. Baldissera, 2005, 523.

follow their husbands even in death is already seen in *Mahābhārata*, in the speech of Śakuntalā of the *Śakuntalopakhyāna* (*Story of Śakuntalā*), and again in the episode of the *satī* of Madrī, the youngest wife of Paṇḍu. Here I concentrate on the Brahmanical viewpoint on suicide, but I would like to note that also in the Buddhist narrative, especially the *Jātakas*, "The [narration of the Buddha's previous] lives", self-sacrifice for altruistic reasons of the Tathāgata's life is praised, and that several pious Jain monks ended their lives in suicide by inanition.

The *KSS* recounts frequent cases of *satī*, but usually without dwelling on details, as those were apparently considered common facts, to be taken as a matter of course. *RT*, however, records nineteen actual episodes of *satī*,[8] all related to the Kashmir royal family, some of which involved several spouses and concubines of a single king entering the fire upon his death – as when seventeen wives of King Harṣa burnt themselves together by setting fire to their pavilion (circa 1001 CE). A different instance concerns those who engaged in "a fast to the death", or "solemn fast", *prāya* or *prayopaveśa*. Several of these were Brahmins, and it is important to recall that *brahmahatyā* , "the killing of a Brahmin", or being responsible for it, in all normative texts, is the first 'Great Crime', *mahāpātaka*, whereas protecting Brahmins is one of the special duties, *svadharma*, of the sovereign.

The second theme is the legal aspect of *dharma,* which is equally frequent in Kashmir's medieval writing. Kashmir texts of different genres reveal a strong lack of trust in the honesty, or dharmic behaviour, of the administrators, from the lowest to the uppermost echelons of government. Not only in the *Ocean of stories* (*KSS*) and in satires, but in the *RT* itself, many scribes, government officers and several kings are seen to behave in appalling, non-dharmic ways. They levy unreasonable taxation, impose strenuous corvées on villages – such as the forced carriage of loads, *rūḍhabhārodhi* – and frequently embezzle the properties of people and temples. Stealing is the second of the five *mahāpātaka*s, "great crimes", on a par with the killing of a Brahmin. It is here in the dishonest dealings of administrators, particularly the kāyasthas, that the themes of suicide and law intersect, as many instances of fasting are initiated to protest the injustices of the courts and officialdom.

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[8] *RT* II.56-57; V.226-227; VI.107; VI.138-144; VII.103; VII.461-478; VII.680; VII.724; VII.859; VII.1468; VII.1486-1488; VII.1491; VII.1570-1571; VIII.363-369; VIII.445; VIII.1440; VIII 2334-39.

The third theme derives from another evil that befalls men, the wily teachings of bawds, the women who ran the brothels. This is a common motif in Kashmir satires, stories, *itihāsa* and historical texts and the bawds' teachings could be seen as the courtesans' "own norms", *svadharma*. As *dharma* guides the way people should behave, it might seem unnecessary that texts dealing with the world of courtesans, who were considered beyond the pale, should mention it. They do tend to dwell on deviations from *dharma* in the conduct of the characters they portray, with *dharma* being mentioned albeit in a rather peculiar manner.

2. *Fasts and solemn fasts*

Fasting traditions in India are quite ancient and were already held in high esteem in the *Taittirīya Saṁhitā*, where fasting was supposed to deal a blow to the Asuras (the anti-gods) and especially to Vṛtra, the belly, because "the belly is Vṛtra", *udaram vai vṛtraḥ*, (*Taittirīya Saṁhitā* II.4.12.6).[9]

Different kinds of fast, usually partial and temporary, but sometimes also complete ones, were performed throughout the centuries for several reasons. The most prestigious one was a form of ascetic practice, *tapas*, done in order to obtain religious merit. It could also be a practice undertaken so that one could perform a rite in a state of ritual purity. In a less prestigious way, it was a useful technique of expiation/reintegration, *prāyaścitta*, meant to atone for and erase the fault of the offender, so that he could be reintegrated in society in his previous condition, as certain faults could entail loss of caste.[10] It could also be a way to please a divinity from whom one wished to obtain a boon. This was usually undertaken by a "decent" person, such as an ascetic, a devotee, or a woman who desired a good husband, like Sāvitrī, for instance, or even divine Pārvatī. Sometimes, however, demons too resorted to going on a fast, usually to please Brahmā and obtain boons that could harm men – as in the case of Hiraṇyakaśipu, who wanted to gain control over the world, and through his ascetic practice obtained from Brahmā the boon that he could be killed neither inside nor outside a building, neither by day nor by night, neither by weapons, animals nor men. Therefore, he could only be vanquished by Nārasiṁha, the man-lion aspect of Lord Viṣṇu, who was able to meet all these requirements.

[9] Lévi 2009, 109, n. 31.
[10] That could then harm the status of the whole extended family of the offender.

This is already a case in which the faster almost coerces the being he is trying to please into granting a boon through an extreme show of ascetic restraint, one of the highest praised qualities in Brahmanical India.

Thus, there were different types of fast, temporary ones, some of which only conferred prestige due to a status of purity, like the fast before an initiation, *dīkṣā*, or voluntary fasts of people who pledged themselves to deities, or the special fast required for new *Śaiva* devotees, before they could remove any previous sectarian marks, prescribed for instance in *Tantrāloka* XXII 14b.

Generally, there were two kinds of solemn fast, or fast unto death, *prāyopaveśa*, or *prāya*. It could be voluntarily chosen by pious old ascetics, who might have been *brahmaṇa*s or Jains, for whom this extreme fast was a way to peacefully end their lives. In the ascetic experience, food was considered dangerous, as hankering after food might be conducive to greed and violence. The first mention of such an opinion, contrary to the Vedic view of food as positive and sacred, is in a Buddhist text, the *Agaṇṇasutta* of the *Dīghanikāya*, but also some Jains go so far as to fear food.[11] A different case is that of a solemn fast undertaken for redress, as an extreme means to obtain justice, often against a stronger opponent. In fact, it had also occurred with heroic vanquished warriors who saw themselves overpowered by a host of more numerous enemies, and by undergoing *prāyopaveśa* were asserting and preserving their martial honour. This particular type of fasting, although held in high esteem by the people because it recalled the holy death in restraint of old ascetics and Brahmins, or the courage of warriors, soon became a political act and was perceived as such in medieval Kashmir.[12]

That fast was the ultimate resort of the powerless. The first instance of a person sitting in fast against someone is found in *Kauṣitakyopaniṣat* 2.1, as pointed out by Hopkins (1894, 158-159): there a wandering ascetic, *bhikṣitvā*, sat in restraint against a village that had refused to feed him. The stance of the faster involved a public declaration of intent, *saṁkalpa*, that preceded touching water and sitting on *darbha* grass in silence and meditation. *prāyopaveśa* thus enjoyed popular support because there was the strong interdiction to kill Brahmins, and ascetics were perceived to be similar beings. The crime of *brahmahatyā*, or causing a Brahmin's death, was dangerous not only for the perpetrator, but for the entire community where it took place, as it was believed

[11] See Baldissera 2016, 70, note 4; Jaini 2000, *passim*, speaks of "fear of food" in Jain communities.
[12] See Baldissera 2005, *passim*.

that a great calamity like drought or famine would ensue. A different instance, perceived as propitious, is the case of men who sacrificed themselves to a deity, usually a goddess. This type of suicide, however, was usually performed with a weapon, like a sword, rather than by fasting. In this case people admired their courage and compared it to the stance of the hero who took that pledge to restore his honour in battle, or to redress a wrong. The latter case, fasting for redress, was perceived as upholding justice against a mightier power, often as something that could benefit the whole community.

The religious prestige of Brahmins in Kashmir, however, was not always enough to prevent them dying in *prāyopaveśa*: usually the king, the protector of his subjects and especially of Brahmins, would be held responsible for their death, but judging from some satires and from the *RT* itself, it seems that it was not always so. Often the real culprit was not the sovereign, but the middlemen, the bureaucrats.

3. *The all-powerful* kāyasthas

Of all the government's officers, the most hated were the kāyasthas. These bureaucrats usually belonged to a low caste[13] and were adept in writing documents and accounting. They are mentioned first in the *Yajñavalkyasmṛti* (IV or Vth CE), where I.336 says that the king must protect his subjects from swindlers, violent people, magicians, robbers and especially from kāyasthas. The commentary *Mitākṣarā* glosses *kāyastha* by *lekhakā gaṇāś ca*, "the specialists in writing and accounting". (See Malamoud, 2002, 127-149). The Kashmir polymath Kṣemendra (11th century) berates the kāyasthas in some of his satires, especially in *Narmamālā* (from now on, *Narm*). Here beside the designation *kāyastha* there are two more terms indicating the same position, *niyogin*, "officer", with the same meaning, plus that of "secretary", *divira*, a term of Persian origins – though in *Narm* I.15 there is a very original and humorous false etymology in Sanskrit.[14] *divira* is also found in compounds that

[13] Sometimes there are mentions of *kāyastha*s belonging to different social groups, as in *RT* VIII.2383, where there is a Brahmin *kāyastha*.

[14] At *Narm I.9* the bureaucrat is the demons's *gehagaṇanāpatiḥ*, "home accountant", and the same character, at I.15, is a *divira* because: "As you wept in heaven [*divi*

specify the different functions held.[15] Even a hundred and fifty years later, in the history of the kings of Kashmir, there is a pointed criticism of the kāyasthas' ways, at *RT* VIII. 88-91.

The most important rank in the state bureaucracy was that of the head administrator. The *RT* offers three different titles for this post: *mukhyamantrin* (*RT* VIII.2360), *agryamantrin* (*RT* VI.194) and *sarvādhikārin* (*RT* VI. 199, 333; VII. 208, 364, 586; VIII. 560, 862, 1850, 2460, 2470, 2471). They appear interchangeable, though there are some lexical nuances: the *mantrin* is an adviser, a confidant of the king, who gives secret counsel; the (simple) *adhikārin* is the person who carries out orders, but on the other hand, in *RT* IV. 81,[16] *sarvādhikārin* (literally "the one in charge of everything") and the relative position, *sarvādhikāra*, mean "the post of first counsellor", that would now be equivalent to that of a chief minister or prime minister, who apparently was not necessarily a Brahmin.

In his informed doctoral thesis of 1969,[17] Naudou remarks that an essential personality of *Arthaśāstra*, (from now on *AŚ*), the *purohita*, "chaplain", whom the king must obey (*AŚ* I.5), does not appear in the history of Kashmir (*RT*). I would surmise that though not prominent as the special advisor of the king, still *purohita*s in Kashmir were followed and respected by the people, especially when they held great hunger strikes in the courtyards of the largest temples in the capital.

As for the administration of justice, in Kashmir some special offices were added by different *rāja*s; for instance King Śaṅkaravarman (reigned 883-902), a rogue king, created the important function of *gṛhakṛtya*, "home affairs",[18] as

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roditaṁ] when the demons were destroyed, You will be known on earth by the name of *divira*". (*Narm* I.15)

[15] Such as for instance, in *Narm*, *grāmadivira*, "village headman", *mūladivira*, "chief officer", *asthānadivira* or *adhikāradivira*, "law court officer, magistrate".

[16] Cf. *RT* IV. 81; VI. 199, 333; VII. 208, 364, 568, 923; VIII. 862, 1850, 2460, 2471. See also Baldissera 2005, Introduction, note 8, "at *RT* VII. 194 the same person is also described as *agryamantrin* and at VIII. 2360 his position is further described as *mukhyamantritā*". I now suspect, however, that when the term includes "*mantrin*" we are in the presence of a Brahmin.

[17] Unpublished thesis, 239, note 1.

[18] *RT* V.167:
karmasthāne puragṛhagrāmādidhanahāriṇā
tenāṭṭapatibhāgākhyagṛhakṛtyābhidhe kṛte //167//

well as that of *aṭṭapatibhāga* "the share of the lord of the market", another means of increasing taxation (*RT* V.167): "This robber of what the temples possessed in villages and other [property], established two new [revenue] offices, called *Aṭṭapatibhāga* (The Share of the Lord of the Market) and *Gṛhakṛtya* (Domestic Affairs)."

King Śaṁkaravarman also invented, or rather systematized, the practice of forced carriage of loads by people, *rūḍhabhārodhi*, later called *Kār-bēgār* (*RT* V.172,174):[19]

> When he was in another region, he fined those villagers who did not come and carry their loads, for one year, by the value of the load [calculated] according to the [higher] prices of that region. (*RT* V.172)
> Thus, he introduced that well-known [system of forced] carriage of loads which is the harbinger of misery for the villages, and which is of thirteen kinds. (*RT* V.174.)[20]

Book VII describes the dangers people faced when the *gṛhakṛtya* office was held by an unscrupulous administrator, as when under King Saṁgrāmarāja

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[19] *RT* V.172:
digantarastho grāmīṇān ūḍhabhārananāgatān
tad deśārghair bhāramūlyaṁ varṣam ekam adaṇḍayat //172//
RT V.174:
ity eṣā rūḍhabhāroḍhiḥ prathamaṁ tena pātitā
dāridryadūtī grāmāṇāṁ yā trayodaśadhā sthitā //174// (see Stein notes on these verses.)

[20] A similar type of corvée also existed in Nepal until quite recent times, as an important part of "forced labour". From a personal letter of Manik Bajracharya I obtained the following information: "In 18 th-19th century Nepal, the most common forms of state-enforced forced labour were *jhārā*, *beṭha* (also spelled as *beṭhi*) and *begāra*. The distinguishing features of these forms of labour are often, however, vague. *Jhārā* is the term most widely used to denote unpaid or forced labour in general. *Beṭha* appears to derive from the Sanskrit term *viṣṭi*, meaning compulsory work. *Begāra*, for its part, comes from a Persian term meaning a forced labourer subjected to either individual or public service (Wilson 1855, s.v. *begar*). Rishikesh Shah identifies *beṭha* and *begāra* as two forms of *jhārā*, *beṭha* being unpaid labour for farms, and *begāra* being labour for such purposes as porterage, construction and digging (R. Shah 1990/I: 207). M.C. Regmi, however, defines the terms differently: *jhārā* as the requisition of labour from each family for public purposes, *beṭha* as the exaction of unpaid labour on a customary basis, and *begāra* as the requisition of labour for emergencies (Regmi 1965: 53)".

(reigned 1003/1028) the great counsellor Tuṅga designated his attendant, Bhadreśvara, as superintendent of Domestic or Home Affairs, *gṛhakṛtyādhipati*. Bhadreśvara was a kāyastha of low origins, a terrible figure, who might well have been the actual kāyastha whose ascent and progress are described in Kṣemendra's *Narm*. This is what *RT* VII. 43-44, says of him:

> Resembling untimely death, that evil minded person cut off the sustenance of gods, cows, and Brahmaṇas. (*RT* VII.43)[21]
>
> Even a fear inspiring Kāpālika,[22] who lives on corpses, gives maintenance to his own people, but the wicked Bhadreśvara did not allow even his own people to live. (*RT* VII.44)

The extreme frequency of instances of *prāyopaveśa*, and the fact that some were undertaken on false assumptions, induced Kashmir's kings to create a new official function, that of the *prāyopaveśādhikṛta* "the superintendent of *prāyopaveśa*". He had to report immediately to the king any instance of people who entered *prāyopaveśa* and had to ascertain whether their motives were true. The first mention of such an official occurs at *RT* VI.14, under King Yaśaskara (reigned 939-948).

A sizable number of *prāyopaveśa* undertaken by different people also occur in *KSS* (*Kathāsaritsāgara*); here however there are only a couple of cases of *prāyopaveśa* undertaken to redress a wrong, and in these the claimant always defers to the superior judgment of the king. It is interesting to give two examples here: the first characterizes the duty of kings to protect the gold of Brahmins, *poena* their threatening to commit suicide.

In the story of King Prasenajit, a foreign Brahmin has one thousand golden dinars stolen from him (*KSS* 6.7.133-159). Consequently, he announces his desire to travel to a holy ford, *tīrthā*, to abandon his life there by fasting. The term used for 'fast' here is *abhuñjānaḥ* "non-eating". The intelligent king with a

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[21] *RT* VII.43-44:
devagotrābrāhmaṇānāthātithirājopajīvinām /
akālamṛtyur vidadhe vṛtticchedaṁ sa durmatiḥ //43//
śavājīvo'pi puṣṇāti krūraḥ kāpāliko nijān /
bhadreśvaras tu pāpo'bhūn nijānām api jīvahṛt //44//

[22] Here, probably this person is a sexton, rather than a *Kāpālika* ascetic.

thorough investigation discovers the culprit and restores the gold to the Brahmin, who immediately stops fasting.

In a subsequent instance (*KSS* 9.5.2-11), the fast, here called *prāyopaveśa*, begins because of a similar claim concerning money, but as one does not know the status of the claimant, this may or may not be another case of a Brahmin fasting. A servant of his minister Marubhūti, sitting in front of King Naravāhanadatta's door, engages in *prāya* against Marubhūti because instead of receiving his promised salary he got insults and a kick. The servant recounts his predicament and declares: "So, I sit in *prāya* against him in front of your gate".[23] King Naravāhanadatta then has Marubhūti pay this servant, who immediately ceases his fast.

The *KSS* also contains stories of people committing protest suicide against a wrong judgement, as in the story of the Brahmin woman, the donkey, and the washerman (*KSS* 12.5.205-215). A Brahmin's pregnant wife had chased a washerman's donkey that was plundering her vegetable plot. The donkey fell in a ditch and split his hoof, and the angry washerman beat the woman with a stick and kicked her so that she miscarried. The judge to whom the Brahmin couple appealed decreed that the Brahmin had to carry the donkey until its hoof was healed, and that the washerman had to impregnate the Brahmin's wife, as he had caused her to abort. The Brahmin couple committed suicide by ingesting poison to protest an outrageously wrong judgment of their case: The king then had the judge executed for causing the death of Brahmins, *brahmahatyā*.

Sadly, even much earlier texts testify that not only judges, but even simple scribes could be found guilty of corrupting judicial acts. The *AŚ* (*Arthaśāstra*) already contemplates such cases, as at 4.9.12 and 17:[24]

> For making forged documents or seals of heads of households, superintendents, chief officers, and the king, the punishment are the lowest fine, the middle fine,

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[23] *KSS*. 9.5.5b: tenopaviṣṭaḥ prāye'haṁ siṁhadvāre'sya tāvake.

[24] *AŚ* 4.9.12:
kuṭumbikādhyakṣamukhyasvāmināṃ kūṭaśāsanamudrākarmasu
pūrvamadhyottamavadhā daṇḍā yathāparādhaṃ vā //
AŚ 4.9.17:
lekhakaś ced uktaṃ na likhaty anuktaṃ likhati duruktam upalikhati sūktam ullikhati arthotpattiṃ vā vikalpayati, iti pūrvam asmai sāhasadaṇḍaṃ kuryād, yathāparādhaṃ vā //

> the highest fine and execution, respectively, or else in accordance with the crime. (*AŚ* 4.9.12)
> If the court clerk does not write down what was said, writes down what was not said, writes correctly what was badly said, writes incorrectly what was correctly said, or alters a clear meaning, he should impose on him the lowest seizure fine, or else a punishment corresponding to the crime. (*AŚ* 4.9.17)

Kṣemendra in his satire *Kalāvilāsa* ("*The grace of Guile*", from now on *Kal*) at V.5 and V.11 shows how the kāyasthas destroy the world:[25]

> These men of black ink / minions of Death (Kāla)
> Wreak havoc among the people / kill people with the effluent of their large pens / blows from their huge staffs[26]
> They are demons (*piśāca*) of calculations and misreckoning, who march across the earth under a banner of birchbark. (*Kal* V.5)

> For perverse minded scribes,
> who steal in secret /stealthily take life,
> are hell's scribal recorders (Citraguptas) of good and evil deeds.
> By deleting a mere line, they can make the 'possessor' (*sa-hita*),
> the 'dispossessed' (*ra-hita*). (*Kal* V.11) [27]

Indian Brahmins mistrusted the written word, which in their opinion made for a loss of the special mnemonic techniques used to learn very long oral texts by heart. In fact, the Brahmins had perfected a rather elaborate system, the quadripartite manner of committing to memory the long oral poems of the Vedic corpus. In this they shared similar views to Plato,[28] who also thought that the fact of writing, though of some utility, would ultimately result in people learning less, both because they would not exercise their memory, and because a written text could not reply to their questions. The Upaniṣats, as well as the

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[25] *Kal* V.5:
ete hi kālapuruṣāḥ pṛṭhutaradaṇḍaprapātahatalokāḥ /
gaṇanāgaṇanapiśācāś caranti bhūrjadhvajā loke //5//
[26] A further meaning for *daṇḍa*: "/blows from their huge taxation/fines (*daṇḍa*)".
[27] *Kal* V.11:
ete hi citraguptāḥ citradhiyo guptahāriṇo divirāḥ
rekhāmātravināśāt sahitaṁ kurvanti ye rahitam // 11//
[28] *Theaetetus*, 274-276; see also Baldissera 1999-2000, 154-157; Malamoud 2002.

tantric tradition, adopt the same standpoint: a text could never be a substitute for the living words of the guru, who knows what to teach to whom, and at the right time.

The Brahmins, moreover, thought also of the problems that misused writing could create, such as the ones already mentioned in *Arthaśāstra* and in the later Kashmir texts I present.

Kṣemendra's entire satire *Narm* is an interesting critique of the typical kāyastha. This humorous composition could be just a product of his vivid imagination, but apparently according to the historian Kalhaṇa, who wrote about a hundred and fifty years after him, things in Kashmir stood exactly as Kṣemendra portrayed them. In his *RT* Kalhaṇa even said something very similar, using the same characters *sa* and *ra* that had been suggested by Kṣemendra in *Kal* V.11.

It is here in fact, at *RT* VI.14-41, that there is the first mention of "the officer investigating [cases of] *prāyopaveśa*", the *prāyopaveśādhikṛta*. When there was a report of a merchant who was entering *prāyyopaveśa* to complain against another treacherous merchant, as well as against the judges who had decided the case in favour of that dishonest merchant, the king decided to hold court. The judges believed the claimant had forged a document, but King Yaśaskara (reigned 939-948 C.E.) instead felt he could trust him. Thus, with a stratagem, the wise king took possession of all the jewels worn by the judges, the claimant, and the defendant, and withdrew for a moment. Showing the ring of the defendant to his people, the king's attendant was able to procure, from that man's house, the account book of the year in which the deed had been made. There the king read that a very high sum, ten hundred *dinnāras*, had been given to the official recorder, the *adhikaraṇalekhaka*, and this is what he thought:[29]

> From the fact that a high fee had been paid to that person,
> who was entitled only to a small sum, the king knew for certain
> that the merchant had got him to write a *sa* (*sakāra*) for a *ra* (*rephe*). (*RT* VI.39)

The recorder, with the promise of impunity, confessed, the counsellors were persuaded, and the king exiled the dishonest merchant, confiscated all his property and gave it to the claimant.

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[29] *RT* VI.39:
tasmai mitadhanārhāya bahumūlyārpaṇān nṛpaḥ /
rephe sakāraṁ vaṇijā kāritaṁ niścikāya saḥ //VI.39//

King Yaśaskara, like King Prasenajit of *KSS*, took very seriously the threat posed to his prestige by people going on a solemn fast. But in medieval Kashmir, mass suicides, even by Brahmins, were quite frequent. *RT* records that King Jayāpīḍa (reigned 755-782 CE) who was valorous and learned, at first behaved honourably towards his people but later, spurred on by his greedy kāyastha administrators, he too became avaricious and started oppressing his own subjects to such an extent that many destitute Brahmins kept dying. One day the furious king said: "(…) Let it be reported [to me] if a hundred Brahmans less one die in a single day." (*RT* IV.633)

At IV.638 the king heard that "a hundred Brahmans less one had sought death in the water of the Candrabhāga" and from then on, he refrained from confiscating *agrahāra*s ("land/village donated by kings to Brahmins in perpetuity"), though he kept snatching the properties of his other subjects.

Kṣemendra's *Narm* gives several examples that show the utter disregard of the different kāyasthas – obviously not curbed by the king – for the plight of the people. The village of one such bureaucrat at *Narm* I.120 is described in these words:

> In his village there was a likeness of hell,
> as thousands of people had died
> by hanging themselves from trees,
> and hundreds had starved through fasting to death (*prāya*-). (*Narm* I.120) [30]

And though, usually, kings preferred to appease people who undertook *prāyopaveśa* in order not to risk a popular uprising, several cases even of Brahmins dying in protest fasts seem to have occurred in Kashmir, supposing that *Narm* and *RT* recorded actual occurrences.

Narm at vv.1.57-58 describes a kāyastha whom an official informant thinks should be appointed as *paripālaka* "superintendent [of a temple]"[31]:

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[30] *Narm* I.120:
vṛkṣārohasahasreṣu prāyaḥ klāntaśateṣu ca/
grāme tasya vipanneṣu narakapratimābhavat //I.120//

[31] *Narm* I.57:
brahmahatyā na gaṇyante govadheṣu kathaiva kā /
prabhubhaktikṛtā yena mūlād unmūlyate janaḥ //I.57//
Narm 1.58:
anye'pi santi sarvatra tadvidhas tu na labhyate /

> Massacres of Brahmins do not worry him, so why should he care about slaughtering cows?
> While engaged in loyalty to his master, people are thoroughly uprooted. (*Narm* I.57)
>
> Others are everywhere, but no one is a match for him: he even brought to death in jail his own wealthy father. (*Narm* I.58)[32]

The most poignant aspect of the practice of *prāyopaveśa* in Kashmir is that it was often performed by very large groups of Brahmins, *purohita*s, "chaplains", and temple attendants.[33] The *RT* records several instances of these collective fasts held in important temple courtyards. The fasters were very conspicuous, as they brought together lots of movable sacred images from other temples, and they were also very loud. They collected many musical instruments, so that the level of noise was extraordinary, attracting curious crowds, as described at *RT* V.465-66 or at VIII. 901-902. In the interregnum after King Śuravarman II was deposed (in 939 CE), while the Brahmins could not agree on whom to inaugurate as the new king, a mass of *purohita*s started a strike in the capital:

> While the Brahmans in this fashion passed five or six days, there assembled an immense host of *Purohita*s of sacred places (*pāriṣadya*) causing a mighty din by their drums, cymbals, and other musical instruments, raising glittering flags, ensigns and umbrellas, and carrying seats on load-animals. (*RT* V. 465-466)[34]

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nītaḥ svajanako yena nidhanaṁ bandhane dhanī //1.58//

[32] This recalls what *RT* VII.44 says about the *gṛhakṛtyādhipati* Bhadreśvara, see *supra*.

[33] I think that these solemn fasts held in the temples are important as they show the respect in which *dharma* was held at the time. However, in medieval Kashmir, according to Kalhaṇa, the practice of *prāyopaveśa* had become quite popular, and he records four different occasions when it was adopted by soldiers, who complained about their insufficient marching allowances. The first instance is recorded in *RT* VII.1156-1157 when the soldiers were instigated by Sunna, the prefect of police, *daṇḍanāyaka*, and acted by both obstructing the royal palace doors and sitting in *prāya*.

[34] *RT* V. 465-466:
pañcaṣāṇi dināny eva yāvat tasthur dvijātayaḥ /
kāhalākāṁsyatālādivādyakolāhalākulam //V.465//
utpatākadhvajacchatraśobhi yugdhārpitāsanam /
aśeṣaṁ pāriṣadyānāṁ tāvat tatrāmilad balam //V.466//

A similar din was raised later, under the reign of King Bhikṣācara (in 1120-1121), when the Akṣosuva[35] *agrahāra*s (land or village granted by the king in perpetuity to Brahmins) were plundered (*RT* VIII.898) and the local Brahmins held a solemn fast against the king:

> When these and other [Brahmans] holding *agrahāra*s had assembled at Vijayeśvara,[36] the solemn fast of the *rājānavāṭika* [Brahmans] broke out too in the City. (*RT* VIII.899)
>
> Thereupon the Purohita-corporations (*parṣad*) of the temples, incited by Ojānanda and other leading Brahmans held a solemn fast also in the Gokula. (*RT* VIII.900)[37]
>
> Such an assembly of Purohitas of sacred shrines (*pāriṣadya*) had never been seen before. The courtyard [of the Gokula] was thronged everywhere with rows of sacred images, which were placed on litters and embellished with glittering parasols, dresses and chowries, and all quarters were kept in an uproar with the din of the big drums, cymbals, and other [musical instruments]. (*RT* VIII.901-902)
>
> Upon what plans did this host of Purohita-corporations not debate, day after day, with the citizens who came to watch the solemn fast? (*RT* VIII.905).[38]

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[35] This place so far has not been identified.
[36] The principal Śiva of Kashmir, situated at about 28 miles from Śrīnagara.
[37] This according to Stein might be the religious building, provided with grazing land for the cows, mentioned at *RT* V.23; V.461; VIII.2436.
[38] *RT* VIII. 899-902; 905:
taiś cānyaiś cāgrahāraiś ca saṁśritair vijayeśvare /
rājānavāṭikāprāyo nagare'pi nyavikṣata //VIII.899//
ojānandādibhir mukhyadvijair uttejitās tataḥ /
gokule'pi vyaduḥ prāyaṁ tridaśālayaparṣadaḥ // VIII.900//
yugyārpitaiḥ sitacchattravastracāmaraśobhibhiḥ /
vibudhapratimāvṛndaiḥ sarvataś chāditāṅganaḥ // VIII.901//
kāhalākāṁsyatālādivādyakṣobhitadiṁmukhaḥ /
adṛṣṭapūrvo dadṛśe pāriṣadyasamāgamaḥ // VIII.902//
prāyaṁ prekṣitum āyātaiḥ pauraiḥ saha dine dine /
amantrayata kāṁ kāṁ na vyavasthāṁ parṣadāṁ gaṇaḥ // VIII.905//

This last verse is quite telling, as it shows that the Brahmins' stand was not religious but political, which meant it could really provoke the people to a rebellion against the government. The Sanskrit terms (*kāhalākāṁsyatālādivādya-*) that describe the din and the mass of loud musical instruments played at VIII. 902, moreover, are the same as those of V. 465, showing that perhaps the way of staging a large demonstration had been the same in both cases.

Similar large groups of fasters who contested political decisions were twice bribed by Queen Diddā (reigned 980/1-1003) and thus switched allegiance. Brahmins in *RT* were sometimes called *utkocāditsayāḥ viprāḥ*, "Brahmins willing to take bribes" (as at *RT* VI.344.). Again, at *RT* VII.13-14, a counsellor plots with the fasters to oust minister Tuṅga, a favourite of that queen, showing that protest fasts could indeed carry political weight. Years later, in fact, as recorded at *RT* VII.1088, the Brahmins fasted against King Harṣa (reigned 1089-1001) who had despoiled temples, and this time the fasters achieved an exemption from the forced carriage of loads, *rūḍhabhārodhi*. About twenty occurrences of collective fasts by Brahmins are described in the *RT*; it should also be noted that this text records several abuses from their side as well, so that at times Kalhaṇa calls Brahmins *prayopaveśakuśala*, "clever in [staging] solemn fasts". At the same time, it is true that in Kashmir people had much to complain about and that many of them, including Brahmins, ended up dying while fasting to obtain redress.

Perhaps the most extreme disrespect shown by a government officer towards true fasters is portrayed in a few verses of *Narm*, when an important kāyastha, gone to a temple with all his retinue to recite a well-known *Śaiva* hymn, the *Stavacintāmaṇi* of Bhaṭṭanārāyaṇa (late 9th, early 10th century), intersperses his prayer with cruel orders – presumably uttered or hissed in an undertone – enjoining his henchmen to add an extra seventy-three people to the dead fasters who were already in the *prāyasthāna* ("the place [allotted, or chosen by] for [fasters'] death") and saying that they were to be removed by pulling at the chains on their ankles. So, it seems that there were many people indeed who had been pushed to such extreme measures and undergone such indignities. *Narm* I.39-42 is then followed by two more verses., I.43-44, coming from a different hymn I have not yet been able to trace:

> 'Oṁ! Through Paśyantī of beautiful words, who captivates the mind as soon as she is seen'

– how many fasters unto death did I put in place in the temple of Vijayeśvara yesterday? (*Narm* I.39)

'His infinite majesty shines forth, glory to Parameśvara!'
– let these seventy-three people be added to those who are already there (*Narm* I.40)

'To Him whose unfolding is prosperity, compassion, understanding, supreme bliss, efficiency'
– Let those learned Brahmins (*bhaṭṭa*s) who died in the *prāyasthāna* be dragged out by the chains on their ankles (*Narm* I.41)

'And to Him whose majesty is resplendent with knowledge, may there be glory to Him, to Aparājita!'
– Let those officers go to the villages, and †…† (*Narm* I.42)[39]

'To Him whose nature is absolute bliss, Who is the cause of all auspicious things'
– Those who defy punishment should be killed, and all their wealth be confiscated! (*Narm* I.43)

'To Him who removes all suffering, to that Brahman Who is pure consciousness, salutation!'
– Only after they are squeezed / Only after they are tortured
do the subjects exude fat / do the subjects exude wealth,
like the seed of *guggulu*.[40] (*Narm* I.44)[41]

[39] The text here is corrupted.
[40] A fragrant gum resin, *bdellium*, of the *Amyridacae*, genus *Balsamodendron*. The Indian variety is the *Commiphora* Mukul. For its medicinal use in the ancient *bhāṇa* ("monologue play") *Pādatāḍitaka* see Baldissera 2014, 125-126, vv. 70-71.
[41] *Narm* I.39-44:
sugirā cittahāriṇyā paśyantyā dṛśyamānayā /
– hyaḥ kiyanto mayā dattāḥ prāyasthā vijayeśvare // I.39//
jayaty ullāsitānantamahimā parameśvaraḥ /
– ādau sthitānām upari prāyantv ete trisaptatiḥ // I.40//
yaḥ sphītaḥ śrīdayābodhaparamānandasampadā /
– prāyasthāne mṛtā bhaṭṭāḥ kṛṣyantāṁ gulphadāmabhiḥ //I.41//
vidyoddhyotitamāhātmyaḥ sa jayaty aparājitaḥ /
– † nirdhām † adhūmakartāro grāmān yāntu niyoginaḥ //I.42//
sarvānandasvarūpāya sarvamaṅgalyahetave /

It is interesting that the kāyastha recites the *Stavacintāmaṇi*, which according to Sanderson (2015, 14) was "a text open to the uninitiated laity", something that a common kāyastha and most people would easily recognise, and not a hymn that only initiated *Śaiva* had access to. Here Kṣemendra attacks the hypocritical, public exploitation of religious piety by these public figures for political ends, and in the second and third part of *Narm* he exposes the main kāyastha – also called *niyogin*, "government officer", as a fake devotee, a man who changed creed three times, and his despicable *Śaiva* guru. In the second part of this satire, this guru is invited to perform a sacrifice in the officer's house. (*Narm* II.101-102):

> The *niyogin* at first was a Buddhist, then out of hypocrisy he became a *Vaiṣṇava*, and finally to protect his wife he conceived a respect for the Kaula[42] tradition. (*Narm* II.101)
>
> He invited a guru, the seat of arrogance, hypocrisy, and greed, who was the *maṇḍala*[43]
> in the initiation rites of trickery, sleight of hand and lust. (*Narm* II.102)
>
> Obeisance to you, lord of the gurus, you who steal wealth and wife,
> You who arouse [women], a devourer of everything, who eat at night like a *yakṣa* ('spirit'). (*Narm* II.103)[44]

– sarvasvaharaṇaṁ kṛtvā vadhyā daṇḍaniṣedhinaḥ //I.43//
sarvakleśāpahartre ca cidrūpabrahmaṇe namaḥ /
– pīḍitāḥ prasravanty eva prajā guggulubījavat //I.44//

[42] Literally, "for the *Kaulāgama*", the scriptures of *Kaula*, an important current of esoteric *Śaivism* in Kashmir.

[43] This is a joke about a salient point of the *Kaula* ritual of initiation: the initiand is blindfolded and lead in front of the prepared *maṇḍala* where the deities had been installed by *Mantra*s, and when the blindfold is removed, the initiand is exposed to the deities and to their influence. Here, instead of absorbing the deities' essence, the disciples are initiated by that despicable guru in the cult of deceit, etc. (See *Narm* 2005, 92 note 226, personal communication of Sanderson.)

[44] *Narm* II.101-102:
so'bhūt pūrvataraṁ bauddhas tato dambhāya vaiṣṇavaḥ /
rakṣārtham atha bhāryāyā jātakaulāgamādharaḥ //II.101//
āninīya guruṁ garvadambhalobhaniketanam /
māyākuhakalaulyānāṁ dīkṣāsamayamaṇḍalam //II.102//

Then follows the depiction of his ugly person and unpleasant habits – all day long the *guru* guzzles and gets drunk,[45] letting out steamy, smelly eructations[46]… until at vv. II.111-112 there is a running pun on the different meanings of the term "*guru*", that could mean "[religious] teacher" as well as several adjectives to do with "weight" or "importance", ranging from "grave" to "superior", to "heavy", to "supreme", to "weighty", and contrasted with "*laghu*", "light". (*Narm* II.111-112):

> The guru, with his mind completely blinded by arrogance /lust,
> by drunkenness, by unmentionable things,
> and by the most profound ignorance, appeared as if he were
> the very embodiment of egotism (*ahaṁkāra*)". (*Narm* II.111)
> "Superior in his bulk, /Heavy in his bulk
> in his voice, in stupidity and indolence,
> supreme in his penis, /extraordinarily cock-heavy,
> heavy in his jowls, his moustache,
> his belly and his buttocks,
> supreme in cheating / heavy with cheating
> prostitutes, libertines, and officers
> and devoid of good conduct –
> strange!
> This guru, who is weighty in everything,
> is always light
> in the great teachings uttered by Śiva! (*Narm* II.112)[47]

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namaste gurunāthāya dhanadārāpahāriṇe /
kṣobhiṇe sarvabhakṣāya yakṣāyeva kṣapāśine //II.103//

[45] Drinking alcohol (*mādya*) is another of the five *mahāpātaka*s "Great crimes" according to *Mānavadharmaśāstra* XI.54 and *Yajñavalkyasmṛti* III.227. In some *Śaiva* and *Śākta* esoteric tantric cults, however, libations and other manners of transgressive behaviour were means of transcending the secular divide between "right" and "wrong" experienced in ordinary life. *mada* ("wine", or "mead"), in fact, was one of the *pañcatattva*, the five elements of *Kaula* ceremonies. In particular cases, especially during Śākta rituals, among initiated people caste distinctions were not observed (Sanderson 2009, 7).

[46] A similar depiction of a smelly merchant guru (called *biḍālavaṇig* "the cat merchant") is found in *RT* VII.281-283.

[47] *Narm* II.111-112:
gurur gurutarāvidyāvadyamadyamadāndhadhīḥ /

In the next verses, Kṣemendra ridicules the devotees who cannot figure out what impostors these fake gurus are (*Narm* II.113-114):

> I wish there could be on this earth
> a person pure of conduct
> who had not worshipped these *guru*s,
> who are real treasures of impurities / who are real rubbish heaps. (*Narm* II.113)
>
> Vying with each other, all the people have fallen at his feet
> and with their heads they imitate
> the trembling of metal pots rolling about in an earthquake. (*Narm* II.114)[48]

Here scholars have wondered whether the author, born in a family of *Śaiva* worshippers, and a disciple of Abhinavagupta, had changed religious affiliation, as he was an admirer also of a *Vaiṣṇava* guru and of the Buddha. As here, however, Kṣemendra mentions those "great teachings uttered by Śiva" (*Narm* II.112d) that are demeaned by false *guru*s, it seems that he respected *Śaivism* and probably also all the three different main creeds of Kashmir, and only berated the hypocrisy and credulity of the base *guru*s and devotees he described. The *Narm* as well as some of his other satires poke fun at these fake *guru*s, impostors even more despicable than Tartuffe, and at their silly followers. What is remarkable here is that we encounter these fraudulent religious teachers at the same time as some of the highest thinkers and poets in religious and philosophical lore, from Utpaladeva to Abhinavagupta, graced Kashmir with their astounding compositions. If we try to imagine Abhinavagupta drinking in the circle of his like-minded friends, the picture we draw is one of relaxed elegance and cultivated *otium*, certainly not one of base debauchery.

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ahaṁkāra ivākāram āgataḥ pratyadṛśyata //II.111//
ākāreṇa gurur guruś ca vacasā kausīdyamaukhyair gurur
meḍhreṇātigurus tathāsya kuharaśmaśrūdarasphigguruḥ /
veśyākāminiyogivañcanaguruḥ sadvṛttaśūnyo guruś
citraṁ sarvaguruḥ śivoditamahāśikṣāsu nityaṁ laghuḥ //II.112//

[48] *Narm* II.113-114:
api nāma sa jāyeta pavitracaritaḥ kṣitau /
aśaucanidhayo yena guravo nopasevitāḥ //II.113//
ahaṁpūrvikayā sarve patitās tasya pādayoḥ /
cakruḥ śirobhir bhūkampaddṛ ṭhatpiṭharakabhramam//II.114//

In some instances, however, in medieval Kashmir the unorthodox behaviour of some Brahmins at special tantric rites was punished publicly by the king.[49] In the writings examined, the practice of outward bigotry and the arrogant yielding of worldly power are instead shown strictly bound together, so that even in this context Kṣemendra keeps reverting to his main theme, the exposure of the sinister kāyasthas. The next government officer he portrays, in fact, is one of the principal guests invited to the kāyastha's sacrifice, officiated by that grotesque guru. The wicked *dharmādhikārin*, "court magistrate", or "superintendent of *dharma*" is the main kāyastha's own father-in-law, and his description shows how impeccably *dharma* might have been administered by him (or generally, at the time) in a court of justice, where bribes were the norm even for the lesser clerks (*Narm* II.128-129, on the court magistrate; II.138, 140, on the clerks):

He has a pot filled with ink dangling from a basket for bark,
which seems to proclaim by its smell his future sojourn in hell. (*Narm* II.128)

Killing good people with his fang-like pen
dipped in the poison which is his ink,
the magistrate crocodiles[50]
in the ocean of the law court. (*Narm* II.129)

Who can survive on the word of these [clerks]
who say only what they want?
Through them the winner [of a case] is defeated,
and the defeated is declared the winner. (*Narm* II.138)

Even though he can see that base man is blind,
even though he can speak he is dumb,
even though he can hear he is deaf.

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[49] See for instance *RT* VI.108-109 (King Yaśaskara branded with a dog's foot mark Brahmin Cakrabhānu, for misbehaving at tantric gatherings) and Sanderson (Handout 2015, sept. 19-20, 7) on the same item and the banning of the *Nīlambaravrātin*s by King Śaṅkaravarman.

[50] *makarāyate* is an original denominative verb, meaning "to crocodile", or "to act like a crocodile". But *makara* also means "a sea monster", not necessarily a crocodile, and this is probably why here he has venom in his fangs. On a more positive note, sometimes *makara* means "a dolphin", the emblem depicted on the banner of Kāma, God of Desire.

> Without a bribe the clerk (*bhaṭṭa*),[51] that cheat,
> goes on sleeping. (*Narm* II.140) [52]

4. *The bawds' teaching*

In the oldest Kashmir satire on bawds and courtesans which I read, the 8th century Dāmodaragupta's *Kuṭṭanīmata* (from now on, *Ku*),[53] *dharma* is first mentioned in the context of the three *puruśārtha*s, "the aims of man".[54] The bawd, recounting many stories, shows her young charges, ready to fling themselves on rich customers, that the most valuable goal in the *puruṣārtha*s is in fact the pursuit of *artha* – here understood in its meaning of "wealth",

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[51] *bhaṭṭa* in this satire may also carry a further meaning, different from the usual "learned Brahmin". At II.133 the legal clerks are called *bhūrjabhaṭṭa*s, the *bhaṭṭa*s carrying documents [written on] *bhūrja*, "birch leaves". Here this might even be one rare case where a word, as a homophone, could be used in its Prakrit meaning: *bhaṭṭa* in Prakrit means "bearer", "servant", "husband [as the one who carries his wife]" and then the term could be a Prakrit/Sanskrit pun. Further on, again in the context of the courthouse, the low origin of these *bhaṭṭa*s legal clerks is made clear (*Narm* II.142-145.) Starting as a shoemaker, brother to a dancing girl, the man becomes first a dancer, then a guardian of the crops (maybe as a scarecrow), then the warden of the village temple of Gaṇeśa, then the servant of the informant of the *kāyastha* in charge of war and peace, and finally, in his messenger role "he obtained the position of *bhaṭṭa*, and all his children and grandchildren became twice-born / became crows of the law court" (*Narm* II.144), as the term *dvija*, "twice-born", means also "bird". Kṣemendra indeed excels in punning.

[52] *Narm* II.128-129; 138; 140:
bhūrja[peṭa]*laḍatklinnamaṣī subhṛtabhājanaḥ /
kathayann iva gandhena bhāvinīṁ narakasthitim //II.128//
*(emendation suggested to me by Sanderson, replacing Kaul's *-pīḍa*)
maṣīviṣārdrāya nighnan sādhūn kalamadaṁṣṭrayā /
āsthānajaladher antar diviro makarāyate //II.129//
kṛtaḥ parājito jetā jayī yaiś ca parājitaḥ /
teśāṁ svatantravacasāṁ vacasā kena jīvyate //II.138//
paśyann andho vadan mūkaḥ śṛṇvaṁś ca badhiro'dhamaḥ /
utkocena vinā bhaṭṭaś ciraṁ nidrāyate śaṭhaḥ //II.140//

[53] Deszö & Goodall, 2012.

[54] They are *Kāma*, ("desire"); *Artha* ("wealth", "advantage", and "meaning"); *Dharma* ("norm", "duty".)

"material advantage" – rather than of *dharma* or *kāma* (God forbid!). Even though, albeit in the original manner the bawd suggests, all three could be fulfilled.

She explains (*Ku* 652-653):[55]

> Dharma, for her, [the courtesan] is realised
> by sex with some lovelorn young man,
> deserving but necessitous;
> the aim of Wealth can be attained
> by congress with a wealthy man;
> Kāma, the third of human goals,
> she satisfies by savouring a man whose lust equals hers. (*Ku* 652)

> But if a man's no use for these –
> for winning Duty, Wealth, Desire –
> and those who live a worthwhile life
> should ask what purpose he might serve,
> how will a man like that give answer? (*Ku* 653)

But usually, what is constantly ridiculed is the greed and hypocrisy of the pious, especially those in power. One day, a self-righteous Brahmin father, proud of his pure lineage, writes a reproachful letter to his young son, who lives abroad and for over a year has been very much in love with a courtesan, who is also truly in love with him. The father writes of the difference between the pure pleasures of a religious student's life and the polluting dishonour of contact with a prostitute. One of the funniest parts is when he writes (*Ku* 418):

> How could one think to juxtapose
> Trembling in fear at being thrashed
> By exquisitely slender rod
> Held in the Vedic master's hand
> With being bound to tolerate

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[55] *Ku* 652:
dharmaḥ kāmād abhinavaguṇavan niḥsvasya madanarogavataḥ /
artho'rthavato'bhigamāt kāmaḥ samaratanaropabhogena //652//
Ku 653:
yas tu na dharmaprāptyai nārthāya na kāmasādhanopāyaḥ /
sa pumān saccaritadhanaiḥ paryanuyuktaḥ kim ācaṣṭe //653//

The fusillades of hefty kicks
Delivered from some angry whore! (*Ku* 418)[56]

As in the *Cārudatta* and the *Mṛcchakātikā*, here there is at least one courtesan who is really in love, and thus contravenes, to her utter ruin, the courtesans' unwritten *dharma*! The *Ku*, moreover, records five instances of loyal prostitutes/mistresses who burned themselves with their dead lovers – one of the lovers being a naked guru, Narasiṁha, while two of those who immolated themselves were foreign women: vv. 560, 561, 562, 564. At v. 565 even Raṇadevī, the one deemed to be the greatest of all courtesans, burnt herself on the pyre of a Vāmadeva.

Three hundred years later, in the *Samayamātṛkā*, ("The Mother of Rendez-Vous", from now on, *Sam*), a satire of Kṣemendra on a similar theme of instructions for courtesans, a barber recounts in several episodes a bawd's extremely treacherous life, rife with cunning stratagems, where the term *dharma* itself appears only twice. First, at 1.39 as part of the compound *dharmarāja*, ("king of *dharma*", but also "god of death") here referring to Yama. This is how, in the words of the barber, the *viṭa*s ("the men about town", or "parasites") salute a cruel physician who has caused the death of many prostitutes: "Homage to Yama, *dharmarāja*, who is Death, Destruction, Son of Vivasvat, the Time who robs every breath" (*Sam* I.39).[57]

The term *dharma* appears again at *Sam* 2.66, as the barber tells how the bawd, when young, became pregnant and abandoned her newborn baby as soon as she had delivered it.

Having interrupted her begging,
as her great belly was hanging down,
as soon as she gave birth, she abandoned her duty (*dharma*)
and went again to the city. (*Sam* II.66)[58]

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[56] *Ku* 418:
kvācāryapratanulatātāḍanasaṁkṣobhasambhavaḥ kampaḥ /
kvā ca kupitavāralalanāniṣṭhurapādaprahāraviṣahitvam //418//
//I.39//

[57] *Sam* I.39:
yamāya dharmarājāya mṛtyave cāntakāya ca /
vaivasvatāya kālāya sarvaprāṇaharāya ca // I.39//

[58] *Sam.* II.66:
vicchinne piṇḍapāte sa lambamānamahodarī /

5. *The death of* Dharma

From all these examples it appears that local writers had a rather grim view of the way *dharma* was administered and/or followed in medieval Kashmir. It seems that almost all the characters and historical personages mentioned in these different texts, the petty provincial scribe or bureaucrat, the magistrate, the tricky merchants, the chief minister, the greedy kings, fasting Brahmins, the soldiers or the prostitutes, and the despicable "*guru*", all share the same desire to acquire both power and riches. These texts suggest that *dharma* in medieval Kashmir was followed only by an unknown, and probably small number of true religious practitioners and presumably by an equally scarce number of loyal administrators, women, and householders. On this *Narm* I.27-29 is categorical: in these three verses it appears that even though *dharma*, by the grace of Viṣṇu, had once melted and transformed into ink (supposedly to become law in the world), in Kṣemendra's own days,[59] thanks to the kāyasthas, it was rather the demon Kali, the evil personification of *kaliyuga*, "the Kali age", or "dark eon", that had transformed into ink for the destruction of dharmic behaviour (*Narm* I.27-29):

> Once upon a time, out of devotion to Lord Viṣṇu, *dharma* melted into liquid
> so that it could pervade the three worlds, and now it survives as ink. (*Narm* I.27)
>
> Now, in order that the three worlds may again be occupied by the lord kāyastha,[60]
> who destroys the daily and the occasional rites of gods, *naga*s and men,
> Kali melted into liquid and is still present in the guise of ink.
> Just as the Gaṅgā bestows heaven, this liquid bestows hell. (*Narm* I.28-29)[61]

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prasūtā dharmam utsṛjya jagāma nagaraṃ punaḥ //II.66//

[59] To protect himself, Kṣemendra says that he is speaking of the *kāyastha*s who lived before his time, see Baldissera 2005a, XVI.

[60] Or, punningly, "the Lord who is in the body", a reference to *Śaiva* mystic practice (cf. *Narm* 2005, I.1 note)

[61] *Narm* I.27-29:
bhaktyā bhagavato viṣṇos trailokyākramaṇe purā /
dharmaḥ prayāto dravatāṁ maṣīrūpeṇa tiṣṭhati //I.27//
Narm I.28:
devanāgamanuṣyāṇāṁ nityanaimittikacchidaḥ /

The most outrageous comment on the entire situation is the cry of despair of the kāyastha at the end of his parable, when he is about to be caught and put in jail (*Narm* III.93):

> Alas! Because of the depravity of the times, / of Kāla,[62]
> how cruel the Kali age has become!
> Good people are destroyed everywhere.
> Damn! *dharma* has perished! (III.93)[63]

Though this final complaint of the ruthless kāyastha refers to the opposite of "good people", still his last ejaculation is an apt epithet for the true death of *dharma* in medieval Kashmir.

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tasya kāyasthanāthasya trailokyākramaṇe punaḥ //I.28//
Narm I.29:
kaliḥ prayāto dravatāṁ maṣīrūpeṇa tiṣṭhati /
yathā svargapradā gaṅgā tathaiṣā narakapradā //I.29//

[62] "Time" or "death", also as Mahākāla, epithet of Śiva.

[63] *Narm* III.93:
aho nu kāladaurātmyād ghoratā kiyatī kaleḥ /
sādhavaḥ sarvathā naṣṭāḥ kaṣṭaṁ dharmo'stam āgataḥ //III.93//

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ASTRID ZOTTER

Writing Nibandhas in Nepal

1. *Introduction*

The Nibandhas, topical digests, form an important textual category in which visions of *dharma* are articulated in South Asian royal milieus from the 12th century onwards. In them quotations from authoritative sources are arranged topic-wise, furnished with headings and moderated by an author. Together with the commentaries, Nibandhas became *the* place to deal with topics that were not part of the earlier *dharma* tradition, such as temple worship and festivals. It is in them that we witness the expansion of the concept of *dharma*, as also of its sources. Through them the Purāṇas and later even Tantric and other sectarian texts made it into the stock of sources considered authoritative for the *dharma* tradition (Davis and Brick 2018, 36-37).

Given their sheer quantity and often bulky size the systematic study of the Nibandhas is a challenging task which nevertheless attracts growing scholarly interest.[1] In the present contribution, I want to specifically address two points. The first is the overt interdependence of Nibandhas. On certain topics parallel passages are found across different texts although many of these quotations cannot be located in the sources they are ascribed to. It is well-known that later Nibandhas were building on earlier ones so that already in 1953 L. Rocher proposed that "Nibandhas may be fitted into a small number of pedigrees" (Rocher 1953, 4). A second line of enquiry revolves around the concrete circumstances under which particular Nibandhas were written. In this regard, D. Davis says:

> Even in later periods, we may know the names, regional origins, and minor biographical details of some authors, but almost no text provides a sufficient

[1] For introductions and the current state of research on Nibandhas, see Cubelic 2021, 30-49; Davis and Brick 2018; De Simini 2015.

> basis from which to draw conclusions or make connections to the personal history of the authors. Therefore, except at a general level, the Dharmaśāstra provides little information about time, place, or authorship-three things we would dearly love to know more about. (Davis 2018, 5)

Both points, the interdependence of certain Nibandhas and questions regarding their historical contexts, can be approached much more straightforwardly if we look at Nibandhas from a bottom-up rather than a top-down perspective, where rather than we starting with individual texts and trying to find their context, we take a real context and ask what texts were produced in them. Here, I will present two case studies from Nepal. Both concern ritual practices and stem from a very late phase of the Dharmaśāstra tradition; the first deals with texts on the use of flowers in worship from the 17th century, the second concerns the treatment of the autumnal Durgā festival in Nibandhas written in the late 18th and early 19th centuries.

2. *Flower texts in the Malla period*[2]

In the so-called late Malla period (1482–1768), texts that deal with the use of flowers in worship were written in the Kathmandu Valley, the historical Nepal. This epoch was characterised by the parallel and competitive existence of three city kingdoms, a political situation that resulted from a splitting of the Malla family. After the death of King Yakṣa Malla in 1482 two princes established Kathmandu and later Patan as independent kingdoms apart from the main seat of the royal family at Bhaktapur. From the latter, the dynasty had been ruling over large parts of the valley from 1200 on. The co-existence of three royal cities governed by close relatives within a limited geographical area triggered political intrigues, but also a competition over cultural achievements, including an accelerated textual production.

In the 17th century, which is considered a heyday of the period, amongst others, texts codifying rules for the use of flowers in worship began to be produced. The resultant text corpus is attested in Nepalese manuscripts of which more than 100 have been microfilmed by the *Nepal-German Manuscript Preservation Project* (NGMPP). There are self-sustained digests, text chapters, excerpts and (often multi-lingual) notes and registers; basically, everything

[2] This section is based on A. Zotter 2013.

from full-fledged Nibandhas (operating on the intellectual plane) down to handbooks and notes (turning to the practical side of the tradition). In the following I will mainly deal with two texts from the corpus, both self-sustained Nibandhas: the *Puṣpacintāmaṇi* and the *Puṣparatnākara*.

Though with the *Puṣpamālā*[3] introduced to Nepal from Mithila there is at least one example of a flower text that predates the texts treated here and there may have been still-untraced forerunners in Nepal itself, the text with the oldest dated Nepalese manuscripts in the extant corpus is the *Puṣpacintāmaṇi*. This Nibandha was composed at the court of Kathmandu between 1641 and 1651, has a named author, Māyāsiṃha,[4] and a royal patron, Pratāpa Malla (r. 1641–1674). The latter is often seen as a paradigmatic king of the late Malla period.

The *Puṣpacintāmaṇi* cites 47 texts by their names in four chapters containing altogether about 400 verses. It quotes some verses with unspecific attributions and occasionally contains short comments. Structured with the help of subheadings, rules about which flowers to offer or not to offer to which deities and under what circumstances are presented. The textual arrangement follows a well-conceived scheme. The chapters proceed from the general to the particular, each of the four being devoted to different recipients. The first chapter contains general rules on the use of flowers and then turns to flowers in worshipping Śiva. Flowers for Viṣṇu, Sūrya and the other planetary deities as well as for ancestor worship are the subject of the second chapter. Rules for presenting flowers to Durgā form the major topic of the third. Finally, the fourth chapter covers flowers for goddesses of the Nepalese Tantric lines of transmission, the so-called *āmnāya*s.

Based on a review of the quoted sources a reasonable scenario of which texts actually were on the author's writing desk can be proposed. Even if the *Puṣpacintāmaṇi* ascribes the assembled quotes to 47 different texts, it was possible to compose most of the text on the basis of just eight manuscripts.[5]

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[3] The *Puṣpamālā* by Rudradhara is also quoted in the *Puṣpacintāmaṇi* and must have been one of its direct sources (see below). This text, though drawing on well-known rules for flowers, consists of 29 newly composed verses, partly in more complex metres than the otherwise usual *śloka*; for more on the text, see A. Zotter 2013, 282-83; for a transcription, ibid.: 386-87.

[4] On the question of authorship and Māyāsiṃha about whom the historical sources remain inconclusive, see A. Zotter 2013, 242-49.

[5] These eight manuscripts together with the author's own verses (*Puṣpacintāmaṇi* 1.1 and 4.96-97) account for more than 85% of the whole text.

Among them were probably two multi-text manuscripts in layouts attested to in the Nepalese manuscript stock in several copies each:

1) one of the Śivadharma corpus[6] containing, amongst others, three texts cited in the *Puṣpacintāmaṇi*, viz the *Śivadharmaśāstra*, the *Śivadharmasaṅgraha* and the *Uttarottara*;
2) a manuscript containing the *Puṣpamālā* and excerpts from the *Durgābhaktitaraṅginī*.[7]

In addition the following texts seem to have formed actual sources of the *Puṣpacintāmaṇi*:

3) the *Ācāracintāmaṇi* by Vācaspati Miśra (1450–1480);[8]
4) the *Tārābhaktisudhārṇava* by Narasiṃha Ṭhakkura, that must have been written immediately prior to the *Puṣpacintāmaṇi*;[9]
5) the *Tantrasāra* by Kṛṣṇānanda Āgamavāgīśa, composed after 1577 probably around 1580;[10]
6) the *Mahākālasaṃhitā* from Mithila;[11]

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[6] For the Śivadharma corpus, see De Simini 2016.
[7] Three such manuscripts have been traced (NGMPP B 134/17, G 52/11, E 1136/8).
[8] For Vācaspati Miśra and his extensive literary activities, including eleven different *cintāmaṇis*, see Ganguly 1972, 112-53; Kane 1975, 1.2:844-54.
[9] In the preface to the edition of the text, its author's activities are dated to roughly 1668. This date needs revision, as the *Puṣpacintāmaṇi* quoting from it was composed before 1651. If the editor's claim that "from his writing he [i.e., Narasiṃha Ṭhakkura] appears to be later than Kamalākara Bhaṭṭa who wrote his Nirṇaya-sindhu in 1612 A.D." (*Tārābhaktisudhārṇava* 1940: 3), proves right, the time of composition can be narrowed down to the 40 years between 1612 and 1651. This claim cannot be verified, or at least I was unable to trace reference to Kamalākara Bhaṭṭa or his *Nirṇayasindhu* in the *Tārābhaktisudhārṇava*. For more on Narasiṃha Ṭhakkura and his possible connections to Nepal, see A. Zotter 2013, 275-76.
[10] Banerji 1978, 78. The *terminus post quem* of 1577 is set by the year of composition of Pūrṇānanda's *Śrītattvacintāmaṇi*, cited in the *Tantrasāra* (ibid.: appendix 3, xxxiii). With the 17th century as likely time of composition Goudriaan and Gupta (1981, 139) assume a slightly later time frame.
[11] Given its popularity and authoritativeness on the Nepalese worship of Guhyakālī, M. Dyczkowski (2004, 222 n. 41) proposed a Nepalese origin for the *Mahākālasaṃhitā*.

7) the *Manthānabhairavatantra*;
8) a text named *Vaiṣṇavāmṛtasaroddhāra* in Nepalese manuscripts, quoted from as *Vaiṣṇavāmṛta*.[12]

When asking for textual interdependences within the Nibandha genre, it is interesting to see how the *Puṣpacintāmaṇi* builds on other digests. The flower text itself only hints at these texts in short comments. Comparatively often, altogether five times, reference is made to the *Ācāracintāmaṇi* (*Puṣpacintāmaṇi* +1.87, +1.120, +2.63b, +2.87, +3.43). The *Tantrasāra* and the *Tārābhaktisudhārṇava* are mentioned only once when discussing a verse at the end of the fourth chapter (*Puṣpacintāmaṇi* +4.95). These few explicit acknowledgments of the three Nibandhas as the *Puṣpacintāmaṇi*'s sources are incommensurate with the extent to which they were actually used, but at least they are mentioned. One of the Nibandhas at the back of the *Puṣpacintāmaṇi*, the *Durgābhaktitaraṅginī*, remained completely hidden. Were it not for an investigation of the surrounding flower text corpus, in which excerpts from it were copied together with the *Puṣpamālā* (see n. 4 above), it could have easily escaped notice altogether.

Comparing the quotations and their arrangements in passages on the use of flowers in the four Nibandhas—all of them deal with the topic only as one among many—the *Puṣpacintāmaṇi* reveals that they contained the major building blocks that were quarried to construct the Nepalese Nibandha. Thus complete sets of quotes from the *Ācāracintāmaṇi* turn up again in the second chapter of the *Puṣpacintāmaṇi* and indeed form large parts of it. Likewise, quotes in the same layout as attested to in the *Durgābhaktitaraṅginī* form the backbone of the third chapter and verses taken over from the *Tantrasāra* and the *Tārābhaktisudhārṇava* contributed to the fourth. The quotes inherited from the earlier Nibandhas were taken over together with their textual ascriptions. Remarkably, this adoption even included introductory statements and commentarial passages, in most cases as silent takeovers. Thus, of all commentary phrases in the *Puṣpacintāmaṇi* very few did not go back to comments by earlier Nibandhakāras. So apart from the introductory verse (*Puṣpacintāmaṇi* 1.1) and two concluding stanzas that disclose the place of

However, as A. Sanderson (1988, 685) has stressed it is more likely to come from Mithila.

[12] For the manuscripts consulted and a transcription of the *Vaiṣṇavāmṛtasaroddhāra* as quoted in the *Puṣpacintāmaṇi*, see A. Zotter 2013, 388-90.

composition, as well as the author's and royal patron's names (*Puṣpacintāmaṇi* 4.96-97), the author's work was confined to choosing and rearranging quotes, consisting of first hand quotations and wholesale secondary borrowings.

An investigation of which quotations were chosen, which were left out and how they were rearranged largely confirms earlier scholarship on these questions (De Simini 2015). The compiler of the *Puṣpacintāmaṇi* seems to have aimed at a concise treatment of the set topic, leaving out repetitions and unnecessary details wherever possible. Moreover, he appears to have refrained from adopting passages that led to conceptual contradictions or those that were too esoteric. On a formal level, a slight preference for primary over secondary sources is observable. At least in cases when parallel quotes on worshipping Śiva were present in both the Śivadharma texts and as second-hand Puranic quotes in the *Ācāracintāmaṇi,* quotes were adopted from the Śivadharma texts. This might have had either purely technical reasons or have been a deliberate choice, to consider the Śivadharma texts to be more authoritative for guiding the worship of Śiva. Generally speaking, despite some liberties taken when quoting and some wrongly attributed quotes, the compiler of the *Puṣpacintāmaṇi* treated his sources faithfully and arranged his composition carefully.[13]

On the one hand, the *Puṣpacintāmaṇi* is based on freshly imported texts from North India, including the *Tārābhaktisudharṇava* that must have been brand new and whose date of composition can be narrowed down by the very fact that the *Puṣpacintāmaṇi* mentions it (see note 10 above). On the other hand, the flower Nibandha builds on authorities that must have become classics on Nepalese religious practice by the time of writing, such as the Śivadharma texts or the *Manthānabhairava*. The *Puṣpacintāmaṇi* thus mirrors both local realities and the state of the art of trans-regional traditions. Moreover, the available material on flowers in worship is specifically tailored to Nepalese royal ritual culture, illustrating a typical vision of religion in Malla Nepal in which exoteric and esoteric traditions appear interwoven. M. Dyczkowski has described this form of religion—based on what is still practiced by the Newars of the Kathmandu Valley—as consisting of two domains; an outer publicly performed one where male gods dominate over females and an inner secret domain (Dyczkowski 2004, 194-95). "The deities that populate this 'inner space' and their rites are closely guarded secrets and, often, they are the secret identity of the public deities, known only to initiates" (ibid., 194). The *Puṣpacintāmaṇi*, too, first covers the realm of publicly performed ritual in that it works through

[13] Still inconsistencies remain (A. Zotter 2013, 345-52).

the typical *smārta* configuration of deities, including Śiva, Viṣṇu, Sūrya and Durgā. In its structure the treatment of rules for flowers for these deities is very much comparable to what is seen in North Indian Dharmanibandhas, such as in the *Pūjāprakāśa* of the *Vīramitrodaya*.[14] Having the *Ācāracintāmaṇi* as its source the *Puṣpacintāmaṇi* is even directly related to a representative of this type of treatment. Rather than just following such North Indian templates, however, it is geared to the local religious landscape more specifically. The first chapter very much draws on the Śivadharma corpus. In a typical Nepalese manner Śiva is dealt with first and most elaborately. The treatment of the *smārta* deities ends with that of Durgā, but the fact that she is considered last in the series does not curtail her importance. On the contrary, the third chapter can be regarded as a hinge connecting two modes of worship. After all, it is Durgā Mahiṣāsuramardinī who forms the exoteric identity[15] of the esoteric goddesses unfolding into different lines of transmission (*āmnāya*) of the Nepalese Tantric traditions dealt with in the last chapter of the text.

This overall structure of treating exoteric and esoteric worship traditions one after another can also be observed in the second Nepalese digest on worship flowers to be discussed. The *Puṣparatnākara* was written under Bhāskarendra Malla (r. 1700-1714), a later king of Kathmandu, in or shortly after 1700 by Navamīsiṃha. This author also composed a better-known comprehensive Nibandha, the *Tantracintāmaṇi*. Navamīsiṃha follows another strategy to compose his text. First of all, he pools all textual ascriptions and mentions all sources in one breath at the beginning of his text. What follows is a running text, without any textual ascriptions. This text format seems to have been Navamīsiṃha's personal predilection and a deliberate choice, as it is also seen in the *Tantracintāmaṇi*. This style not only included the heavy re-use of quotations separated from their ascriptions, but also actual rewritings of more complex metres into simple *śloka*s, as exemplified by verses from the

[14] The *Pūjāprakāśa* discusses the worship of the *smārta* deities, including Viṣṇu, Śiva, Sūrya, Durgā, and Brahmā. For all of them except for Brahma extensive sets of quotations on the use of flowers in *pūjā* are given; for Viṣṇu pp. 41-71, for Śiva pp. 210-16, for Sūrya pp. 255-59, for Durgā pp. 315-19.

[15] Dyczkowski 2004, 136, 148, 240, 283. The *Puraścaryārṇava* (1985, 13 lines 13-15) written in the early Śāha period (see below) prescribes the worship of Durgā as also of Kumārī, the goddess in the form of a girl, as a compulsory part of the daily ritual routine of all *āmnāya*s.

Puṣpamālā, that are found reformulated in the *Puṣparatnākara* to fit the uniform metre.[16]

Even though Navamīsiṃha gives the impression of having consulted his sources directly it is apparent from the arrangement of the verses and the text names mentioned that for major parts he did not go back to primary sources. The earlier *Puṣpacintāmaṇi* has clearly formed the template for his text which he topped up with additional material (see Table 1). Though he does not mention his textual forerunner, one detects allusions to it having provided the main textual modules for the *Puṣparatnākara* and a road map for its structure. Thus, a "wish-fulfilling jewel" (*cintāmaṇī*) becomes a "jewel mine" (*ratnākara*) and four chapters become eight. Large parts, especially sections from the first and second chapter of the *Puṣpacintāmaṇi* are used almost verbatim. Some verses are added, such as those for the worship of Gaṇeśa, which with regard to the local religious landscape might have been perceived as a lacuna in the earlier text that needed to be filled. Major rearrangements of and additions to the textual material provided by the *Puṣpacintāmaṇi* are found in the *Puṣparatnākara*'s discussion of flowers for goddess worship. More exoteric goddesses are added and the treatment of the esoteric ones is rearranged and more thoroughly reworked.

[16] Thus *Puṣparatnākara* 5.24c-25b (*atha niṣiddhāni || uktetararaktapuṣpam arkamandārabhāntike | śukletaram agandhaś ca nogragandhaḥ praśasyate*) goes back to a verse from the *Puṣpamālā* as cited in the *Puṣpacintāmaṇi* 2.93 (*atha niṣiddhāni tatraiva || uktetaraṃ lohitam apraśastaṃ mandāram arkodbhavabhāntike ca | śukletaraṃ gandhavihīnam ugragandhaṃ ca puṣpaṃ na hitaṃ pitṛbhyaḥ*).

Table 1: A comparison between the topics treated in the different chapters of the *Puṣpacintāmaṇi* and the *Puṣparatnākara*

Puṣpacintāmaṇi		*Puṣparatnākara*	
1	Common rules (1.1–16b) Śiva (1.16c–141)	1	Sources, common flowers
		2	Common rules: use of flowers, prohibited flowers
		3	Gaṇeśa (3.1–4) Śiva (3.5–120)
2	Viṣṇu (2.1–65) Sun (2.66–88b) Planetary deities (2.88c–90) Ancestor worship (2.91–93)	4	Viṣṇu
		5	Sun (5.1–18) Planetary deities (5.19–21b) Ancestor worship (5.21c–26)
3	Durgā	6	Bhavānī (6.1–23b) Durgā (6.23c–55) Gāyatrī (6.56–58b) Sarasvatī (6.58c–61)
4	*paścimāmnāya* (4.1–16) *uttarāmnāya* (4.17–51) Dakṣiṇakālī (4.52–62b) Nīlasarasvatī (4.62c–69) *ūrdhvāmnāya* (4.70–95)	7	Dakṣiṇakālī (7.1–31b) *paścimāmnāya* (7.31c–48)
		8	*uttarāmnāya* (8.1–31) *ūrdhvāmnāya* (8.32–55) Nīlasarasvatī (8.56–64)

With the Nepalese flower texts it becomes clear that much less work was involved in composing actual Nibandhas than it seemed from the outset. Older texts and notably earlier digests were quoted, often to an extent that went far beyond what the texts actually acknowledged. The Nibandhas developed further, branching out into new forms and crossing textual genres. Thus, being silently swallowed up by the *Puṣparatnākara* was only one way textual material compiled in the *Puṣpacintāmaṇi* was re-used. Apart from that, its fourth chapter started to be transmitted independently under the title *Puṣpamāhātmya*. In this compilation, the rules for flowers were operationalised by supplying them with *vākya*s, formulas to be spoken when offering particular flowers to particular

deities in order to attain particular results.[17] Moreover, the rules on flowers gave rise to multi-lingual glossaries of flower names.

In this textual tradition it seems to have mattered much more to transmit the scholastic knowledge on flowers in worship and to relate Sanskrit quotes from the trans-regional *dharma* tradition to local religious and botanic realities than to preserve a single text faithfully. Seen as part of a textual tradition a single work only appears as a snapshot of a river constantly receiving influx and branching out into different runoffs. Texts may even be integrated silently into later ones, as the *Puṣpacintāmaṇi* was by the *Puṣparatnākara*. The tradition built up over time so that at least within the Nepalese flower text corpus it really becomes possible "to carve out the pedigrees".

The cultural activities of the late Malla period were styled as a "neo-classical mode" (Bledsoe 2004) guided by classical norms of dharmic kingship:

> in the period of the Three Kingdoms, Nepali rulers […] rediscovered precisely these classical norms, aspired to their fulfillment, and celebrated their triumph in re-achieving perfections prescribed in the distant past. (ibid., 96-97)

Nepal was not alone in this, but part of larger trans-local developments in the "early modern period, during which North India in particular experienced a renaissance of Sanskrit learning that has only begun to be revealed again" (Davis and Brick 2018, 45). This must have involved a high degree of mobility and exchange between different royal courts and centres of learning. For example, we see in the flower text corpus that newly produced Nibandhas from North India, such as the *Tārābhaktisudharṇava*, were used in Nepal almost immediately.

Although built on earlier texts from North India the whole textual tradition surrounding flowers in worship remained a local Nepalese issue. To my knowledge, it did not spread beyond Nepal before the *Puṣpacintāmaṇi* was published in 1966 in Varanasi. The text may not have been received directly but was in the form of quotations. Thus the *Puṣpacintāmaṇi* is mentioned in a

[17] Thus the rule "*Jātī* grants worldly enjoyment and liberation" (*bhuktimuktipradā jātī*, *Puṣpacintāmaṇi* 4.6a) quoted as a rule for the Western Tradition (*paścimāmnāya*) is provided with the liturgical formula: "Today, I, who have the desire to attain worldly enjoyment and liberation, will worship the glorious goddess Kubjikā with these *jātī*-flowers" (*adya bhuktimuktiphalaprāptikāmaḥ ebhir jātīpuṣpaiḥ śrīkubjikādevīm ahaṃ pūjayiṣye*).

Nepalese Nibandha that has acquired fame beyond Nepal, the *Puraścaryārṇava* by King Pratāpa Siṃha Śāha (r. 1775-1777).[18]

3. *Texts on Navarātra in the early Śāha period*

With the just-mentioned *Puraścaryārṇava* we enter the next phase in Nepalese history, connected with a dynastic change and the birth of Nepal as a larger territorial state. Through the conquest of the Kathmandu Valley in 1768 to 1769 under Pṛthvīnārāyaṇa Śāha the royal house of Gorkha deprived the Mallas of their powers and removed them from their palaces. Together with this material infrastructure the new rulers inherited veritable treasure-houses of knowledge, including texts and scholars. They also brought in their own scholars from Brahmin families who had long entertained relations with the Gorkhālī kings, being their initiatory gurus, astrologers (*jyotiṣa*s), house priests (*purohita*s) or temple priests (*pūjārī*s). Many of these Brahmins studied in, retired to or even hailed from North Indian centres of learning, such as Varanasi or Bengal. In the scholarly milieu of pre-conquest Gorkha, texts were copied and composed under royal patronage[19] although probably on a much lesser scale than that produced under the Malla kings in the far richer Kathmandu Valley. The Malla kingdoms of Nepal were also among those regional power centres, with whom the kings of Gorkha exchanged texts. Thus from a Nepali translation of passages on flowers in worship it is apparent that textual material that had been codified in the *Puṣpacintāmaṇi* at Kathmandu between 1641 and 1651 had already travelled to Gorkha in 1689.[20]

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[18] In its passage on flowers the *Puraścaryārṇava* (1985, 232-39) seems to have drawn on material provided by the *Puṣpacintāmaṇi* and the *Tārābhaktisudhārṇava* amongst others. In a commentary the text refers once to the opinion of the author of the *Puṣpacintāmaṇi* (*Puraścaryārṇava* 1985, 237).

[19] Ample evidence for manuscripts scribed at Gorkha, prepared for the royal family or commissioned by them has been collected by D.R. Panta with many colophons published in the third volume of his *Gorakhāko itihāsa* (D. Panta 1988).

[20] This text calls itself a "*Puṣpamāhātmya* according to the sequence of the *āmnāya*s composed by a collection of [quotes from] several Tantras" (*iti śrītaṃtrāṃtarasaṃgrahakṛtaṃ āmnāyakramapuṣpamāhātmyaṃ samāptāṃ* (sic)) and was scribed in "[Vikrama] Samvat 1746 (1689 CE) in the city of Gorkha" (*saṃvata satrahasau chayālisa goraṣanagarīmā̃hā*). It mentions the then reigning King of

During the first generations of Śāha rule over Nepal as a larger territorial state at the end of the 18th and the beginning of the 19th century we witness yet another wave of Sanskrit scholarship. Texts of different genres were produced: playwrights, texts on history or inscriptions amongst others. This making of a new textual tradition, which happened in the wake of political change, is not yet well-known in Western academic discourse, even if Nepalese scholars have already been carrying out ground-breaking work for many decades.

Among the newly produced texts were also Nibandhas. One is the just-mentioned *Puraścaryārṇava* written in 1775[21] by King Pratāpa Siṃha Śāha (r. 1775-1777). It is a comprehensive treatment of Tantric ritual practice, including a description of the general layout of the system and of the modes for worship, as well as rules on initiation (*dīkṣā*), particular mantras and details of worshipping esoteric deities. The second big Nibandha is the *Satkarmaratnāvalī* that lays out the full canon of common Brahmanic ritual conduct, such as daily ritual routines, sacrifices, recitations, rituals of the annual cycle (*varṣakṛtya*), life-cycle (*saṃskāra*) and so on. It was released by King Gīrvāṇayuddha Vikrama Śāha (r. 1799-1816) in 1812 (ŚS 1734).[22]

The two texts have some features in common. One is their bulky size, although dwarfed in comparison with eminent representatives of their genre such as the *Caturvargacintāmaṇi* or the *Vīramitrodaya*. Another commonality is the fact that their alleged authors were both kings and ones usually considered of minor political importance. In Nepalese history writing, such as D.R. Regmi's *Modern Nepal*, Pratāpa Siṃha who ruled for only 36 months, is represented as a feeble character who "was swamped in luxuries, was easily influenced and listened to tell tales" (Regmi 1961, 1:276) while his younger brother, Bahādura Śāha, is said to be one who "always appears as a man of kind disposition, and broad outlook and brave in word and deed" (Regmi 1961, 1:273), being favoured over his elder brother by their father Pṛthvīnārāyaṇa. Pratāpa Siṃha died young. His death marked the beginning of a period when baby kings were crowned with relatives appointed to rule in their stead. Pratāpa

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Gorkha, Pṛthvīpati Śāha (r. 1673-1716), as being a descendant of Rāma Śāha (r. 1609-1633) (*śrīrāmasāhakuladīpamani bhaye śrīpṛthvīpatisāha*). It was microfilmed as NGMPP E 1383/10 in Dhading district and as far as can be judged by cursory inspection is based on parts of the first and last chapters of the *Puṣpacintāmaṇi*.

[21] The text was released on the fifth of the bright fortnight of Māgha in VS 1831 (5 February 1775, N. Panta 2003, 44 n. 22).

[22] *Satkarmaratnāvalī* 1969:2, i.

Siṃha's grandson, Gīrvāṇayuddha, was such a baby king, crowned in 1799 at the age of two. His case is even more special, as he was an unlikely heir to the throne, being the offspring of a Brahmin widow married against the norms of caste. His coronation was forced through by his father, the abdicated king Raṇabahādura, and infringed the rules of *dharma* on several counts[23] overthrowing the rights of his elder half-brother, Raṇodyota Śāha. Gīrvāṇayuddha never ruled independently but under the regency of his step-mothers until he died at the age of 19 in 1816.

To attribute authorship of a Nibandha to a king is not uncommon. Regarding the Nepalese case the actual roles of the two young kings in composing the texts seem suspicious, to put it mildly. Thus, it has been aptly remarked by N. Panta about the *Puraścaryārṇava* that it is "hard to imagine that a king of 23 years could have produced such a book".[24] Even harder to conceive of the 15-year-old King Gīrvāṇayuddha as the single-handed author of the *Satkarmaratnāvalī* that in its modern edition fills more than 1100 printed pages. Indeed, on the basis of a colophon to a manuscript of the *Puraścaryārṇava* it has been proposed that the actual author was not King Pratāpa Siṃha but a person named Vidyākara Sūri (N. Panta 2003, 46 editors' note).

Applying strict concepts of single or even main authorship and originality would certainly misconstrue what was important for such royal digests. The examples from the flower text corpus above have already shown that Nibandhas were not written from scratch but largely assembled from earlier collections of quotations. Their originality and literary achievement rather lay in the maintenance of a tradition refined and enhanced through constant adaptations. The two Śāha period Nibandhas may have been the product of scholars who sought to make a career at the newly reconfigured court of Kathmandu by demonstrating their mastery in tailoring the wealth of textual authorities available there to the demands of the new royal dynasty or even be the result of a more collective endeavour. Within the frame of collaborative authorship it also seems conceivable that the young kings—as part of their royal educational canon—were indeed personally involved in such large-scale projects. Ascribing the final product to the king may then be seen as a seal of approval, branding the Nibandha in question as a decisive achievement of scholarship at a royal court. But just as much as a learned Nibandha published under a king's name

[23] See A. Michaels' contribution to this volume.

[24] "*23 varṣakā rājāle yasto grantha banāuna sake holān bhanī kalpanā garna gāhro cha*" (N. Panta 2003, 46).

established the text as being authoritative for a regional tradition it was also tangible proof of the king's qualification to rule. What B. Bledsoe has said about Malla period inscriptions holds true for the royal Nibandhas from the Śāha period too: "they became discursive texts with the capacity to 'make' their makers" (Bledsoe 2004, 53).

In that line of interpretation, it also becomes plausible why the two major Śāha period digests were launched under exactly these two kings' names. Pratāpa Siṃha's reign was crucial for firmly establishing Śāha rule over Nepal. That the new king, the first of the house of Gorkha who had passed his formative years at Kathmandu, was personally capable of performing his role as major ritual patron (*yajamāna*) of the realm and, importantly, by authoring the Tantric *Puraścaryārṇava,* demonstrated his competence as premier initiate in and expert of the Nepalese Tantric traditions that had been at the heart of the kings' right to wield power over Nepal for centuries, must have been an important step to solidify the rule of the new dynasty. Presenting King Gīrvāṇayuddha as the author of the *Satkarmaratnāvalī* fulfilled the ideal of a learned king and certainly helped in stabilising his kingship, even if his descent and ascent to power clearly infringed *dharma* rules. The mastery of a literary genre crucial for ordering the world according to dharmic principle was a statement of his personal competence to reign.

While more reflection is needed on how to conceptualise the royal authorship of Nibandhas and the actual motives for the composition of the two major Nibandhas of the early Śāha period, in the following I will turn more to their interrelations. Far from lodging a claim for this cursory examination to be valid for the two texts in their entirety or even for larger textual arrays I will deal with only one selected topic, namely the prescriptions for the rituals of the autumnal worship of the goddess Durgā as Mahiṣāsuramardinī, "crusher of Buffalo Demon". The festival complex around the Navarātra, the "nine nights", celebrated over the first nine lunar days of the bright fortnight of the autumn month of Āśvina, together with the Vijayadaśamī rituals on the tenth, formed one of the or even *the* most important festival at the Nepalese courts at least from the early Malla period on.

Both, the *Puraścaryārṇava* and the *Satkarmaratnāvalī*, contain elaborate treatments of the festival. Though the two texts approach the ritual culture of Nepal from two different perspectives—the *Puraścaryārṇava* focusing on the Tantric system, the *Satkarmaratnāvalī* more resembling North Indian Dharmanibandhas on proper ritual conduct (*ācāra*)—their expositions of the festival are astonishingly similar, from the texts quoted to the arrangement of

quotations and comments. However, there remain major differences. The most obvious is that the *Puraścāryārṇava* forms a mere collection and scholastic discussion of quotes and is thus confined to treating only the *pramāṇa* aspect of the rituals, whereas the *Satkarmaratnāvalī* also contains *prayoga* parts, instructions for practical application. The close relationship between the two passages and the developments that took place from one to the other are even more evident if two intervening texts are put in place, which exclusively deal with the autumnal Durgā festival (see Table 2). The first is the *Durgākṛtya-kaumudī* written by Vāṇīvilāsa Pāṇḍe for Bahādura Śāha in 1786;[25] the second the *Durgārcanakalpataru* composed in 1793 by Daivajñaśiromaṇi Lakṣmīpati Pāṇḍe for Raṇabhīma Śāha of Salyan.[26]

Table 2: Nibandhas dealing with Navarātra composed in the early Śāha period

text name	author and patron	date
Puraścaryārṇava	King Pratāpa Siṃha Śāha (r. 1775–1777)	1775
Durgākṛtyakaumudī	Vāṇīvilāsa Pāṇḍe for Bahādura Śāha (regent 1785–1794)	1786
Durgārcanakalpataru	Lakṣmīpati Pāṇḍe for Raṇabhīma Śāha of Salyan (married to Vilāsa Kumārī)	1793
Satkarmaratnāvalī	King Gīrvāṇayuddha Vikrama Śāha (r. 1799–1816)	1812

So within less than forty years the festival that was to become the national festival of modern Nepal was dealt with at least four times in Nibandha form. Three of these digests were directly related to King Pṛthvīnārāyaṇa's children. His eldest son, Pratāpa Siṃha, released the *Puraścaryārṇava* barely a month after Pṛthvīnārāyaṇa's death (N. Panta 2003, 44). After his elder brother's death in 1777 his younger sibling, Bahādura Śāha, patronised the *Durgākṛtyakaumudī* which appeared in 1786, about a year after Bahādura was appointed regent for

[25] More particularly, on the 13th of the bright fortnight of Māgha of the Śaka era year 1708 (Pauḍela 1964, 53).
[26] On the 2nd of the bright fortnight of Āśvina of the Śaka era year 1715 (D. Panta 1966a, 47).

his nephew, King Raṇabahādura. In 1766 Pṛthvīnārāyaṇa's eldest daughter, Vilāsa Kumārī, was married to Raṇabhīma Śāha of Salyan (Manandhar 1986, 102) for whom the *Durgārcanakalpataru* was written in 1793. In the same year, Raṇabhīma was crowned king of Salyan and his father, Śrīkṛṣṇa Śāha, abdicated (ibid., 103).

Different from the two more comprehensive Nibandhas that claim royal authorship, the two Nibandhas focused on the Durgā festival mention members of the royal family as their patrons and name Brahmin scholars as authors. Both men, Vāṇīvilāsa Pāṇḍe and Lakṣmīpati Pāṇḍe, made outstanding careers in the early Śāha period and left behind extensive writings. Vāṇīvilāsa Pāṇḍe,[27] the author of the *Durgākṛtyakaumudī*, came from a Brahmin family that had entered Gorkhālī service in the early 18th century and whose members had shaped the ritual culture of the court since then.[28] Vāṇīvilāsa's activities are attested from 1770 to 1831. Apart from the *Durgākṛtyakaumudī* he wrote other texts for members of the Śāha family, of which only the *Praśastiratnāvali*—a text about how to compose eulogies for different types of addressees, commissioned by Śrīkṛṣṇa Śāha (a nephew of Pṛthvīnārāyaṇa)—has been published so far. Vāṇīvilāsa also composed the texts of several stone inscriptions that include long Sanskrit poems and record religious endowments of several queens and other high-ranking politicians.

In his old age Vāṇīvilāsa Pāṇḍe retired to Varanasi, just like the author of the *Durgārcanakalpataru*, Lakṣmīpati Pāṇḍe.[29] Lakṣmīpati's forefathers had been astrologers at the Gorkhālī court for four generations before him. He was born in 1758 in Gaikhur, Gorkha, came to Kathmandu around 1778 and later joined the conquests of western Nepal under Bahādura Śāha. As an astrologer in the army he kept track of military events in his almanac. He fixed the auspicious timings for attacks when the Gorkhālī forces marched west in 1786 and conquered a number of petty states within just a few months. He was rewarded

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[27] The following is based on the introduction to the *Praśastiratnāvali* (Pauḍela 1965).

[28] Vāṇīvilāsa' ancestor, Gaurīśvara, originally served the Sena kings of Tanahun, but eventually became the initiatory guru of Pṛthvīnārāyaṇa's father, Narabhūpāla Śāha (r. 1716-1743). Narabhūpāla's mother, Mālikāvatī was the daughter of Dāmodara Sena of Tanahun and, according to the dynastic chronicles (*vaṃśāvalī*s), Narabhūpāla Śāha was born at her maternal house at Tanahun. There Gaurīśvara already performed the childhood rituals for the later king (D. Panta 1984, 1:165, 169).

[29] The account of Lakṣmīpati Pāṇḍe's life is based on D. Panta 1965; 1966a; 1966b; 1966c; 1966d.

with wealth and privileges for his successful prediction that the realm would extend up to the Bheri river in between the months of Bhādra and Pauṣa that year. As an employee of the foreign department he wrote the *Durgārcanakalpataru* for the brother-in-law of the regent in 1793. Around this time Bahādura Śāha's star began to fall, also setting back Lakṣmīpati's own career. He spent his last years at Varanasi where he continued his studies and, in 1831, passed away.

Including the Navarātra works of these two court Brahmins, the topic was codified in Nibandha form repeatedly and in rapid succession in texts connected to the top tier of Nepalese political leadership. Just as royals were involved in textual production, Brahmin scholars were involved in warfare and politics. Knowing their biographies and specialisations helps to explain certain characteristics of the texts produced, as will become apparent.

From a formal point of view the four expositions of the autumnal Durgā festival display striking differences. In the *Puraścaryārṇava*—the comprehensive Tantric digest—the some 170-page-long *durgotsavavidhi* (*Puraścāryārṇava* 2009, 958-1129) forms the major part of the 11th chapter where it is clubbed together with a shorter passage on mantra practice related to Durgā (ibid., 952-58). The corresponding roughly 40-page-long section of the *Satkarmaratnāvalī* (1969, 2:201-43) is embedded in the series of annual rituals (*varṣakṛtya*). It deals with the rituals as part of the monthly obligations in the month of Āśvina in the sequence of the lunar days and does not feature a separate heading for the whole festival complex. The *Durgākṛtyakaumudī* and the *Durgārcanakalpataru* treat the festival spanning from the first to the tenth of the bright fortnight of Āśvina cover to cover in Nibandha form. While the available copies of the *Durgārcanakalpataru* have around 100 folios or even less, manuscripts of the earlier *Durgākṛtyakaumudī* have more than 250.

Despite these differences regarding the text framings and lengths, when inspecting the actual passages the four texts appear clearly related. Often the same quotes, largely from Puranic and Tantric sources, are found in all four Nibandhas. Moreover the texts build on one another so that step by step a tradition builds up that is refined along the way, enriched with details and discussions. That process is not only one of accreting more and more sources along the way, the material also undergoes major developments.

The passage in the *Puraścaryārṇava* opens with a general section on the significance, the main elements and forms of the ritual depending on what form of Durgā is worshipped (1985, 958-66). Then it turns to the *nirṇaya* (lit. "determination"), the issue of how to fix the ritual elements in time and how to

match the elaborate ritual complex stretching over ten *tithi*s—lunar days of varying length—with solar days (ibid., 966-92). After a passage on how to deal with conditions of impurity (*aśauca*) and whether the festival should be reckoned as obligatory (*nitya*) or occasional (*naimittika*) ritual (ibid., 992-94), which ends in a long quotation from the *Mahākālasaṃhitā*, the *Puraścaryārṇava* turns to the rites to be performed on the different days. Whereas in the first sections quotes from different sources, including alternative opinions, are discussed extensively, this last part on the concrete form of the rites contains only extensive quotes, or, more accurately, it consists of one long citation from the *Mahākālasaṃhitā* with a few other shorter quotes interspersed. Only some subheadings separate this material into sections that may help the reader to navigate through the multi-day procedure. Moreover, though the verses quoted from the *Mahākālasaṃhitā* also include some mantras to be spoken, as has been mentioned above, the text contains no explicit *prayoga* parts.

Such *prayoga* parts with detailed instructions of what should be said and done and by whom and with what material, when and where, form a major part of the *Durgākṛtyakaumudī* and the *Durgārcanakalpataru*, the two texts written about ten and twenty years after the *Puraścaryārṇava*. After a general introduction on the significance of the festival that largely relies on Navamīsiṃha's *Tantracintāmaṇi*, they deal with the rituals in strict temporal sequence. In this section the texts constantly alternate between quoting and explaining authoritative statements and providing instructions and mantras for their practical implementation, between *pramāṇa* and *prayoga*.

In the *pramāṇa* part, many passages as quoted in the *Puraścaryārṇava* can be rediscovered, especially from its *nirṇaya* passages. These are, however, rearranged and relegated to the individual days. Then, especially in the part dealing with the rituals the two later Nibandhas diverge from the *Puraścaryārṇava*. As the *Mahākālasaṃhitā*, which had been the major source in the Tantric Nibandha, as far as I can see, completely disappears as a source, the parallelism in this section is limited. Moreover, especially in this section, along with the *prayoga* parts, more subheadings, quotes and comments are introduced.

The thorough rearranging of the material and the designing of a full manual for the autumnal Durgā worship was probably an achievement of the *Durgākṛtyakaumudī*, but it is parallelly present in the *Durgārcanakalpataru*. These two texts are so similar that at first glance one has the impression of seeing exactly the same text in front of oneself. This not only concerns the quotes and

their arrangement but is also evident at the level of the sometimes extensive comments. More interesting, therefore, are the differences between the two texts that often concern different excursuses and mirror their authors' specialisations. The *Durgākṛtyakaumudī* was penned by Vāṇīvilāsa Pāṇḍe, who grew up in a family engaged in Gorkhālī court rituals. This text is very elaborate on ritual details, delivering long series of quotations on ritual requisites[30] and technical terms. It almost seems as if Vāṇīvilāsa took the Durgā festival as a kind of paradigm to elucidate ritual conduct comprehensively. Accordingly, he calls his text a *dharmaśāstra*.[31] The *Durgārcanakalpataru* by the famous astrologer Lakṣmīpati Pāṇḍe, who bore the title Daivajñaśiromaṇi ("crest-jewel of astrologers") contains more elaborations on astrologic details. Interestingly, Lakṣmīpati does not just take over and extend the earlier *Durgākṛtyakaumudī*, instead both enlargements and shortenings are seen. Therefore, the most extensive treatment of the festival is not found at a later stage, but in the second text in temporal succession, the *Durgākṛtyakaumudī*, by far the most elaborate. In many cases the later *Durgārcanakalpataru* leaves out the extensive excursuses on general ritual details and summarises the comments of its forerunner.

Not so surprisingly, the *Satkarmaratnāvalī*, which deals with the Navarātra rituals as part of the *varṣakṛtya*, reduces the material further. It largely parallels the *Durgākṛtyakaumudī* and *Durgārcanakalpataru* in combining scholastic quotes with instructions on how to implement the ritual in practice. While the obvious suspicion is that the *Satkarmaratnāvalī* in its treatment of the Durgā festival drew on either the *Durgākṛtyakaumudī* or the *Durgārcanakalpataru*, the development was probably more complicated than just four texts each basing itself on its forerunner.

This can be demonstrated with an example passage, that on fixing (*nirṇaya*) the beginning of the festival (*navarātrārambha*) on the first day of the bright fortnight of Āśvina. Except for a few exceptions, all quotes found in the *Satkarmaratnāvalī* on this aspect (1969, 2:201-03) were already present in a much longer passage on the question in the *Puraścaryārṇava* (1985, 970-74). However, the *Satkarmaratnāvalī* only contains quotes from the first part of the

[30] Interestingly, when flowers in worship are treated we again encounter material known from the Malla period flower texts (*Durgākṛtyakaumudī*, NGMPP B 369/17 fols. 119a-24b).

[31] This designation is found in all chapter colophons as well as in the concluding stanzas of the text; both are cited in Pauḍela 1964, 52-53.

Puraścaryārṇava passage (1985, 970-71) and the quotes appear thoroughly rearranged. Parts of these rearrangements can be explained with recourse to the *Durgākṛtyakaumudī* and the *Durgārcanakalpataru*. In these texts the first part of the quotation series is found in the same arrangement as in the *Satkarmaratnāvalī*, albeit with different textual ascriptions. If no other thus far unidentified textual intermediary was involved, it seems as if in this section the *Satkarmaratnāvalī* drew on the *Puraścaryārṇava* for quotes and their textual ascriptions and on the *Durgākṛtyakaumudī* or the *Durgārcanakalpataru* for rearranging the sequence of the beginning of the quotes. Moreover, the *Satkarmaratnāvalī* (1969, 2:203) ends its discussion of the *navarātrārambha* with a commentary that parallels those in the *Durgākṛtyakaumudī* and the *Durgārcanakalpataru.* In comparison to the *Puraścaryārṇava* the discussion of how to fix the beginning of the festival is much shorter in the *Satkarmaratnāvalī* and shorter still in the *Durgākṛtyakaumudī* and the *Durgārcanakalpataru*. This shortening of quotation series was not only a quantitative one, but also reflects a remodelling and negotiation of the rituals involved. The later texts leave out an alternative way to deal with the case when the first lunar day (*pratipad*) is *kṣaya*, i.e. if it does not cover sufficient parts of a solar day to define it and thus gets lost. The *Puraścaryārṇava* contains a more elaborate discussion together with śāstric underpinnings to the two alternatives to perform the rites of the first lunar day, either together with that of the second on the next solar day or on the preceding new moon day. While the former was the preferred option under the Śāhas, for the Malla period there is evidence that the latter option had been applied repeatedly (A. Zotter 2018, 50). In the *Satkarmaratnāvalī* those quotations remain that condemn the option to perform the beginning of the festival on the preceding new moon day and that advance the performance on the second. This tendency to narrow the śāstric discussion down to those options that were advanced under the new dynasty is not only observable in this case, but also in other *nirṇaya* discussions and also in terms of which specific form of Durgā is to be worshipped (A. Zotter 2018, 49-55).

The development of the treatment of Navarātra in Nibandha form is more complex than can be observed in the case of the flower texts. The texts not only rest on one another with more and more material assembled, there are also developments, both structurally and in terms of content. Importantly, a practically applicable model for the festival is carved out. The *Puraścaryārṇava* collects quotations, including many alternatives, and remains on the theoretical level. The *Durgākṛtyakaumudī* intensively rearranges the material and treats the rituals from beginning to end in temporal sequence. It adds more quotations,

especially concerning ritual details. By providing a *prayoga* it adds a completely new dimension to the text. The next text in line, the *Durgārcana-kalpataru* then leaves out many of the details in the *Durgākṛtyakaumudī*, but also adds others that mirror the author's specialisation in astrology. Finally, the *Satkarmaratnāvalī* provides a concise treatment and practical guidance to navigate through the rituals, from which the alternatives that had been an integral part of the *Puraścaryārṇava* are largely eliminated.

A detailed analysis of these developments and textual relations is beyond the limits of the present chapter, so that we have to let it rest at this superficial survey for now. From these preliminary results it seems noteworthy that the differences between the *Puraścaryārṇava* and the other three texts are greater than those between the latter three. If I were allowed a cautious guess, it appears to me as if it was only after the reign of Pratāpa Siṃha after whose death ritual specialists of the preceding Malla dynasty are remembered to have been removed from the court, that the codification of rules for the Durgā festival lay fully in the hands of the newly arriving Gorkhālī scholastic elites. Possibly, in these four texts composed in the formative years of Śāha rule over Nepal we witness the search for an authoritative line for the performance of the most important annual court ritual that was largely accomplished by the time of the *Satkarmaratnāvalī*. In his investigation of the Śāha's Navarātra rituals N. Chaulagain has shown that these texts, especially the *Puraścaryārṇava* and the *Satkarmaratnāvalī* were indeed decisive and their prescriptions are paralleled in the actual handbooks used (Chaulagain 2019, 12-13). So, as with the flower texts, the codification of rules for Navarātra was not only a scholarly exercise in the Nibandha genre but also intertwined with the practically oriented sister genre of handbooks, a modern incarnation being the chapter on Durgāpūjā in a school book designed for teaching the Karmakāṇḍa classes at the Mahendra Sanskrit University (Upādhyāya Gautama and Dāhāla 2004, 133-68). Thus, we see that the accelerated textual production of the early years of Śāha rule was indeed foundational for what was to become the educational canon for modern Nepalese ritualists.

4. *Conclusion*

Both textual corpora introduced in the present chapter confirm general principles of writing Nibandhas, allowing us to see the actual working procedures of the Nibandhakāras and their texts' place in larger textual

developments. Not only the pedigrees of their own genre produced in their own local context can be elucidated, but the digests can also be connected to other genres of texts and to textual traditions from other South Asian regions.

These findings on Nibandhas accord with what is known about other genres of religious Sanskrit literature: newly emerging texts re-use passages from their predecessors, rearrange and alter them to conform to a new textual setup. Thus, it has been observed for the handbook genre:

> Besides being mainly self-referential, the genre is constantly self-revising. Generations of priestly Brahmins (some of them scholastics) re-composed and re-compiled handbooks on the basis of pre-existing manuals (only occasionally taking note of texts of other genres). In this way, they have produced a thick web of texts […]. (C. Zotter 2020, 244-45)

The Nibandhas too can be described as a self-referential and self-revising genre. As De Simini's (2015) analysis of selected passages on gifts has also shown it is a general working principle of the Nibandhakāras to heavily draw on earlier compilations and then add some "fresh" citations from primary sources available at that time and place. Yet, the actual dependency on earlier digests usually differs vastly from what is acknowledged in the texts themselves. Connections between texts can be made visible when working in their direct textual surroundings.

What was exemplified here with Nepalese Nibandhas, when extended to larger arrays of texts, could help to understand dependencies in particular Nibandha schools, as well as the spread of authoritative quotations over longer distances and spans of time. In comparison to the work involved in dealing with genres such as the Purāṇas or Tantras, that are also known to have built on one another, it should be much easier to establish an absolute chronology and topography of Nibandha production, as very frequently the names of the author or royal patron of a work are mentioned.

Seen in their individual historical settings the Nibandhas can be used as lenses that magnify aspirations to actively define and shape ritual traditions committed to upholding righteous rule and to proliferate *dharma*. Not only in the late Malla period rulers and cultural actors around them adopted a neoclassical mode, under the early Śāha kings following the conquest of Nepal in 1768/69, too, a distinct interpretation of elite religion and *dharma* was carved out, which entailed a heightened textual production in Sanskrit carried forth by scholars and kings.

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TIMOTHY LUBIN[1]

Sacred Law as a Device of State-Building in Gorkhali Nepal

1. *Introduction*

The conquest of "Nepal" – that is, the Newar-ruled Kathmandu valley – during 1767–68 by the king of Gorkha, Pṛthvīnārāyaṇ Śāh (hereafter PNS), has been seen as ushering in a period of major social changes and political realignments as power came to be concentrated in Gorkhali hands, to the detriment of the Newar kings of the three cities. With support from "Tibeto-Nepali" ethnic groups of the lower hills – Magars and Gurungs – PNS captured Nuwakot in 1744 and Kantipur (the future Kathmandu) in 1768. For the next forty-seven years, the Gorkhali rulers brought more and more of the Himalaya and adjacent plains under their control until they were checked by the British in the "Gurkha war" and the Treaty of Sugauli of 1816.

New and expanding regimes often seek to legitimize themselves by embracing what they take to be a compelling ideology of law and religion, one that sets the ruler up as lawgiver or reformer, and promises a new horizon of public order and prosperity for the newly reconfigured polity. In South and Southeast Asia, this has usually involved the embrace and tailored adaptation of sacred law, especially framed as Brahmanical *dharma*. The Gorkhali regime adopted such a program from the outset, using it to participate in a prestigious Indian cosmopolitanism imprinted with Brahmanical religious ideals of piety

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and kingship, and to provide a template for intergroup relations in a culturally, linguistically, and religiously diverse realm.

Brahmanical *dharma* from its earliest beginnings involved legal theorists born and trained within Brahmin caste groups promoting their doctrine to kings and would-be kings, refining it under state patronage, and serving as officials and advisors to kings. They played these roles often even under Buddhist kings, for although Buddhist doctrine offered a model for pious kingship and moral precepts for the laity, Buddhist law mainly applied to members of the Buddhist monastic order. Brahmins, by contrast, made their name in matters of law by straddling the sacred (*dhārmika*) and worldly (*laukika*) spheres.

Though remote from the power centers in the plains – or precisely because of this sense of being on the periphery of great powers – both the Nepali-speaking hill peoples ("Pahāṛīs") and the Newars of "Nepal" proper (the Kathmandu Valley) were always keenly aware of political and legal developments to the south, which left their imprint in administrative structures and vocabulary. As early as the 16th century, Persian words like *kazi*, *muluk*, *hukum*, and *ain* were borrowed from the Islamicate empire of the Mughals. In the 19th century, when the British held sway in India, many English terms would be adopted in the same way. But the most systematic forms of emulation were of "Hindu" ideals and institutions in the Sanskritic idiom, framed in terms of Hindu kingship and the socio-ethical system called *varṇāśrama-dharma*, the 'observance of sacred duties according to social class and life-stage'.

The invocation of this ideal in the Himalaya is probably as old as *Manu's Dharmaśāstra* (*MDh* hereafter), which classifies various regional ethnic groups, including some linked to Nepal and the adjacent Himalaya, 'Licchivi', 'Khasa', and 'Kirāta' (*MDh* 10.22 and 44),[2] as birth-groups (*jāti*s) that came about from intermarriage across classes or from "not seeing Brahmins" – the standard tropes for explaining the multiplicity of castes despite the supposedly "original" four-part division of society that belonged to the creation of the world itself. (It is noteworthy that these Himalayan groups are missing from the only earlier similar list, in *Gautama Dharmasūtra* 4.21.)

[2] Among other ethnicities mentioned are Greeks (*yavana*), Parthians (*pahlava*), Scythians (*śaka*), Tamilians (*draviḍa, coḍadraviḍa*), and 'Chinese' (*cīna*, probably Central Asians of some sort; see Olivelle 2005, 22). Of these, *Gautama* has only the *yavana*. Most such ethnonyms, especially those pointing beyond South Asia, were often used imprecisely in antiquity, by authors who may have had no direct familiarity with those referred to.

Brahmanical *dharma* has been invoked by those who ruled from the Himalayan hills since the kings who called themselves Licchavi first attempted to apply it in the complex social fabric of the region. Already in the earliest Licchavi record, the Chāṅgu Nārāyaṇa pillar inscription of 464 CE, Mānadeva follows the lead of his father, Dharmadeva, who was *dhārmika* and "enlarged the great kingdom of Nepal through *dharma* alone."[3] Both Mānadeva and his mother gave "constant" or "undiminishing wealth" to Brahmins,[4] which is a necessary adjunct to the royal promotion of *varṇāśrama-dharma*. Charters recording instances of such benefaction are numerous in the subsequent Licchavi record, and later Licchavi kings made similar claims to adhering to *dharma*: Śivadeva in a charter from 805 is described as "establishing all the *varṇa*s and *āśrama*s in proper order."[5] In the 18th century, and perhaps also in the seventeenth, the kings of Gorkha found ways to adapt and express similar ideals through decrees and other expressions of administrative policy.

2. *The* Upadeśa *or* Bhāsaṇa *ascribed to Pṛthvīnārāyaṇ Śāh*

The short text purporting to be PNS's first-person memoir and instructions was published in Nepal by the famous scholar-monk Yogī Naraharināth and Bābūrām Ācārya in 1952 under the title *Divya Upadeśa* (the full title translates as "*Divine teaching of the father of the kingdom, five-times holy great king Pṛthvīnārāyaṇ Śāh*"). Naraharināth claimed that the published text was based on a privately held paper manuscript dating to 1801 or 1802 (according to a statement appended to the printed text).[6] This manuscript has been seen by very

[3] *[dha]rmmeṇaiva … [nepala]rājyaṁ mahat [sphī]tīkṛtya*, lines A16-18.
[4] *[vi]prebhyo 'pi ca sarvvadā pradadatī,* line B19; *dhanam prādād dvijebhyo 'kṣayam,* line C26.
[5] *samyagviracitasakalavarṇāśramavyavasthaḥ* (Balambu stela of samvat 129, no. 136, line 1, in Regmi 1983). Śivadeva is similarly called *suvihitavarṇṇāśramasthitiḥ* in a grant from a few years earlier (Sonaguthi stela, no. 133, line 1, in Regmi 1983).
[6] In the second edition of VS 2010, the one most often cited, the manuscript is said to have been "written 150 years ago"; the reprinting of the text in *Itihāsa Prakāśamā Sandhipatrasaṅgraha*, of VS 2022, the corresponding statement reads "written 164 years ago." Based on the publication dates of the books, that implies that the manuscript was written in VS 1860 or VS 1858. Assuming the discrepancy is explained by a longer gap between the editor's writing and actual publication, VS 1858 is probably closer to

few other scholars, but in 1968, four historians led by Nayaraj Pant published a separate, more extensively annotated edition based on a collation of that document and another to which they had gained access. The inaccessibility of these manuscripts has made the text problematic to use as an historical source. Most scholars, beginning with Bāburām Ācārya, have described it as having been dictated by PNS himself;[7] some others have accepted PNS's authorship with some caveats.[8]

By contrast, the noted Newar historian Kamal P. Malla has voiced serious doubts in a critique of the consensus:

> … Prithivi Narayan's own letters from the trenches are in a totally different tenor from his so-called "Divine Counsel". The two are so different in style and substance that they could hardly be the work of the same man. Besides, coming from a rural Gorkha background, his espousing the cause of economic mercantilism is totally unconvincing in the history of economic ideas. …
> The ruling ideology of Shah-Rana despotism was neither Hinduism nor Brahmanism, though they showed a superficial respect for the cow, the Brahmin and the Hindu dharmashastra. To call their culture "Sanskritic" is only a parody

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the editor's intention, yielding a date of 1801-2 CE (or so). The precision of these statements seems to imply that the manuscript was dated, but no date is included in the published versions of the text. The 1952/3 edition was based on a single manuscript owned by one Bakhatmansingh Basnyat. N. Pant et al. (1968) produced their edition on the basis of comparing that manuscript with another owned by one Purnachandra Shah, which they treat as inferior.

[7] Ācārya (1965, 67-68). Stiller (1968, iv) describes the text as "what Prithwinarayan Shah actually said." Regmi (1972, 13) speaks in similar terms: "Prithvi Narayan Shah described the new Kingdom as a garden…" Hutt (1984, 65-69) repeats Ācārya's account that the text was "written or, more accurately, dictated [by PNS] to a scribe in December 1774, while the king was at Nuvākoṭ a month before his death." Whelpton (2005, 37) describes the text as "his political testament…, dictated a few months before his death." Rupakheti (2012) speaks about what PNS "believed" (p. 25 n. 75) and says (p. 13) that in the *Upadeśa* "Prithvi Narayan Shah himself stressed that his success depended upon drawing different local rulers and powerful groups to his side." Relying on the assessment of Ācārya, Naraharināth, N. Pant, and Nepali historians, numerous anthropologists and other scholars have echoed this view.

[8] Baral, who reports having "seen" the manuscript, says (1964, 10 n. 1): "The form of the text as we have it suggests that it was composed piecemeal, possibly by dictation, and assembled at a later date. It may be that a later ruler wished to draw upon Pṛthvīnārāyaṇ's wisdom in the conduct of his own military strategy and internal policy."

> of the timeless values enshrined in the tradition. The Shahs imitated the courtly practices of the Moguls and the Ranas were increasingly attracted to "Westernized" lifestyles, so visibly documented in their mahals, durbars and stucco palaces modelled on 19th century Victorian mansions. There is no doubt that, despite their obscure social origins, they laid dubious claim to Rajput origins and made this claim a legitimate basis for all their social climbing, and the greedy Brahmin immigrant clientele from the plains supported these by lending them a political sacred thread to climb ever higher up the social ladder.[9]

Malla's critique of the editions of the *Upadeśa*, often openly polemical,[10] casts doubt on its authenticity as a record of PNS's own words by asserting its differences from the king's letters (which he accepts as authentic), and dismisses the dynasty's Hindu self-presentation and ideology as "superficial" or even parodic. The implication is that the work is a later fabrication attributing to PNS words and mercantilist economic ideas he could not have expressed.[11] I will consider some of those words and ideas, and offer an assessment of their historical value.

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[9] Malla (2006, 179-80).

[10] In an earlier review, Malla (1983, 132) pours scorn on the N. Pant team for larding their massive multi-volume work with Pant's long "anaemic" poem (with auto-commentary) celebrating PNS as a national hero, plus lots of other extraneous material. With derisive use of quotation marks, he compares their "antediluvian 'textual/critical edition'" unfavorably with Stiller's slim volume, even though Stiller does not present the original text at all. (Malla appears to be unaware of Baral's dissertation.) His sniping was part of a long-running feud between him and Pant. His sour assessment omits to note that the Pant team did examine both the Basnet manuscript used by Naraharinath and a second manuscript belonging to one Purnachandra Shah, which had come to their notice. Their edition (on pp. 314-331, not 413-431 as stated by Malla) is text-critical insofar as it is based on an apparently fairly careful collation of the two manuscripts, and includes an apparatus recording all variant readings of the Shah manuscript, which the editors deem to be inferior. (Indeed, that manuscript shows a number of eyeskips, and seems in some cases to modernize spelling and syntax.) The Pant edition is followed by a useful 56-page glossary of every word in the text, providing modern equivalents of archaic forms (pp. 332-387). Whatever the book's other defects, it does mark a substantial advance in the study of this text.

[11] In fact, Regmi (1972, 142-43) expressly described PNS's policies as amounting to mercantilism (based on the *Upadeśa* but subsequently illustrated by other Gorkhali documents).

As it happens, I was recently able to consult photographs of the entirety of the manuscript used by Naraharinātha and Ācārya that are on display in the Gorkha Museum (which apparently holds the original document). Besides allowing me to check and correct the readings of the edition, the photos disclosed some further text. Two lines in the bottom margin of folio 1r, written carelessly by a second hand, state:

> *līṣītaṃ* [i.e., *likhitam*] *1 laṃ* [read: *naṃ*] *paṭṭikā hāmiko* [read: *hākimko*] *tapasil bamojī*[*ṃ*]
>
> "Written according to the particulars (provided) by the chief of jurisdictional territory no. 1 **(**probably Dhankuṭā)."[12]

This clearly indicates that both the manuscript and the text it contains were not produced directly by the king himself but were instead mediated by a government official (a district *hākim*), who was the source of the information, and then by the person who actually produced this document. Access to these photographs also allowed me to make a diplomatic transcription of the manuscript. In what follows, I will quote from this transcription.

The *Upadeśa* harks back to earlier initiatives of law-making: most immediately, the early 17th-century Gorkha king Rāma Śāh, but also the 14th-century Newar king Jayasthiti Malla, who was reputed for his justice, and who is said to have commissioned a Newari rendering of the 5th- or 6th-century Sanskrit lawbook *Nārada Smṛti*, called the *Mānava Nyāya Vikāsinī*:[13]

> Item: I have seen the laws decreed (*bāṃdhyāko thiti*) by King Rāma Śāh. I have also seen the laws decreed by King Jayathiti Malla. I have also seen the laws decreed by King Mahindra Malla. I had the desire that, God willing, I too would through similar regulation (*bandej*) decree laws for the twelve thousand (houses). I would close the routes in the east and west and promote the route through Nepal (Kathmandu), and would regulate the proper activities of the respective castes.[14]

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[12] I thank Nirajan Kafle for his assistance in interpreting this marginalium.

[13] D. Pant 2008.

[14] *uprānta, rājā, rāma, sāhale, vādhyāko thiti pani heri, sake, rājā, jayethitimalle vādhyāko thiti, pani heri, sake, rājā, mahindramallale vādhyāko thitī pani, heri sake, isvarale diyo bhanyā, ma pani, yastā, vandeja,ko, vāhra, hajārako thītī, vāṃṃdhi jālā,*

This sets PNS in a line of Himalayan rulers, both Gorkhali and Newar, who appealed to Brahmanical social theory and political-legal principles to provide a rationale for their sovereignty over diverse other groups as well as to demonstrate publicly their participation in a prestigious cosmopolitanism.[15] The centralizing of trade through the Kathmandu Valley is explicitly linked to a policy of defining and enforcing caste-based social distinctions.

The document also translates the political linkages between leading social groups into a legal institution designed to dress those linkages in the garb of disinterested justice and good governance:

> Item: Make the mint operate pure. In the law court examine a Ṭhakuri and appoint him as *ḍiṣṭhā*. Examine a Magar and appoint him as *bicāri*. Appoint one (Brahmin) *paṇḍit* in each courtroom and run the law court in accordance with the *śāstra* of law. Do not retain the law court's monies in the palace. Distribute it as alms and food for mendicants, ascetics, yogis, sannyasis, and Brahmins. Distribute dhotis and shawls. If this happens, the guilt of untruth is not incurred.[16]

This brief list of administrative guidelines reveals several things. First, it sets up a three-way distribution of juristic power. In each jurisdiction, the highest judicial office, that of *ḍiṣṭhā* (more commonly written *ḍiṭṭḥā*)[17] is reserved for a Ṭhakuri, representing the Gorkhali elite. A Magar is to be appointed to the role of *bicāri*, 'magistrate', reflecting the importance of the alliance with Magar groups in Gorkhali expansion. *Bicāri*s heard and examined testimony in

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bhanyā, avīlāṣā thīyo, puruva, pachim·ko, rastā, vandha gari, nepālako rastā calāī, diulā, āphnā, anā jāta, viseṣa,ko, karma garnu, bhandeja gari jālā, (lines 3v6-11, corresponding to Naraharināṭha and Ācārya 1953, 17-18).

[15] I employ the term "cosmopolitanism" in the sense specified by Pollock (2006, 10-19).

[16] *ṭaksāra, pani, coṣo calāunu, adālathamā pani, ṭhakuri jāci ḍiṣṭhā, rāṣnu, magara jāci, vicāri, thāpanu, kacahari piche, yak· yak·, paṇḍīta, rāṣī, niñā, sāstra, vamo,jim·, adālatha, calāunu, adālatha,kā paisā, dara,vāra bhitra na hāl·nu; phakīra, phakiḍā, atita, jogi, sannyāsi, vrāhmaṇa,haru, inailāī, dachinā, bhorjana, calāī, dinu, uprekā paisā, dakṣinā, calāī, dhoti, rumāl·, calāi dinu, yasva bhayā, asatya,ko, dos· lāgdaina,* (lines 5r6-12, corresponding to Naraharināṭha and Ācārya 1953, 25-26). *niñā* is an old Nepali orthography for *nyāya*.

[17] The manuscript's *ḍiṣṭhā* looks like a partial Sanskritisation. Pant's edition has this reading (p. 329), but Naraharināṭha has the even more Sanskritised *diṣṭhā.*

lawsuits, and could render decisions and levy fines in all but the most serious cases.[18] Finally, the Gorkhali author endorses Brahmins' traditional claim to be uniquely qualified to serve as court assessors and experts in jurisprudence. In other Nepali law texts, the normal title for a Brahmin judge is *dharmādhikāra* ('having authority in matters of *dharma*'), whose special role is to make ruling in matters of sin and purity violations, to prescribe penances and to certify their performance as a means of reinforcing caste boundaries and proper relations, in accordance with Dharmaśāstra principles and customary norms.[19] The appeal to Brahmins and their textual expertise is followed by a precept that monies generated by court fines and fees should be redistributed as pious alms for religious professionals as a means of publicly reinforcing the legitimacy of the court.

The next section is the most explicitly ideological one, and the one most often quoted by nationalist writers:

> It is a garden of all the castes. Everyone realizes this. This is true abode of Hindus for the four castes and thirty-six groups, inferior and superior, of this garden. They must not abandon their own family observances (*kuladharma*). Do not deprive the descendants of Kāḷu, the chamberlain, of the chamberlainship. Do not deprive the descendants of Sivarām Basnyāt of responsibility for relations *(ghāhā)* with the south. Do not deprive the descendants of Kālu Pāṇḍe of their responsibility for relations with Tibet. Let the Pāṇḍes, the Basnyāts, the Panths, the royal family, and the Magars enjoy authority *(mārātāp)* each in turn.[20]

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[18] Turner 1931, 259 s.v. *ḍiṭṭho* and 440 s.v. *bicāri*; cf. "ḍiṭṭhā (Glossary of Technical Terms)," n.d. The term *ḍiṣṭhā* seems a distant echo of Kauṭilya's *pradeṣṭṛ* (*KārthaŚ* 4). Hodgson (1834) lays out court offices and functions on the basis of three sets of responses to a questionnaire answered by former court officers; the data, edited by Stiller, were published by Regmi (Stiller 1984). Compare also Khatry (1995, 48-49). It is frustrating that the 1854 *Ain* fails to define the two roles with precision, but the terms appear frequently in lists of officials, normally together, with the *ḍiṭṭhā* first. *MA* 45.5 specifies that the fine for insulting a *ḍiṭṭhā* is twice that for insulting a *bicārī*, a sign of the former's greater dignity and higher status.

[19] Though the term is not used in the *Upadeśa*, it appears in Rāma Śāh's 22nd *thiti* (Riccardi 1977: 60; Baral 1964, 35 n. 7), in the *Gorkhārājavaṃśāvali* (Naraharinātha 1964) referring to Rāma Śāh's reign (p. 792), as well as in the colophon of two *Mahābhārata* mss copied in 1737 CE (Michaels 2005, 12).

[20] *savai jātako, phul·vāri ho, savailāī, cetanā, bhayā, yo phul·vāriko choṭā, vaḍā, cārai jāta, chatisai varnale yo asil·, hindus·thānā ho, āphnā kulādharma, na choḍ·nu,*

> Hear cases justly. Do not allow injustice in the country. Those who give bribes and those who take bribes pervert justice. There is no sin even if these two are deprived of their property and lives. These are arch-enemies of the king.[21]

This passage echoes – in substance and even somewhat in wording – the eleventh decree of king Rām Shāh:[22]

> You Pāṇḍe, Panth, Arjyāl, Khanāl, Rānā, and Bohorā became the 'Six Clans'. The meaning of your being called the Six Clans is: If anyone such as a *cautariyā*, *kāji*, or *sardār* should enter into an unjust or unlawful act in order to destroy the throne or impair justice, it is (my) will that you come to file a petition on the matter in detail without the least partiality or favor for them. The ruling (*vyavasthā*) on the Six Clans is graciously granted to you, your descendants, and remote descendants, by us, our descendants, and remote descendants, that you may bestow support to secure the throne – this was (our) command. The decree is bestowed.

Rām Śāh's will is presented as a 'decree' (*vyavasthā*) 'graciously bestowed' (*baksanu bhayo*), and a 'rule' (*thiti*), while PNS's words have been preserved in

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ṣvāmin·ko nun·ko udhāra garnu, kālu kavardārakā, santānalāī, kavardāri, na chuṭāunu, daṣinako, (gh)āhā, sivarāma vasnyāt·kā, santānalāī, na chuṭāunu, bhoṭako, ghāhā, kālu pāḍekā, (santāna)lāī, na chuṭāunu, pāḍe, vasnyāt·, paṁtha, bhaiyāda, maṃgra,lāī, mārātāp· didā, ālo pālo pālo gari, ṣāna dinu, (lines 4r8-14, corresponding to Naraharinātha and Ācārya 1953, 20-21).

[21] *niñā, nisāp·, vigarnyā, bhanyāko, ghus· dinyā ra, ghusa ṣānyā, īrna, duīko tā, dhana jīwa, gari liyāko pani, pāpa chaina, ī (r)ājākā mahā,satura hun·,* (lines 4r19-21, corresponding to Naraharinātha and Ācārya 1953, 21-22).

[22] *pāṃde paṃth arjyāl khanāl rānā bohorā timiharu cha thar bhayau timiharulāi cha thar bhanyāko bādhyāko, kyā arthale ho bhanyā cautariyā kāji sardār i prabhṛti aru jo kohi anyāya anritimā lāgi gādiko bigārnāmā ra nisāph bigārnāmā pasnan, tinko katti mohabad molāhijā na rākhi jo bhayāko bistār biṃti garna āunu bhani marji bhaï. cha thar bhaṃnyā vyavastā bādhi baksanu bhayo timiharukā saṃtān darsantānlāi hāmrā saṃtān darsaṃtānle, gādiko sojho garaṃjyāl samma thāmi baksaulā bhani hukum bhaï thiti bādhi baksanu bhayo.* Text and translation (adapted) from Riccardi 1977. As Riccardi himself notes (p. 32), these edicts are available only in a compilation made in the late-eighteenth or nineteenth century, long after Rām Shāh's time, so not only do we lack any context or provenance, we also cannot be sure how closely this obviously modernized version reflects the king's own words (which are likely lost forever), and whether some passages were added, deleted, or otherwise substantively modified.

the form of a policy statement, an 'instruction' (*upadeśa*). But in both cases, the royal intent is to reaffirm the right and authority of certain leading families to ensure justice, to protect the state (= *muluk,* 'realm; jurisdiction', or *gādi*, 'throne'), and to maintain caste-observances (and thus caste-distinctions) in society. In fact, some of the same clans are named.

The first half of the *Upadeśa* recounts PNS's first visit to "Nepal," that is, to the Kathmandu valley, his resolution to conquer it, his astrologers' prediction that he would succeed, and his return to Gorkha to make plans. Throughout, he evokes pan-Indic models: he and his allies are compared with the Pāṇḍava heroes of the *Mahābhārata*; he consults with his maternal uncle who has just returned from a tour of sacred temples: Nīlakaṇṭha, Paśupati, Mukuṇḍeśvar (at Devghāṭ), and Gorakhnāṭh in Gorkha itself – a circumstance intended to charge his advice with sacred authority.

Asked whom he would recruit for his army, PNS says that they will be drawn from "the four castes" (*cār jāt*), which he calls *bāhun, khas, magar,* and *ṭhakuri*. This is surely intended as a nod to the Brahmanical model of the four classes, although this list does not correspond to the Brahmanical one apart from putting the Brahmins first, and is not ranked in the same way (since one assumes the Ṭhakuris would not be set on a par with Śūdras. Moreover, the passage inverts the canonical use of the terms *varṇa* (of which there are just four in theory) and *jāt* (more often the term applied to the more numerous particular caste groups recognized in everyday practice, conventionally numbered 36). There is a reference to "castes" among the Gurungs – something that has been disputed by Gurungs themselves.[23] These deviations from the orthodox formulations suggest that although it is conscious of Brahmanical ideals, the text is not the work of someone well versed in the finer points of the doctrine.

It is evident that the work opens with what Baral called "a scribal introduction."[24] Unlike this rest of the text, this part refers to PNS in the third person rather than the first, and begins by invoking the aid of "five-times holy Pṛthvīnārāyaṇ" following similar appeals to the goddess Kālikā and the Gorkhalis' patron deity Śiva Gorakhnāth (the legendary yogi viewed as an incarnation of the god Śiva). PNS is thus quasi divinized.

Malla's doubts about PNS's direct authorship cannot be refuted conclusively, but his objections are not fully probative. The differences of tone,

[23] See Zotter n. 2: https://nepalica.hadw-bw.de/nepal/editions/show/987#note--2.
[24] Baral 1964, 35 n. 7.

style, and substance between the *Upadeśa* and the letters may be attributable to the difference of genre and purpose, and the possibility that longer reflection and the input of courtiers contributed to the form and content of the text. The fact that even the seemingly earlier manuscript postdates by at least a quarter-century the occasion mentioned at the start of the text (PNS's return to Nuvakot after his conquest of the three cities) also suggests the possibility of editorial interventions if not outright inventions.

Yet there is nothing in the main substance that could not represent the views or even the words of the king. It recalls the personal tone of Aśoka (though not the latter's qualms about violence). Malla's assumption that PNS's "rural Gorkha background" rendered him incapable of formulating the economic recommendations expressed in the text is mere supposition. Besides providing glimpses of PNS's strategic, diplomatic, fiscal, and monetary policies (including complex instructions to his agents in purchasing gold from Tibetans),[25] his letters also deal with trade policy, including closure of alternate trade routes between India and Tibet: "Do keep the routes closed. They are not to be left open. … We have heard that forty or fifty *muri* of food grain have reached Tibet. By what route did they get there? Keep on imposing the ban…"[26] This chimes with the passage in the *Upadeśa* on controlling trade by restricting alternate routes. Another letter alludes to his sending a businessman as trade representative to Lhasa after expelling other Gosain and Muslim traders who had earlier been operating in the valley.[27] Moreover, the language of the *Upadeśa* is not markedly different from that of the letters or indeed of other documents datable to the end of the 18th century.

To be cautious, we may simply affirm that even if the *Upadeśa* may not contain the unadulterated words of PNS himself, in any case it likely reflects the views of the Gorkhali court of the period – the views of someone keen to show that the conquest and the new regime, foretold by sages, was in accordance with and conducive to *dharma*. It is plain from the opening colophon and invocations in the manuscripts, as well as the title and framing of the published editions, that PNS as its putative author was venerated as "father of the realm," a national hero blessed by the gods – factors that can fairly justify doubts about the

[25] Baral 1964, 56-58, 62, 330-332, 334.

[26] *rāhā ta vaṁdai gara choḍanu chaina. … taṁhāṁ cālisa pacāsa muri anna bhoṭa gayo bhanyāko suniu tyo kasko vāṭovāṭa gaya niṣeda garirāṣa* (Baral 1964, 58 and 332 [letter 1, lines 39-44]).

[27] Baral 1964, 77 and note 7.

authenticity of the attribution to PNS, or about their fidelity to an underlying source text.

All the same, the author of the letters, like the author of the *Upadeśa*, allies himself with Brahmins and ascetics, and involves them in his administration. The letters, though composed in plain-spoken Nepali, begin and end with Sanskritic formulas. In these ways, they may lend plausibility to the idea that PNS could have appealed to Brahmanical social categories, Brahmin status, and the ideal of *dharma* based on textual authority in the texts assembled as his "words" (*bhāsaṇ*). The fact that references to such concepts in the text are not quite consistent with how a Brahmin would have phrased them – inverting the usage of *varṇa* and *jāti*, citing *nyāya-śāstra* rather than *dharma-śāstra*, generally not using Sanskritic orthography – might even be taken as evidence that they preserve more of PNS's own voice than that of a more doctrine-imbued ventriloquist. At the very least, the *Upadeśa* may be taken to reflect the self-representation of the Gorkhali court around the turn of the 19th century, when the regime was still young.

3. *Gorkhali royal decrees*

Another crucial source for understanding the period, and a more voluminous one, are the inscriptions and official paper documents issued by the Śāh kings. A large number of these have been published in some form, although the vast majority have not yet been critically edited or translated.[28] These documents provide examples of how both ruler and ruled made use of the *dharma* doctrine in practical situations to promote their aims and interests in Nepal.

As he conquered more and more of the Kathmandu Valley, PNS issued a flurry of orders making endowments of his own to important shrines, beginning with those in Nuwakot in 1744 and, after his conquest of Kathmandu in 1768, a

[28] Most of this material has been published in Nepal, in journals (*Abhilekh* and *Pūrṇimā*) or in compilations like the *Itihāsa Prakāśa* series and similar works (e.g., Naraharināṭha 1956-1957; 1965; Pant et al. 1968). The ambitious project "Documenta Nepalica" led by Axel Michaels, under the auspices of the Heidelberg Academy of Sciences, has set out to rectify this deficiency by editing (or re-editing) and translating such documents for inclusion in an online database (https://nepalica.hadw-bw.de/nepal/). All citations from this database in this article give the text and translation as provided there.

"*guṭha*" for the Gorakhnāth temple there.[29] Meanwhile, he reconfirmed (and thus appropriated credit for) *guṭhi* endowments made earlier by Newar rulers. The royal practice of making religious tax-exempt religious endowments can be traced back to the Maurya emperor Aśoka's gift of "cave" residences for ascetics in the Barabar hills, and especially his exempting the Buddha's birthplace from tax payments. The format for such benefaction begins to be standardized in records of Śakas, Sātavāhanas, and Kuṣāṇas, and ultimately by Gupta-era rulers.[30] It was adopted in the Himalayan hill-country as early as the Licchavi kings. Newars had developed a variety of forms of benefaction – trusts managed by associations referred to in Newari with the Indo-Aryan loan word *guṭhi* (< Skt. *goṣṭhī*). One gauge of the shifts that came with Gorkhali conquest is that it seems to have been just in this period that the term *guṭhi* was adopted in Nepali to refer to the endowment itself, not just the association that managed such arrangements.[31] Endowments by private citizens were not always reaffirmed, since they diverted revenue that might otherwise flow into state coffers, but with royal grants, the new ruler apparently saw the value of stepping into the royal benefactor role earlier played locally by the Newar kings.

Besides participating in the patronage patterns of the valley, the Gorkhali kings from the time of Rāma Śāh found another way of playing the role of the Brahmanical *dharma*-compliant king. They did this by classifying their subjects in categories of caste and social class even though the regional ethnic patterns were not a natural fit. They issued orders defining the caste privileges of these groups (including certain ethnic groups' exemption from "enslavability"), imposing on them certain obligations to follow Brahmanical ritual norms. For example, Rāma Śāh recognizes the Brahmins' exemption from capital punishment (a privilege asserted in Sanskrit Dharmaśāstras). His 15th edict even cites this canonical basis for the claim of "Brahmanical exceptionalism" (as Mark McClish 2019, 190-97, calls it): "it is said in the Śāstra (s*āstramā pani kahyāko cha*)." He poses the conundrum that a king who executes a Brahmin criminal himself commits a sin, and leaving the criminal unpunished is also a sin. The solution? "Therefore, it has been said that banishment is equivalent to death. … Therefore, shaving [the head] is said to be equivalent to death, and so

[29] Naraharinātha 1956-1957, vol. 2.3, p. 287.
[30] I make an argument in favor of such a continuity in Lubin 2018.
[31] Regmi 1976, 47.

[the Brahmin] is to be banished."[32] This *śāstra*-based privilege is then extended by analogy to ascetics called *saṃnyāsī* and *vairāgī*, and to bards (*bhāṭ*), as equivalent to Brahmins (the former two by virtue of their holy garb).

In Edicts 16 and 17, Rāma Śāh applied the rubric "caste" (*jāt*) to Brahmins, Khas, Magar, and Newar, and the 26th alludes to the formula "the four classes and the thirty-six castes" (*cār varṇa chatis jāt*) as an all-embracing framework for referring to all his subjects, "small and great" (*choṭā baḍā*).

Once the three Newar city-states had finally been subdued (in 1768-69), PNS found ways to elicit acquiescence from the conquered citizens through a combination of levies and concessions. In a document of 1769, he exonerates some Newar traders who had apparently been attempting to evade Gorkhali fiscal obligations in their business, in exchange for payments and a commitment in future to "serve [us] with honesty and engage in your trades" and to "live dutifully":

> To the Newars Dhanju Nevāra, Bhājudeu Nevāra and Jñānasiddhi Nevāra […] who are engaged in trade in Āgin Coka, Sirtuṅa, Tāku and Nuvā̃koṭa. We have pardoned the fault (*taksīra*) of dishonesty that has been committed in virtue of the fact that until today you, subjects (*raiti*) of Nepāla, have engaged in dual trade (*dohaṭa bepāra*), staying here (outside of the valley) while leaving your family in Nepāla. For this [pardon] we have received, together with the fine [applicable to] subjects of Nepāla (*nepālakā raiti daṇḍa*), a tribute-gift (*salāmī*) of 1,000 coins, so that from now on you are our subjects and servants. Live in your own houses and lands. Serve [us] with honesty and engage in your trades. We have discharged you from all [liability]. Live dutifully.[33]

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[32] *tasartha des nikālā garnu pani maryai tulya cha bhani bideś garāunu bhanyāko ho. … taskāran mudnu pani māryai tulya cha bhani muḍī bides garāunu bhanyāko ho* (Riccardi 1977, 53). The "*śāstra*" meant by the edict may be *MDh* 8.123 (on exile as a punishment for Brahmins), 8.314-317 (on the king's duty to kill a thief), and/or 8.351 (on the legitimacy of killing even a Brahmin felon caught in flagrante delicto), the latter considered in juxtaposition with *MDh* 11.90 (on the sin of intentionally killing a Brahmin), as one finds in the commentaries of Viśvarūpa and Vijñāneśvara on *Yājñavalkya Dharmaśāstra* 2.21. *Vasiṣṭha Dharmasūtra* 20.41-42, moreover, mentions shaving the head of a Brahmin thief. I discuss all these text passages in light of this underlying jurisprudential question in Lubin 2023.

[33] *āge pāṭanyā nagvai ṭolako ṅyāṃṣā cokako pusiṃ nevārako nāti ānaṃda nevārako chorā dhanju nevāra bhājudeu nevāra jñānasi[?] nevāraharū āgincoka sirtuṅa tāku nuvāṁkoṭavasi vepāra garnyā nevārake ājasaṃma nepālakā raiti bhai dohatavepāra*

Besides paying the "fine [assessed for] Newar subjects" (*nepālakā raiti daṇḍa*), they paid 1000 *sikkā* coins in tribute (*salāmī*); in recognition, the king decreed that "from now on you are our subjects and servants."[34] Similar documents relating to citizens of Bhaktapur were issued in 1770 and 1771.[35]

PNS's successors issued decrees ordaining that various Tibeto-Nepali groups, especially the Magars and Gurungs, employ Brahmins as their priests (and thus adhere to Brahmanical ritual norms). Thus, King Girvāṇa Yuddha Vikrama of 1802 ordained:

> … Henceforth, for all Gurungs of our realm – Nhucana, Acārja, Gurung Lama, Ghale, Gharti, Tum, Mormmi, etc. – for you, we have granted a decree exempting you (*māph gari thiti bāṃdhi baksyauṃ*) from *cākacakuī* ([penalties for] illicit sex)[36] and escheat (*maryo aputālī*). Formerly also you acknowledged Brahmins. From now on, employ Brahmins in your births, deaths, weddings, and festivals.[37]

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gardāne kavadabhayākonepāla kapilā rāṣi ihāṃ vasyāko taksīra māph gari nepāla kā-raiti daṃḍasamet sikkā hajjāra 1000 salāmi likana āja uprāṃta hāṃmrā kadami raiti sevaka bhayau āphnā gharaṣetamahāṃ vasa sojhosevā gara vaṃjavepāra gara sava-vātako phāraṣaksyauṃ āphnā ṣātir jāmāsita vasa (Bajracharya and Khatiwoda 2018, ll. 5-15).

[34] On the Magars' payment of a *salāmī* levy in order to obtain an exemption from the *maryo aputāli*, see Fezas 1986, 172 (3.1.1 = NGMCP DNA 14/23) and Regmi 1988.

[35] NGMCP E 2825/6 and E 2825/4.

[36] *Cākacakui* 'illicit sex', was used to denote "forms of marriage among different ethnic groups which are not in accordance with the Hindu ideal of marriage" ("Cākacakuī (Glossary of Technical Terms)" n.d.); cf. Stiller (1976, 174): "[Such documents represent an] essential dialogue by which the Hindu ideal was accommodated to local custom. … [T]he government, either at the centre or at the local level, passed an ordinance or made a ruling that outlawed certain practices that were commonly permitted in the area; an appeal was made to the centre explaining that this ruling infringed on a traditional practice of the place; and the centre then normally permitted an exception from the general law under certain specific conditions."

[37] *āge hāmrā bhara mulukkā nhucana acārja, guruṁ lāmā ra ghale. gharti tuṁ mormmi sab vagaihra guruṁ prati tin iharulāī. cākcakuī. maryo aputāli māph gari thiti bāṁdhi baksyauṁ hijo pani brārhmaṇa māṁndarahyāchau. āja uprānt. janmadā mardā viṣāha. cāḍa kalyāṇ gardā. brãhmaṇa rãkhi kāj kām gara* (Riccardi 1976, 150, ll. 3-8).

Injunctions like this were inserted into royal decrees, *thiti bandej*, formalized (and sometimes reaffirmed subsequently) in documents called *lāl mohar* ('red seal'). They gave official sanction to certain group-specific norms, especially related to marriage and sexual practices, that deviated from Brahmanical precepts – namely the custom of marrying maternal cousins. These decrees simultaneously conferred exemption from the rule of escheat (whereby the property of individuals who died childless would default to the state), and from being subject to penal enslavement. The latter privilege, like the Brahmin's exemption from capital punishment, served as a status marker differentiating these groups from the those still deemed "enslavable." (This is a category that would later be elaborately codified in the 1854 Ain [the national law] commissioned by Jang Bahadur Rana in emulation of British and French law, after he usurped power in the Kot massacre of 1836. These *thiti bandej* bear witness to the process by which these status distinctions got negotiated.[38])

In a decree of 1822, King Rājendra assured Magars that they would not be subject to punishment by enslavement. This a privilege that served as a crucial marker of higher social (and legal) status in Nepal:

> To the Magaras throughout the kingdom, east from the [river] Bherī [and] west from the [river] Mecī:
> It is apparent that (our venerable father, King Gīrvāṇa Yuddha) had granted you an exemption from escheat [and] *cākacakui*. Today, we issue a copper-plate having made the following decree (*thiti*): "We exempt [you] also from *pharnyāulo*, *vāksyo*, [and] *gvāsyo*, and in [other] punishable offences (*birāu*) [the authorities] shall punish [you] by fine, but [you] shall not be enslaved."[39]

The top-down language of such attempts to enforce Brahmanical Hinduism obscures the persistance of diverse customary norms among the groups on the receiving end. András Höfer made a strong case that these decrees were not spontaneously offered but were made at the behest of local elites[40] – often "pressure groups already alienated from the traditional norms of their own caste

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[38] Cf. Bajracharya 2022.

[39] *āge bheri pūrva meci paścima bhara mulūkakā magaraharuke ¯ ¯ ¯vāṭa aputāli cākacakui māpha gari vaksanubhayāko rahecha āja hāṃmivāṭa pharnyāulo vāksyo gvāsyosametmā phagari au virāuṃ māphikkā ṣatamā daṃḍasāsanā garnu jīya namāsanu bhani tithivāṁdhi tāvāpatra gari vaksyauṁ* (Khatiwoda and Zotter 2017, ll. 5-9); cf. Fezas 1986, 173 [3.1.2].

[40] Höfer 2004, 151-57.

or ethnic group. The petition was meant to postulate the degree of 'Hinduisation' already attained by them for the whole ethnic group (or for a local segment of such a group) and to have it legalised." Moreover, they were "not always a simple sanctioning of the status quo ante legem,"[41] but were more in the nature of negotiated settlements. The Limbus secured thereby exemption from the imposition of certain elements of Brahmanical orthopraxy, whereas the Magars sought to have their reconfiguration as a Brahmanical caste formally certified.

We find elsewhere in Rājendra's decrees signs that the Gorkhali state had been petitioned to allow other non-Brahmanical practices to be maintained. In 1826, Rājendra issued a decree adding a stipulation allowing Gurungs, Ghales, and Lāmās to continue having their traditional priests (Lamas and Gyabrings) officiate at non-Brahmanical rites, so long as they use Brahmins for the Brahmanical rites:

> To Gurungs, Ghales, Lāmās, the four jātas and the sixteen jātas, etc. throughout our realm. …[all of you] have been granted exemption from escheat (*aputālī*), fines for illicit intra-communal sexual relations (*cākacakuī*), and *pharneulo.* Today, too, we have issued a copper-plate decreeing (*thiti bandej bā̃dhi*): "In line with the customary practice of your households since earlier times, [all of you]—except for *pasuī*s who enter our palace—are exempted from *aputālī*, *cākacakuī* and *pharneulo*. As to the rituals that need to be performed by Lāmās and Ghyābriṅs, have Lāmās and Ghyābriṅs perform them, but the rituals that one needs to have Brahmins perform shall be performed by Upādhyā Brahmins. Moreover, as punishment for [other] wrongdoing, [we] shall punish [you] with fines [but you] are not to be enslaved."[42]

And in 1829, he reconfirmed exemptions for Gurungs and others:

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[41] Höfer 2004, 153.

[42] *āge hāmrā bhara mulūkakā gurūṃ ghale lāmā cārajāta sorhajāta gairhake ¯ – – – ¯vāṭa aputāli cākacakuī pharneūlo māpha gari vaksanubhayāko rahecha āja hāmivāṭa panī timiharūkā aghi deṣī calīāyāko rititithiti aputālī cākacakuī pharneūlo hāmrā darvāramā pasyākā pasuī vāhika māpha gari lāmā ghāvriṃle garnu pārnyā kāma lāmā ghāvriṃvāṭa garāūnu vrārhmaṇavāṭa garāūnu pārnyā kāma ūpādhyāvrārhmaṇavāṭa garāūnu au virāva māphikakā ṣatamā daṃḍasāsanā garnu jiya namāsanu bhanī thiti vaṃdeja vādhi tāmvāpatra gari vaksyauṃ* (Zotter 2018, ll. 4-11).

> To Guruṅs, Ghales, Lāmās etc. throughout our realm: [You] were granted by [our father] an exemption from escheat (*aputālī*) and [the payment of] fines for illicit intracommunal sexual relations (*cākacakuī*). Today we, too, have issued a copper-plate confirming by decree (*thiti bandejabā̃dhi*): "In line with the customary practice of your households since earlier times, [all of you] – except for *pasuī*s who enter our palace – are exempted from escheat, cākacakuī, and *pharneulo*. As for rituals that need to be conducted by lāmās and ghyābriṅs, let lāmās and ghyābriṅs conduct them, but rituals that need to be conducted by Brahmins shall be conducted by Upādhyā Brahmins. Moreover (*au*), as punishment for [other] wrongdoing (*birāva*), [the authorities] shall punish [you] according to the infringements, [but you] are not to be enslaved."[43]

In the case of a decree of King Rājendra issued to the Sunwars in 1830 – a group who actually sought permission to import Brahmins to serve as their priests – certain of their non-*śāstra*-compliant norms are protected, while other, disapproved practices are made subject to *nītismṛti*, i.e., textually grounded law (not precisely specified). Yet even in that case, they are assured that they will not be subject to penal enslavement:

> To Sunuvāras throughout our realm, east of the Triśūlagaṅgā and west of the Mecī, we have issued a copperplate confirming by decree (*thiti bandeja bā̃dhi*): "In line with the customary practice of your households since earlier times, [all of you] – except for *pasuī*s who enter our palace – are exempted from [the payment of] fines for illicit intracommunal sexual relations (*cākacakuī*) and from escheat, while incestuous sexual relations (*hāḍaphorā*), infanticide (*jātakamārā*) and other [such] wrongdoing (*birāu*) are to be treated according to the law-books (*nītismṛti*) according to the infringements, [but you] are not to be enslaved [as punishment]."[44]

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[43] *āge hāmrā bhara mulukakā guruṃ ghale lāmā gairhake ¯ ¯ ¯ ¯ ¯vāṭa aputālī cākacakuī māpha gari vaksanu [...]ko rahecha āja hāmīvāṭa pani timiharūkā aghi deṣī calīāyāko rititihiti aputālī cākacakuī pharneulo hāmrā darvāramā pasyākā pasuī vāheka māpha [...]ri lāmā ghyāvriṃle garnu pārnyākāma lāmāghyāvriṃvāṭa [...]rāunu vrāhmaṇavāṭa garāunu pārnyā kāma upādhyāvrāhmaṇavāṭa garāunu au virāva māphikakā ṣatamā ḍaṃḍa sā[...]rnu jiya namāsanu bhani thitivaṃdeja vāṁdhi tāmvāpatra gari vaksyauṃ* (Zotter 2020, ll. 5-14).

[44] *āge triśūlagaṃgā pūrva mecī paścīma bhara mulukakā sunuvārake timherukā gharako aghi deṣi caliāyāko rititihitimā hāṁmrā darvāramā pasyākā pasuī vāheka cākacakuī maryo aputālī māpha gariau haḍphorā jātakmārāra aru virāu māphikakā*

These groups were thereby allowed to have their own customary rites performed by their own priests, but they were also required (on principle, anyway) to have recourse to Brahmin priests for classical Hindu rites of passage and the like. Stiller and Höfer rightly see the shifting balance between these contrasting aims as the result of an on-going process of negotiation between the Gorkhali state and the governed groups. But it also no doubt reflects struggles within individual ethnic groups and even within the Śāh regime itself over identity and self-representation: how to fashion corporate identities that "ring true" (i.e., have a plausible claim to maintain distinctive internal tradition) but also "make sense" within the overarching, transregional ethos framed in terms of Brahmanical tradition. Appeals to that tradition, and gestures of conformity to it (even if in some respects merely notional), may arise out of aspiration – the aspirations of individual groups to merit status-recognition and rights; and the aspiration of an ascendant regime to lay claim to the legitimacy of glorious kings of old, as well as status among its peers and rivals in the wider region.

4. *Conclusions*

We began by noting that rulers in the Himalayan hills have since the Licchavis sought to act – to be seen to act – according to Brahmanical sacred law (*varṇāśrama-dharma*), at least in their public statements of ideals and in many of their formal acts of religious benefaction. The 1854 *Ain*, the extensive law code produced at the behest of the usurper, Jaṅg Bahādur Rāṇā, has attracted a lot of attention since it recast Nepal's Dharmaśāstra-influenced customary norms and royal decrees as a formal government-endorsed code of law.[45] The pre-*Ain* documentary sources reviewed here offer glimpses of how during the first six decades of Gorkhali rule in Kathmandu the royal court's policies and its interactions with its ethnically diverse subjects were articulated in terms of ideals and categories adapted from (or imitative of) Brahmanical sacred law. The early Gorkhali rulers invoked some of its general concepts, including the

ṣatamā nītīsmṛti garnu jiya namāsanu bhani thitivaṃdeja vāṁdhi tāmvāpatra gari vaksyauṃ (Zotter, Timalsina, and Zotter 2017, ll. 6-12).

[45] The code has been the object of scholarly editions (Fezas 2000; Michaels 2005), a recent complete translation (Khatiwoda, Cubelic, and Michaels 2021), and book-length studies (Höfer 2004; Michaels 2005).

axiom of Brahmin authority in matters of ritual purity and the policing of caste distinctions, as part of their program for legitimating their own rule. In doing so, they were carrying on older patterns of kingship, including the precedent earlier set by the Newar kings they supplanted. *Dharma* principles now provided a framework for situating Magars and Gurungs in a Gorkhali state and society alongside the Thakuri rulers and their Hindu Khas allies.

Making "concessions" to group-specific custom – a principle that was in fact endorsed in Dharmaśāstra[46] – was a secondary phase in the negotiated process by which these groups adapted to the new "imperial" program of the Śāh kings. Such concessions, though they took the form of authorizing documents "graciously granted" by royal fiat, were in fact the end products of negotiations between the regime and individual social groups over their group status, rights, and duties. Those negotiations, in turn, were predicated upon on-going group-internal deliberations about how to balance a desire to maintain customary norms against a countervailing interest in adopting some degree of Dharmaśāstra-derived status-marking, and the potential for enhanced prestige in the new "Gorkhali Nepal" that could come with it.

This progression in some ways mirrors the gradual formation of Anglo-Hindu law under the British, across the border. Like the Gorkhalis, the British initially pitched a vision of law narrowly tied to *śāstra* and the guidance of Brahmin jurists. Then they faced pushback from various parties who sought recognition in law-courts of customary norms observed by particular groups. This in turn led to the accumulation of precedents based on recognized custom, and to codifying such variety in black-letter law. The *Ain* was the Rāṇās' primary vehicle for achieving such a codification in Nepal. But the *Ain* itself was elaborated upon the piecemeal policies and lawmaking-by-decree of the first Gorkhali kings of Nepal, selectively repackaging "*śāstra*" and transformed "customs" into group-specific laws that reconfigured society under the aegis of a Gorkhali "true abode of Hindus for the four castes and thirty-six groups, inferior and superior."

[46] See Wezler 1985; Lubin 2016.

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AXEL MICHAELS

Between Love and Power: The Dharma *Drama of King Raṇa Bahādura Śāha (1775-1806)*

1. *Introduction*

On Wednesday, the bright fortnight of Māgha in Vikrama Saṃvat (VS hereafter) 1855 (20 February 1799), King Raṇa Bahādura Śāha (1775-1806), the grandson of the so-called founder of Gorkha Raj (or Nepal), Pṛthvīnārāyaṇa Śāha, persuaded or forced around a hundred members of the nobility (*bhāradāra*) – all men of higher ranks and important officials and functionaries, among them some nine Brahmins[1] – to issue in copper plates a pledge of allegation called *dharmapatra* and a dharmic promise (*dharmakarāra*)[2] to Gīrvāṇayuddha Vikrama Śāha (r. 1797-1816), the then only two-years-old son of Raṇa Bahādura Śāha. The reason was that Raṇa Bahādura had abdicated in favour of Gīrvāṇayuddha Śāha. Raṇa Bahādura – who had formally ruled since April 1777 when he himself was only 2 years old so that the regency and thus de facto power was in the hands of his mother and uncle until his maturity in 1794 (VS 1851 Vaiśākha) – was in doubt as to whether the succession to the throne would actually be implemented when Gīrvāṇayuddha grew up and thus wanted all officials to manifest their loyalty. Allegedly, he even blinded his cousin Kuladīpa Śāha, one of the possible successors, and the only one left in a direct line to Pṛthvīnārāyaṇa Śāha, because a crippled person could not become king.[3]

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[1] Ācārya Bhuvaneśvara, Dharmādhikāra Vidyānanda Ojhā, Purohita Vaidajña (read: Daivajña) Kesari, Purohita Devīdāsa as well as the *vaidyas* Ekadeva, Melajhā (Mela Jhā?), Yajña Ballava (Ballabha?), Milamha, and Rādhā Ballava (Ballabha?), where it is not always clear whether they have been Upādhyāya or Newar Brahmins.

[2] In the *Ain* of 1854, mostly *dharma bhāknu/bhakāunu*, 'to swear', is used but not the term *dharmakarāra.*

[3] Shaha 1990, 1: 85.

Gīrvāṇayuddha was the product of an unlawful affair, which had shocked Nepāla's upper nobility, especially the influential 'minister' (*kājī*) Dāmodara Pā̃ḍe (1752-1804). Gīrvāṇayuddha's mother, Kāntivatī, was a (Miśra) Brahmin widow from Mithila. She became Raṇa Bahādura'a third spouse and queen consort – after Rājarājeśvarī Devī and Suvarṇaprabhā Devī. Suvarṇaprabhā, who allegedly was not married to the king but remained a concubine (*bhogya rāṇī*), objected the marriage, but Senior Queen Rājarājeśvarī was in favour of it because she did not want Suvarṇaprabhā's son Raṇodyota to become the heir.

2. *The* dharmapatras*, pledges of allegiance*

These *dharmapatras* are now kept in the Paśupati Gośvāra at the Paśupatinātha temple in Deopatan. They were microfilmed by the Nepal-German Manuscript Preservation Project (NGMPP), of which a digital catalogue is available in Documenta Nepalica, a database of Nepalese documents.[4] One example is the following by Ḍambara Khatṛ (Khatri),[5] grandson of Hira Mani Khatrī and son of Dhanarāja Khatrī:

[At the upper margin:]
[1] śrī durgāyasahāya:
[2] śrī iṣṭadevatā śrī paśupati śrī guhyeśvarī śrī pāṃcāyana devatā
[3] śrī mahārājā śrī raṇa bahādura sāhale śrī gīrvāṇayuddha vikrama sāha
[4] śrī māhārājā gīrvāṇayuddha vikrama sāha

[Main text:]
[5] likhitaṃ ḍambar ṣatṛ. āge ----[śrī mahārājā śrī raṇa bahādura sāhale śrī gīrvāṇayuddha vikrama sāha
]lāī rajāi gādi baksādā garībaksyākā baṃ-
[6] dobastakā mohora tā̃vāpatra bamojimakā karāra baṃdhejamā maile narahyā vimanu

[4] Documenta Nepalica (https://nepalica.hadw-bw.de/nepal/catitems) lists 121 such copper plates: PN_0001_0003-0070, PN_0002-0008-0053 and PN_0003_0026 and 0029, PN_0004_0017-0037 and 0059, and PN 0098_0017; Chittarañjan Nepālī (VS 2020: Par. 8) lists only 95.
[5] NGMPP ID PN 1/3, catalogued in Documenta Nepalica as PN 0001_0003. A standard formulation of these *dharmapatras* is given in Nepālī VS 2020: 28-29 and in *Itihāsa Prakāśa*, vol. 1: 28-9.

[7] bhayā baṣeḍā [ga]rnāmā pasyā ----[śrī iṣṭadevatā śrī paśupati śrī guhyeśvarī śrī pāṃcāyana devatā]kā kopa kudṛpile[6] ma ra aghikā merā pasta[7]
[8] sāt au esa baṃdhejamā narahanyā chorā nātikā kṣaya bhai kāti[8] janma guhu-
[9] kā kira bhai naraka bhoga garnuparos. ----[śrī māhārājā gīrvāṇayuddha vikrama sāha]le ṭhulo bhai kājakāma ganu[9] lāgyā-
[10] pachi anyāya anurāhāsaṃga davāi gardā vimanāi bāhika hajurabāṭa ga-
[11] rībaksyākā baṃdhejmā rahanāko kabūla garī dharmakarārako tm̃vāpatra leṣi
[12] cahrāñā. hajurabāṭa garibaksyākā baṃdhejamā rahanāmā pasuṃta mera saṃtā-
[13] na paryantako ------[śrī iṣṭadevatā śrī paśupati śrī guhyeśvarī śrī pāṃcāyana devatā]kā sudṛṣṭile uttarāttara[10] vṛddhi baḍhati huna jā-
[14] vas. iti samvat 1855 sāla māgha śudi 15 roja 4 śubham
[At the left margin:]
[15] hiramani khatrikā nāti dhanarāja khatrīkā chorā ḍambara khatrile
[16] yati leṣī cahrāym̃ samvat 1855 sālamā.

May glorious Durgā save [us]
Glorious tutelary deity (*iṣṭadevatā*), Glorious Paśupati, Glorious Guhyeśvarī, Glorious Set of Five Deities (*pāṃcāyana devatā*)
Venerable Great King Raṇa Bahādura Sāha to Venerable Gīrvāṇayuddha Vikrama Sāha
Venerable Great King Gīrvāṇayuddha Vikrama Sāha
Written by Ḍambara Khatṛ. Furthermore: If I do not keep the promises written in the royal [decree on] the copper plate[11] which was issued when the throne was granted from the venerable Great King Raṇa Bahādura Sāha to the venerable Gīrvāṇayuddha Vikrama Sāha, or if I hold different opinions on that, or if I cause disturbances, I and the seven generations after me [including those] sons and grandsons of me who do not agree to this arrangement shall – due to the evil eyes and anger of the glorious tutelary deity (*iṣṭadevatā*), the glorious Paśupati, the glorious Guhyeśvarī, and the glorious Set of Five Deities (*pāṃcāyana devatā*) – perish, become a worm in the excrements for a crore of lives and

[6] Read: *kudṛṣṭile*.
[7] Read: *pustā.*
[8] Read: *koṭī.*
[9] Read: *garna.*
[10] Read: *uttarottara.*
[11] This refers to a long copper plate of Raṇa Bahādura dated VS 1855, Phālguna sudi 2, in which he declares to abdicate and withdraw from ordinary life to become an ascetic. For the edition of this document see Nepālī VS 2020: Par. 9.

> remain in hell. Once the venerable great king Gīrvāṇayuddha Vikrama Sāha comes of age and fulfils his royal duties, I remain loyal to Your Majesty's arrangement, except for the case that I do not agree if he oppresses people by injustice and favouritism. I have hereby written and offered to you this copper plate of a dharmic promise (*dharmakarāra*). May I and my future generations – due to the benevolence of the glorious *iṣṭadevatā*, the glorious Paśupati, the glorious Guhyeśvarī and the glorious *pāṃcāyana devatā* – flourish increasingly, as long as we accept the arrangement made by Your Majesty.
> Wednesday the 15th of the bright fortnight of Māgha in Vikrama Era 1855.

Such a "dharmic promise" was issued by highest officials including *cautariyā*[12] Śera Bahādura Śāha, Raṇa Bahādura's half-brother who, in spite of this promise, later murdered him, and Dāmodara Pā̃ḍe – but interestingly not by Rājaguru Gajarāja Miśra.[13] The fact that it is mentioned in these *dharmapatras* that the signatories would not follow the new king if he oppresses people by injustice and favouritism, indicates the loss of power of the Śāha kings, which began with Raṇa Bahādura.

3. *The violation of* dharma

According to the Dharmaśāstra, Raṇa Bahādura had certainly violated at least two rules: he married and/or[14] had sexual intercourse with a widow and he married across the *varṇas*. Although the prohibition of remarriage of a widow makes the son from such a union a *paunarbhava* (born to a re-married widow), which Yājñavalkya recognises as a son, such a union – with the exception of Levirate marriage – is generally regarded as *adharma*:

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[12] var. *cautariyā*; n. in the early Shah period, a royal collateral appointed as principal officer of the state, often kings' second and third sons; later a title with no specific functions attached, granted to several male descendants of the Śāha kings at a time. Cautarīyās held different higher administrative posts, like governors.

[13] *Itihāsa Prakāśa* 1: 21.

[14] According to Oldfield (1880, 1: 285), Raṇa Bahādura was not formally married to Kāntivatī; according to Baburam Acharya (RRS 7.4 (1975): 74) they married after Gīrvāṇayuddha was born in Gorkha.

> Twice-born men should never appoint a widowed woman to another man, for in appointing her to another man, they assail the eternal Law. (Manu IX.64)[15]
>
> Since that time, good people denounce anyone who is senseless enough to appoint a woman to have children after her husband dies. (Manu IX.68)[16]

This inter-*varṇa* marriage was clearly "against the grain" (*pratilomāntaraja*), because there was no other *varṇa* between the *varṇas* of father and mother. The descendants of such a hypogamous union had a low status. According to Mahābhārata XIII.48.10, Gīrvāṇayuddha would have become a Vrātya in his next life, for whom one may not perform sacrifices. According to other sources (e.g., Manu X.11), he would have become a bard (*sūta*).[17]

If Raṇa Bahādura would not have been king, he would have been outcasted. No wonder, then, that the nobility, and especially the Brahmins, could not accept such a king. After all, the norms of the Dharmaśāstra also applied to Nepal, a country that declared herself more and more as "the only Hindu kingdom left in the Kali age" where cows, women and Brahmins are especially protected.[18]

It is uncertain, however, whether the public was so aroused by the a-dharmic behaviour that Raṇa Bahādura was more or less forced to resign (Oldfield 1880, 1: 285), or whether Kāntivatī urged him to resign to secure the succession to the throne for her son (Acharya 2013, 30), or whether he did so because he himself wanted to fix it or in order stay with his wife who fell ill with smallpox (or tuberculosis?, cf. D. R. Regmi 1975, 583) after the birth of Girvāṇayuddha, or whether he did so because an astrologer had predicted that he would die in his twenty-fourth year (D. R. Regmi 1975, 589).

Whatever the exact reason – the sources are quite different in this regard[19] – there was no compelling reason to resign. In the 18th century and the first half of

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[15] *nānyasmin vidhavā nārī niyoktavyā dvijātibhiḥ /*
anyasmin hi niyuñjānā dharmaṃ hanyuḥ sanātanam //

[16] *tadāprabhṛti yo mohāt pramītapatikāṃ striyam /*
niyojayatyapatyārthe taṃ vigarhanti sādhavaḥ //

[17] Cf. *Bṛhaddharmapurāṇa* 57, no. 17; cf. Brinkhaus 1978, 29.

[18] MA, 8f.: *hiṃdu rāja gohatyā nahunyā strīhatyā nahunyā brāhmahatyā nahunya (...) Kali[yuga]-mā hiṃduko rājya yehi muluka mātrai cha.*

[19] The exact circumstances of the drama surrounding Raṇa Bahādura therefore remain unclear and contradictory. The descriptions of D. R. Regmi (1975, 582-602), for example, are largely unsubstantiated. Although the author mentions a chronicle, it is not

the 19th century, the king in Nepal had absolute power and was the supreme authority in legal matters since important cases were decided or affirmed by him – thus following the traditional Indian concept of the king's role as the upholder of *dharma* even though he sometimes shared it with royal collaterals (*cautariyā*) and a council of four *kājīs* or ministers. In deciding cases, the king was supported by the Brahmanical *rājagurus* (royal priests and preceptors) who kept the highest position in the palace with regard to the religious matters. Since the 18th century, they were supplemented by the chief (religious) judge, *dharmādhikārin* or *dharmādhikāra* (Michaels 2005), who decided according to the customary law(s) of the country, sometimes applying Hindu law principles of penance and religious behaviour. He could grant expiation (Skt. *prāyaścitta*) and caste rehabilitation (Nep. *patiyā)* when somebody was afflicted by impurity, especially when he or she had been polluted by sexual or bodily contacts with impure persons, including spouses and other family members. In such cases he could grant partial or full re-admission to his or her caste. For this purpose, the Dharmādhikārin had to issue a writ of rehabilitation (*patiyāpūrji*), a kind of letter of indulgence.

The full power of the king is shown in what followed: Gīrvāṇayuddha, "the bastard prince" (Oldfield 1880, 1: 286), was crowned by King Pṛthvīpāla Sena of Palpa, and his elder step brother Raṇodyota Śāha became chief *cautariyā.* Kāntivatī's health deteriorated fast. As announced by himself, Raṇa Bahādura withdrew with her to Deopatan and looked after her, but his efforts were to no avail. Kāntivatī died on the 4th of the bright fortnight of Kārttika *śukla* 4 in Ne Saṃvat 920 (31 October 1799). Raṇa Bahādura went crazy.[20] This change has so far been seen almost exclusively as his personal aberration, but, I argue, it triggered the decline of Nepalese royalty. Previously, Raṇa Bahādura was regarded as a *dharma*-full king who gifted Brahmins and temples, had various sanctuaries built or renovated, who according to the *Nepālikabhūpavaṃśāvalī* (vulgo Wright Chronicle) "used to give one thousand cows as gifts during important days, and [who] made his subjects to act in *dharma* repeatedly."[21] But after the tragic death of his beloved wife, he turned from a dharmic to an a-

clear to which of the three mentioned in his bibliography (one of them called "Vamsavali in the possesion by the author") he refers to.

[20] As far as I know, only Chittarañjana Nepālī (VS 2020) presents rational explanations for Raṇa Bahādura's behavior.

[21] *ī rājā kasto bhanyā baḍo dinamā sahasra godāna garī bāraṃbāra dharma garāunyā* (NBhV 20: 96).

dharmic king and transformed himself into a still powerful man who committed numerous atrocities. The *Nepālikabhūpavaṃśāvalī* lists his misbehaviour as follows:[22] "the confiscation of the Brahmin's property, causing distress to all children, closing the main roads, causing destruction to (the shrines) of various deities, and having illicit relationships." Among the temples destroyed by the king was the temple of Harītī or Sītalā, the goddess of small pox, which he blamed for the death of Kāntivatī, and who caused him to bring all children with smallpox outside the Kathmandu Valley. A pitifully song in Nevārī says: "Since the King had no *dharma*, he made parents abandon their smallpox-afflicted children. They had to cross the river Tāmā[kośī] river."[23] He further burnt a *narakadhūpa* – a fire using excrements as incense – "at the shrines of Taleju and many other deities, caused destruction there and killed the *vaidyas*" (NBhV 20.113).

To what degree Raṇa Bahādura occasionally went out of control is illustrated by a report by Captain W. D. Knox to the British governor general concerning his alliance with Kāntivatī:

> [Raṇa Bahādura Śāha] cut off the noses and ears of many of the Brahmins who officiated at the temples where prayers had been offered for the recovery of the Rannee [Kāntivatī]; he deprived others of their cast[e] by forcing the flesh of dogs and hogs into their mouths. […] He directed the temple itself to be demolished, and the three companies of Sepoys, to whom he gave the orders, demurring at the sacrilege, he commanded scalding oil to be poured upon their naked bodies, feasting his eyes upon the sight of their sufferings. (W. D. Knox quoted from M. C. Regmi 1995, 9)

The early 19th century chronicle *Triratna-saundarya-gāthā* of the Buddhist Paṇḍita Sundarānanda adds that he had a cremation place dug up and had all vultures of the Valley cremated there, ordered the houses of the doctors and astrologers to be destroyed and temples to be smeared with excrement. He even organised funerals for Taleju, the tutelary goddess of the kings. According to the *Triratna-saundarya-gāthā,* this behaviour shows Raṇabahādura's closeness

[22] For more atrocities see D. R. Regmi 1975, 589.

[23] *svāmī jujuyā dharma ma dayā: kacimacā vāke Chvata, vane māla Tāmākhusi pāri* (*Nevārīgītimañjari*, from Lienhard 1974, 96.18). According to Nepālī (VS 2020) the deportation of children suffering from smallpox was rational, since he feared – as it was predicted by an astrologer – that he himself might die from the same disease.

to Śiva, especially in his fierce form of Bhairava, despite the identification of the Śāha kings with Viṣṇu.[24]

When he had created enough "panic among the people, he fled to Vārāṇasī out of fear" (NBhV 20.115) together with his first wife, Rājarājeśvarī. Though Raṇa Bahādura had chosen an outwardly life, named Paramanirguṇānanda (NBhV 20:106) or "Nirvananda" (sic!, D. R. Regmi 1975, 587), he still was very much involved in worldly affairs. He even attempted to regain power, and in 1804 succeeded to a limited extent after he had sent back Rājarājeśvarī one year earlier, who managed, with the help of *mūlakājī* Dāmodara Pā̃ḍe, to seize power as a kind of unofficial regent. Rājarājeśvarī immediately cancelled the agreement with the British, paid the debts accumulated by her husband in Benares, and saw to it that he returned. This is not what Dāmodara Pā̃ḍe had wanted at all, and therefore he sent troops to stop Raṇa Bahādura. The soldiers, however, switched over to the ex-king's side, and as soon as he reached the Kathmandu Valley, he had Dāmodara Pā̃ḍe arrested. However, since he could not again ascend the throne after having abdicated, Raṇa Bahādura became the *mukhtiyāra*, a prime minister of sorts, and probably acted as regent too.

In this confused transition from the 18th to the 19th century, there were three rulers on occasion: Dāmodara Pā̃ḍe as the powerful prime minister (*mūlakājī*), the regent Rājarājeśvarī, and Raṇa Bahādura, who still considered himself to be the actual ruler from his stronghold in Deopatan, and who had Dāmodara Pā̃ḍe beheaded on 13 March 1804. On 25 April 1806, Raṇa Bahādura was killed by his half-brother Śera Bahādura. Until the mid-20th century, the Śāha kings never really regained strong power due to the many infant kings that followed and the regents and prime ministers who were more focused on fighting each other than caring for the country. Even more so, they lost their absolute supremacy and kept only a representative authority when the Rāṇā clan usurped power for almost a century in 1846.

4. *After the* dharma *drama: The king in the Rāṇā period*

During the Rāṇā period, the prime minister (*mukhtiyāra*) had supreme and absolute power and the king had only a representative authority. Most legal cases were neither decided by the king nor the prime minister but by various courts of justice (Nep. *adālata*, *amāla*, *bhārādārī kausala*, *aḍḍā*, *kacaharī*). In

[24] Cp. Lecomte-Tilouine 2015, 14-15.

some cases, the prime minister used to interfere in court decisions during his audiences, and in major decisions, such as degradation of caste or capital punishment, the courts of justice were to consult the Court Council (*bhārādārī kauśāla*). The council consisted of 230 noblemen and included all the senior Rāṇās, royal priests (*rājguru*), royal collaterals (*cautariyās)* and many civil and military officers, but only 30 Brahmins.

Most importantly, law became codified in the *Mulukī Ain* (MA), or *Ain* as it was called originally. Prime Minister Jaṅga Bahādura Rāṇā (1846-57 AD) got it prepared, and it was enacted during the reign of King Surendra Vikrama Śāha (1847-81) and promulgated on 5 or 6 January 1854 (7 Puṣa, VS 1910) under his and Crown Prince Trailokya Vikrama Śāha's red seal, together with the yellow seal of ex-king Rājendra Vikrama Śāha. Thereafter, the *Ain* has been amended and enlarged several times, and is still in use today, even if in a form that is totally different from the first version.

The *Mulukī Ain* is a bulky text; it has 163 chapters and nearly 1.400 pages in the edition of VS 2022 (1966) and almost 800 pages in the English translation. It is a remarkable law text, a kind of constitution, a code of civil and penal regulations that combines two sources: a) written laws (especially the Dharmaśāstra and Nibandhas, even though they are not quoted verbally; only in MA 89.71, authoritative are scriptures mentioned by using the general term *nītismṛti*) and b) customary laws (*lokadharma*) of the castes and various ethnic groups. The *Ain* deals with land-ownership, revenue administration, hereditary matters, marriage regulations and purity rules (particularly regarding commensality), murder and killing, thievery, witchcraft, slavery etc., but also such odd acts as farting and spitting in public, or throwing chilli into people's eyes or onto their genitals.

The *Ain* changed the role of the king considerably as it was mainly composed to legitimize and structure the complex caste system of Nepal in the 19th century (see Table 1). The *Ain* often refers to the caste system by the phrase *cāra varṇa chattisa jāta*, "four *varṇas* and 36 castes". According to Höfer, this standard formula phrase "seems to be meant to denote the totality of the castes covered by the *Ain*. The number 36 stands symbolically for the multitude of individual castes and certainly lacks empirical evidence."[25] In fact, around 50

[25] Höfer 2004, 88; similarily *Epigraphia Indica* XXX, 115: "(…) the number 18 means 'all' in such cases. The number 36 has the same meaning the Bengali expression *chatriś-jāti*, '36 castes'." It seems to be a widespread connotation and stem from Pauranic sources, e.g., *Bṛhaddharmapurāṇa*, ch. 57.

individual castes are mentioned in the *Ain,* and the *Nepālikabhūpavaṃśāvalī,* quoting a text called Jātanirṇaya, lists 64 castes in which the kings appear second after the Brahmins.[26] This differentiation is mainly a result of changes in profession and migrations, as well as in status demands, as Rajendra Pradhan aptly remarks:

> The ethnic groups, speaking Tibeto-Burman languages such as Gurung, Tamang, and Limbu, migrated at different times from regions across the Himalaya far to the north and east, with the Sherpa and some Tibetan-speaking groups having arrived more recently from the same general direction. The Nepali-speaking Bahun (Brahmin), Chhetri (Kshatriya) and Thakuri as well as the service caste dalits, collectively known as Parbatiya ("hill people"), migrated in from the west and south. The ethnic group known as the Newar is a composite of several communities such as the formerly forest-dwelling Tharu, Sattar, and Santhal [and] have probably been around for over two millennia as well, whereas others such as the farming Maithili-speakers of the eastern Tarai arrived later' (Pradhan 2002, 1).

[26] In 1966, one researcher counted 26 castes among the Newar alone; in the census of 1991, 60 castes and ethnic groups were counted, and in 2011 it was already 125. Cf. B. G. Shrestha 2007 for the counting of castes and social groups.

Table 1: The Caste System of the *Ain* of 1854[27]

Caste Society as a Whole				
Water Acceptable Castes			Water Unacceptable Castes	
Wearers of the Sacred Thread (*tāgādhāri*)	Alcohol Drinkers (*matwāli*)		Touchable	Untouchable
	Non-Enslavable	Enslavable		
Upādhyāya Brahmin, Rajapūta (Ṭhakurī), Jaisī Brahman, Chhetrī (Kṣatriya), Newar Brahmin, Sannyasī, Lower Jaisī, Various Newar Castes and others	∗Gurung, ∗Magar, ∗Sunuwar, ∗Other Newar Castes and others	∗Bhoṭe (Tāmāṅga), ∗Chepang, ∗Kumāla, ∗Hāyu, ∗Thāru, ∗Ghartī, ∗Lepcā, ∗Newar castes from whose members water is unacceptable and others	Kasāī (Newar Butcher), ∗Kusle, (Newar Musician), Hindu Dhobī (Newar Washerman), ∗Kulu (Newar Tanner), Musalamāna, Mleccha (European) and others	Kāmī, Sārkī, Damāī, Gāine, Bādi Bhā̃ḍa, Poḍe, (Cyāmakhala) and others

The *Ain* examines the correlation of caste and status, and the role of the state with regards to the caste system. Basically, the hierarchy of the *Ain* is based on four symbolic items determining higher and lower status: sacred thread, alcohol drinking, cooked rice, and water acceptance along the water-exchange line. However, there were glimpses of equality: "Henceforth, lower and higher-ranking subjects shall be punished uniformly according to their guilt and caste."[28]

According to this law book, Raṇa Bahādura Śāha would have faced serious problems regarding his decisions of 1799. First of all, he would have gone to prison because of his sexual intercourse with the Brahmin wife Kāntivatī:

[27] For a more detailed version see MA 32-3 and Höfer 1979, 45. The asterisks refer to ethnic groups.

[28] *choṭā vaḍā prāṇi sabailāi khat jāt māphik ekai sajāya havas* (MA, 1-2, preamble).

> If a Rajapūta caste member has consensual sexual intercourse with an unmarried girl or a widow who is past the age of 11 and belongs to an Upādhyāya Brahmin caste, and if he has not contaminated [any of his fellow caste members] through cooked rice, he shall be imprisoned for 2 years. If he has contaminated [any of his fellow caste members] through cooked rice, he shall be imprisoned for 4 years. If he pays double the fine in lieu of his prison term, it shall be accepted and he shall be set free. Anyone who is accidentally [contaminated] shall be granted expiation. (MA 147.1)

Moreover, the state would have confiscated Rāṇabahādura Śāha's share of property:

> When the Upādhyāya Brahmins give their daughters away [in marriage], who are commensal in cooked rice, they shall give them in marriage to families that are commensal with respect to cooked rice. If someone willingly gives his daughter away [in marriage] to a person from a caste inferior in status to his own and non-commensal with respect to cooked rice, his share of property shall, in accordance with the *Ain*, be confiscated and the daughter shall be provided with half [of the confiscated property] while the [other] half shall be deposited with the Iṭācapalī court. Anyone who belongs to a lower caste and is non-commensal with respect to cooked rice with Upādhyāya Brahmins, [but] marries a daughter of theirs, shall be punished in accordance with the *Ain*'s [regulations] for having illicit sexual intercourse with an Upādhyāya Brahmin girl, and the husband and wife shall be separated. (MA 99.9)

And his son, Gīrvāṇayuddha would not have received any share of property:

> If someone from any of the Four Varṇas and Thirty-six castes begets a son by a ritually married wife, widow, unmarried girl, common woman, slave or the like, and he brings the son into his house, performs the name-giving and rice-feeding rituals, and later on adopts a son from among the sons of his own brothers or sisters or daughters, such [adopted sons] shall not receive any share [of the estate]. If there are sons arising from his own semen by an appropriate or inappropriate wife, they shall receive shares. Other sons adopted after a son is born to an appropriate or inappropriate wife shall not receive [any share]. (MA 29.3)

This shows, that in the *Ain* the king was no longer outside the law, which itself received an unquestionable, almost absolute authority:

> The *hākima*, *ḍiṭṭhā* or *bicārī* of an *adālata* or the *mālika* of *ṭhānā* office shall dispose of lawsuits according to the *Ain*. Even if an [oral] order or an order through a *lālamohora* or *daskhata* comes from the king or prime minister to deal with the lawsuits in deviation from the *Ain*, [the judges] shall not obey such orders. The lawsuits shall be disposed of in accordance with the *Ain*. (MA 45.2)[29]

In the *Ain*, the king could even be dethroned if he was found guilty of breaking the law:

> If an enthroned king, without the advice of the prime minister, gives an order that breaches an agreement with an emperor to the south or north, or else at home, through engaging in duplicitous activity, causes harm to his own high-ranking officials (*umarāva*), *bhāradāras*, army [personnel] or subjects, he shall be dethroned and the one entitled to the throne according to the roll of succession shall be enthroned and reign. (MA 0.1.17)

The same applied when the king suffered from serious diseases or became mentally ill:

> If an enthroned king suffers from white leprosy or from a mental illness which remains uncured even after he has been under strict medical care for 3 years, [so that] he breaches the traditions of his clan (*jātako dharma*) and becomes an outcaste, and so becomes impure, such a king shall be provided with food and lodging with honour and be housed [somewhere] outside the palace. Whoever is the rightful claimant on the roll after him shall be enthroned. (MA 0.1.24)

And there is more: the royal right to pardon was dependent on the consent of the Kausala (§ 0.1.20). The prime minister and *rājaguru* could even give an official reprimand to the king for inappropriate actions (§ 0.1.21). Nonetheless, the king retained a protected position. In contrast to the prime minister, he and his family were exempted from capital punishment, whereas the prime minister could still be executed, for example for an attempt to usurp the throne (§ 0.1.31) or in the case of treason.

All these paragraphs show that, at least in the mid-19th century, the king was not above law, as Marie Lecomte-Tilouine (2015, 13) was arguing: "However, the king being above law, Ran Bahadur was not subject to the rules of caste."

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[29] Cf. MA 35.11-12.

5. *A parallel case in the Ḍoṭī kingdom*

Paradoxically, the diminished power of the king led to a stronger implementation of the Brahmanical *dharma* in the whole kingdom. It was enforced by the Rāṇās in the name of the Śāha kings. An apt example of many is a Royal Order (*lālamohara*) of 1823 CE to the king of Ḍoṭī, a little kingdom in West Nepal.

> Royal Order (*lālamohara*) by King Rājendra Vikrama Śāha to the *mukhtiyāras* and *bhāradāras* through Chautariyā Puṣkara Śāha and Kājī Bhaktabīra Kũvara stationed in the *ādālata* in Ḍoṭī, issued Chaitra *sudi* 4, VS 1890 (Monday, 25 March 1833 CE)
>
> *mulukamā aghideṣi calyāko ācāra vyavahāra rītithiti thāmnu. ghaṭiyā vyavahāra rahecha bhanya hamrā mulukamā calīāyāko baḍhiyā vyavahārasaṃga milanyā dharmaśāstrokta ācāra vyavahāra calāunu. muhuḍāmā parī āyāko dharmaśāstrako nirṇaya māphika mulukamā baḍhiyā vyavahāra calaunu. ādālatamā niropan huṃdā nīti smṛtimā viruddha parna gai chinyāka kurāmā jhagarīyāko citta nabujhī karāuna āyā bhanyā pāriyāko vistāra mukhtiyāra bhārādārasamma puryāī bhārādārī kausala garī hāmrā mukuka vivahāra dharmaśāstrakā rītasaṃga milanyā niropana garāī ciṭṭā bujhāī mulukamā śāstrako vyavasthā baḍhiyā hunyā dharmamā viruddha naparnyā kāma garnālāī kāśīnātha upretīlāī paṭhāyāko cha. īnalāī rāṣī bandobasta garnāko hukuma baksyāuṃ. upretilāī yasa kāmako ṣānagī sāla 1ko rupaiyā 200 baksyāko cha.*
>
> Take steps to ensure that traditional customs and usages (*vyavahāra nītithiti*) that have been practiced since earlier in our kingdom are followed. If bad practices are happening, then adapt the customs which are proclaimed in the *dharmaśāstra* and which are consistent with the great customs that have been practiced in our kingdom. Concerning the law suits that are launched in the frontier courts, adapt the great customs and usages based on the decision done in accordance with *dharmaśāstra*.
> If, while any case is dispensed of by the *ādalata*, the decision is in contravention of practices sanctioned by *nīti* (i.e., the customs and usages of the community) or *smṛti* (i.e., those sanctioned by the scripture), and any litigant is therefore not satisfied with such decision, and submits a petition accordingly, refer the details to the *mukhtiyāra* and the *bhārardāras*, and have it discussed at *bhāradāri* council. Make a decision which is consistent with the *dharmaśāstra* followed in our kingdom, and thus satisfy the litigant. Kāśīnātha Upretī has been deputed for this task. I order you to appoint him and make [necessary] arrangments. Upreti

> has been awarded a yearly wage of 200 rupees for this task. (RRC 26, 508; RRS 11.10 (1979, 147))

What could be the background to this royal order? Presumably it is related to an order of the same year, with which the tradition of the Patars of Ḍoṭī, a kind of *devadāsīs*, should no longer be tolerated.[30]

Another instance, however, reveals a striking parallel to Raṇa Bahādura's behaviour and his relationship with Kāntivatī. Baburam Acharya mentions this case without giving any details or references: "King Nagabam Malla of Doti also had married a Brahmin widow named Bhanumati, and proclaimed the son begotten by her as his successor."[31] It seems that Baburam Acharya means Nāga Malla from the Katyūrī dynasty (Joshi 2014); "bam" being an abbreviation of Brahma(n). According to a forthcoming paper by Basudev Pande,[32] this king is listed in a chronicle of the Doṭī kings, the *Ḍoṭī ke Rājāoṃ kī Rājavaṃśāvalī*. Nāga Malla, it says, ruled between Śāke 1306-1317 (= 1385-95 CE) and is the son of Niraipāla Deva. He is believed to have been a very controversial king with a transgressive behaviour like Raṇa Bahādura. He forced [Brahmins] to drink liquor, destroyed the Brahmanical and Vedic traditions, and let human sacrifices be performed at the Gorelī Bhagavatī (temple). It is said that he finally had to leave the palace by disguising as an ascetic. Since the authorities could not find him, the Bhāradārī Sabhā decided to crown a main person from the main caste (*thara*) of Ḍoṭī. Apparently, Nāga Malla did not have any offspring. When the authorities finally found him, he was staying in the house of a Brahmin widow called Dyaumā or Gomā at Timailsena and had sexual intercourse with her daughter. He begot a son from her, who was called Ripu Malla. He died on the way while being brought to Ajayameru Kot from Acham.

It seems that Raṇa Bahādura was not an exception, and as pointed out by Marie Lecomte-Tilouine, the recurrent ambivalent and ambiguous roles of Nepalese kings were part of the transgressive nature of the Nepalese Hindu kings: "The pendulum motion of the king, from human to divine, from one god to another, but also, from ideal to monstrous, is a corollary of his defined,

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[30] RRC 28: 448-450, cp. RRS, 3.2 (1971): no. 7.

[31] Acharya 1966, quoted from RRS 1975, year 7.4 (1975): no. 74.

[32] In a personal communication (mail) from 19 June 2022, Maheshwar Joshi was so kind to send me the relevant passages from this paper, on which the following is based. The paper will be published in a volume by Professor Joshi et al.

hypertrophic, and paradoxical nature."[33] This is certainly true, especially in the mythological domain, but historically the contradictory forms of behaviour matter differently. Raṇa Bahādura Śāha's conduct was not tolerated, there was a strong opposition and he never gained back the role and function of a king. On the contrary, he changed the history of Nepal considerably, causing a fundamental mistrust of the palace, which, in the end, ruined the monarchy.

6. *Conclusion*

In classical Indian sources, and in Nepal up to the mid-19th century, state and religion were not strictly separated. The king had absolute and religious power since penalties ordered by him could have expiative results – though there has always been a clear differentiation between penitential and penal law systems. With Raṇa Bahādura Śāha, however, the position of the king changed. He had blatantly broken with the Brahmin *dharma* norms, so that a process began that ultimately led to a limitation of the king's power as recorded in the *Ain* of 1854. Thus, Raṇa Bahādura's love of Kāntivatī and the *dharma* drama that followed shook Nepal and weakened the Śāha dynasty as much as Edward VIII's abdication because of his love for Wallis Simpson or Lady Diana's love for Dodi Al-Fayed shook the British Kingdom. Not until the middle of the 20th century, was the Śāha dynasty able to claim power again. To be sure, it was not Raṇa Bahādura Śāha alone who initiated the decline of the power of the Śāha kings but also, for example, Bahādura Śāha, the brother of Pratāpa Siṃha Śāha, and, after him, King Rājendra. Political and economic factors should also not be underestimated. Nevertheless, I hold that Raṇa Bahādura's *dharma* drama accelerated a process of power change that had already happened in India, where the classical *rājadharma* doctrine with the king as the main protector of *dharma* had faded with colonial rule. In Nepal as elsewhere, the *dharma* lost its importance for the law and increasingly became a moral system of norms with less legal implications. Raṇa Bahādura's *dharma* drama was decisive in this development.

[33] Lecomte-Tilouine 2015, 18.

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MANIK BAJRACHARYA AND RAJAN KHATIWODA

Legitimizing Slavery through Brahmanical Norms: The Ain *of 1854*

1. *Introduction*

The topic of historical slavery in Nepal is only marginally studied despite its considerable presence in the past. Epigraphical sources show that slavery existed there at least from historical times onward (i.e., as early as the 7th century) until its abolition in 1925. This paper aims to look into how the Nepalese state in the 19th century regulated the institution of slavery through a codification process based predominantly on the Hindu legal scriptures, i.e., Dharmasūtras, Dharmaśāstras, Smṛtis, Nibandhas and so forth.[1] The paper will also present a comparative analysis of Nepal's first legal code (promulgated in 1854 as the *Āin*[2] and later called the *Mulukī Ain*) in relation to the Hindu legal scriptures over a range of topics relating to slavery, including a definition, typology, the social order, enslavement and emancipation. In addition, it will investigate a number of contemporary legal and administrative documents in order to understand how Brahmanical ideas of slavery were institutionalized in non-Brahmanical settings through the state's legal code.[3]

Nepal, although geographically situated directly on the border with British India, was among the few kingdoms in the region that remained fairly

[1] For the process and sources of the first legal codification of Nepal, see Khatiwoda, Cubelic and Michaels 2021 and Khatiwoda 2024.

[2] See, for example, the preamble (in the form of a *lālamohora* issued in VS 1910) of the *Ain* of 1854 in the edition published by the Kānuna tathā Nyāya Mantrālaya in VS 2022 (1965) and the edition by Jean Fezas (hereafter *Ain*-54-JF). The preamble is translated in Khatiwoda, Cubelic and Michaels 2021, 85-86. Also see Michaels 2005, 7 and Khatiwoda, Cubelic and Michaels 2021, 2.

[3] We would like to express our gratitude to Prof. Axel Michaels and Dr. Simon Cubelic for their valuable suggestions and inputs for this article. Our sincere thanks go to Philip Pierce for useful comments and corrections.

autonomous and maintained its independence from both British India and China. That is why the country could define its own legal practices without direct foreign interference in what it perceived itself to be: the last remaining Hindu kingdom of the Kali era (*kaliyuga*).[4] This makes it an especially interesting case for the study of socio-legal practices including Brahmanical law, which, as stated by B. H. Hodgson, an early 19th-century British envoy to Nepal, "might puzzle the *Shastrís* to explain on *Hindú* principles."[5] This is exactly the case with the system of slavery and unfree labour in Nepal regulated and legitimized through the *Mulukī Ain* of 1854 (hereafter *Ain* or *Ain*-54), which is "more quoted than understood" (Khatiwoda, Cubelic and Michaels 2022, Preface). The *Ain* offers unique insight into life in South Asia, not only because it mirrors the socio-economic situation in mid-19th century Nepal but also brings together Brahmanical social and legal concepts, customary practices and the emerging notion of positive law.[6] It thus serves as a foundational text for the study, understanding and interpretation of social, religious and economic features of the early Śāha and Rāṇā periods. This applies in particular to the system of slavery in Nepal. The *Ain* contains several separate articles exclusively concerned with various aspects of slavery (Articles 11, 80–86, 118, 124, 129, 139, 153 and 161-162). It also formulates legal regulations touching on slaves, bondservants and other unfree labourers in almost every other field—from land ownership, inheritance and private commercial contracts to the law governing sexual offences and ritual observances (see Cubelic, Khatiwoda and Michaels 2022).

2. *Slavery and caste, kinship and state*

The *Ain*, including as it does extensive regulations on various aspects of slavery, mirrors the existing forms of unfree labour and attempts to systemize and reconfigure their relation to institutions that were key to the Rāṇā polity. An understanding of the relationship between slavery, multifarious modes of stratification, institutional settings and social codes as treated in the *Ain* helps us

[4] See Khatiwoda 2024 for a broader discussion on the social-legal practices of 19th-century Nepal.
[5] Hodgson 1874, 39.
[6] See, for example, Cubelic and Khatiwoda 2017 for a more detailed overview of the changing notion of divine kingship in the *Ain*.

to elucidate the unique features of Nepal's slavery regime. The state fundamentally demanded that state actors should follow the law and base themselves on solid evidence when pursuing lawsuits, but at times it still expected firm loyalty to the *dharma* and concern about one's next birth as guard rails for the dispensing of justice.

> When the *hākima* [of a court], the *mālika* of a *gauḍā*, or a *subbā*, *ḍiṭṭhā*, *bicārī*, *amālī*, *dvāre*, *tharī*, *mukhiyā*, *mijhāra*, *chaudharī* or *jimidāra* at an *adālata*, *ṭhānā* or *amāla* is handing down a judgement in a legal dispute, the particulars of the *Ain* alone are insufficient in terms of following procedure. The case shall not be decided without assembling the evidence recorded in the [plaintiff's] written deposition, such [things] as documents, possessions, witnesses, testimony and eyewitnesses. A verdict in a legal dispute [initiated through the plaintiff's] written deposition shall be delivered following the above-mentioned criteria, and without taking bribes, without favouritism, without bias, remembering the *dharma* and the gods, remaining pure, mindful that [your] master will bestow honour following the delivery of a proper verdict, satisfying the *pañca* [on the bench] and [acting] in accordance with the *Ain*. Whoever delivers a judgement violating what is written [above] and knowingly breaches the *dharma* will be punished by the king in this world and by the god of death (Yamarāja) in the next (*Ain*-54 § 35.37, translated in Khatiwoda, Cubelic and Michaels 2021, 279).[7]

Rhetoric in the interest of upholding the *dharma* is also well reflected in 19th-century documents dealing with transactions involving slaves or the emancipation of them. One such document from the late 19th century, issued in

[7] हाकिम गौडाका मालिक. अदालत ठाना अमाल्का सुव्वा डिठ्ठा विचारि अमालि द्वार्या थरि मुषिया मिझार चौधरि जिमिदार राइ (sic!) कर्त्ताहरूले झगरा छिंदा ऐनको वेहोरा मात्रै हेरि अंग पुगि सक्तैन तस निमित्त इजाहर कचहरिमा दाषिल भया पछि. इजहारमा भयाको प्रमाण कागज पत्र भोग दसि गुहाइ तेसर यति कुरा षडा नगरि झगरा छिंनु हुदैन इजहारमा लेषियाका यति मुद्दाको रीत पुर्याइ. घुस रोसवत् नषाइ. आफ्नु विरानु नछुट्याइ पनपक्ष नगरि धर्म र अकवत् सम्झी आफु चोषो रहि हक निसाफ् गर्या मालिकवात इज्जत चढाइ वक्सीन्या छ भंन्या ठहराइ. पंचको चित्त वुझाइ. ऐन वमोजिम्. निसाफ् गरि झगरा टोडि दिनु. लेषियाको कुरो छोडि जानि जानि अधर्म गरि. जो निसाफ् गर्ला ञाहा राज दंडमा पर्ला. मर्यापछि ज्यमराजको दंडमा पर्ला (Note that the *Ain*-54-JF numbers this article on Court Procedures as 37 instead of 35, but does not record this particular section. The original texts given here and below are copied from the edition of the *Mulukī Ain* published by the Kānuna tathā Nyāya Mantrālaya in VS 2022.).

the Atharasaya Khola region,[8] regarding the purchase and eventual emancipation of a female slave reads:

> When Kārto, the daughter of Chiriṃ Buṭī Toṅā who is a resident of the aforementioned village, came to my house and lamented, saying: "With the famine occurring this year in the village, all [those] people died due to the lack of food … we too are about to die from hunger …" I counted out 35 *mohararupaiyās* and handed them over to the mother, Sānu Chiriṃ Buṭi, as the price of the said slave (*keṭī*). … Today I feel pity for this slave and that I should definitely free her. Having seen my husband and son, too, freeing 2 other persons in the practice of pious act (*dharma*), I also felt that I should free [her].
> Even though the aforementioned Kārto is [still] a slave, I have freed her with the intention of *dharma*, stating: "She shall serve us and be fed throughout the life of my husband. After [his] death, she may happily go wherever she wants and live according to her own wishes." (NGMPP L_1200_0016, dated Pauṣa VS 1949 (1893 CE))[9]

Similarly, another document from the same region, recording the purchase of a female slave reads:

> … *Āge*: During the rainy season of the year [VS 19]49, when a famine occurred in the immediate surroundings, Palsāṃ Chīrīṃ *2 jānī* and [their] daughter Palsāṃ Buṭī came to my house and said: "Our family has suffered excessively due to hunger and famine. Please save our lives." Palsāṃ Chīrīṃ *2 jānī* then said: "Please determine a price for my daughter Palsāṃ Buṭī and uphold the *dharma* by accepting (i.e., buying) her." After he said this, since they were of an enslavable caste (*māsīne jāt*), … [I] handed over *mohararupaiyās* 25 [as the price] for the 14-year-old Palsāṃ Buṭī to her father and mother. [The girl officially became my slave] through oil being applied to her head (*kapālmā tel*

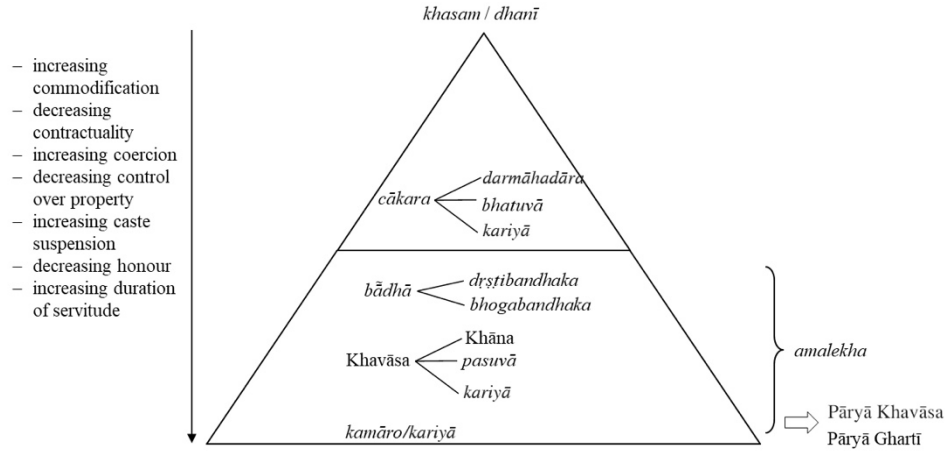
[8] See the commentary section of Tsum_0001_0001 [ed. and transl. by Nadine Plachta and Rajendra Shakya] in Documenta Nepalica for more information about this region: https://nepalica.hadw-bw.de/nepal/editions/show/28163 (accessed on 29.08.2022).

[9] … आगे यहि साल गाउमा साह्रो अनिकाल पर्दा षाना वेगर सवै मऱ्या … मेरो ज्यू दाता भै तपाञीका घरमा जुनिभर करिया भै वस्छु भनि सोही गाउ वस्न्या छिरिं वुटी तोङाकी छोरि कार्तोले मेरा घरमा आइ रुंदा कराउंदा … निज केटीको मोल् वदे मोरु ३५ … दी निज कार्तोलाइ मानु ष्वाइ काज लाइराष्याको हो । आज निज केटीको माञा लाग्यो र यस्लाइ पार दीन्यै हो भंन्या मेरा चीत्तमा लाग्नाले र अरु २ जनालाइ पनि मेरा षसम र छोराले स्मेत् धर्म गरि छाडेको देष्दा मलाइ पनि छाडीदीउं भंन्या लाग्यो र निज कार्तो करिया हो ता पनि मेरा षसम्का ज्यूताभर हाम्रा चाकडी गरि वस्नु षानु सेषपछि आफु सुषि भै जाहा मन् लाग्छ वाहा गै षानु वस्नु भनि धर्म जानि पार गरि दीञा । (edited and translated by Manik Bajracharya, and published in Documenta Nepalica https://nepalica.hadw-bw.de/nepal/editions/show/25031 [accessed on 29.08.2022]).

ṭhokī). (NGMPP E_3446_0032, dated the 9th of the bright fortnight of Kārtika, VS 1949 (1892 CE))[10]

The *Ain*, as an instrument for institutionalizing slavery, recognized various degrees of enslavement in terms of the relationship between master and slave. Figure 1 shows the levels of dependency of slaves upon their masters based on contractual conditions, extent of their commodification, and ties with the master's household.

Fig. 1. Slave types and their dependency statuses in the *Ain*[11]



[10] … [आ]गे ४९ सालका वर्षामा गाँऊघर अनीकाल पर्दा नीजै गाँऊ [वश्रे] पल्सां छीरीं २ जानी र छोरी पल्सां वुटी ईन्हरूले मेरा घरमा [आ]ई हाम्रा जहान् भोक् अनीकाल्ले सारै दुष पायो हाम्रा जीया वचाईदीन पर्यो भनी नीज पल्सां छीरीं २ जानीले र नीजका छोरीले भंन आऊदा नीज पल्सां छीरीं २ जानीले मेरा छोरी पल्सां वुटीको मोल्मोलाई गरीली धर्म टेकाई दीन पर्यो भनी भंदा १९४९ सालका जेश्ठ शुदी ५ रोज २ का [दी]न्मा नीजहरूको मासीने जात् हुनाले पल्सां छीरींका [छो]रि पल्सां वुटी वर्ष १४ भयाका … मो रू २५ नीज केटीका वाव् र आमासंग वुझाई कपाल्मा तेल् ठोकी … (edited and translated by Manik Bajracharya in collaboration with Raju Rimal and Rajan Khatiwoda, and published in Documenta Nepalica: https://nepalica.hadw-bw.de/nepal/editions/show/25030 [accessed on 29.08.2022]).

[11] This figure has been taken from Cubelic, Khatiwoda and Michaels (2022).

The *Ain* thus was a tool allowing slavery to be regulated through the institutions of household and caste. By putting slavery under strict state control, it created a monopoly on slaves and labour for the state and the ruling class.

2.1. *Slavery and caste*

The form of slavery in Nepal is distinct from slavery elsewhere, namely in its relation to caste. In contradistinction to the normative Brahmanical *varṇa* system, wherein a slave is always regarded as a person assigned to do impure work, the *Ain* does not qualify a slave in terms of his or her work. The *Ain* strictly prohibits enslaving a person belonging to Non-enslavable castes. It did, however, allow persons already enslaved before the promulgation of the *Ain* to be kept on as slaves even though they belonged to a Non-enslavable caste. The *Ain* permitted slaves to retain their former caste status. In that sense, it enforced the caste hierarchy with regard to slaves rather than subverting it.

The Brahmanical *varṇa* model is further altered in the *Ain* to address the necessity of incorporating *deśadharma*. The Hindu legal scriptures clearly define the *varṇa* model, putting Brahmins on top of the hierarchy followed by Kṣatriyas, Vaiśyas and Śūdras, and assigning walks of life on the basis of it. The *Ain*, by contrast, instead of directly following the *varṇa* model, classifies people into five caste groups:

1. *Tāgādhārī*, "Sacred Thread–wearers"
2. *Namāsinyā matuvālī*, "Non-enslavable Alcohol-drinkers"
3. *Māsinyā matuvālī*, "Enslavable Alcohol-drinkers"
4. *Pāni nacalnyā choi chiṭo hālnu naparnyā*, "Water-unacceptable but Touchable castes"
5. *Pānī nacalnyā choi chiṭo hālnu parnyā*, "Water-unacceptable, Untouchable castes"

Such a caste classification is not seen in any other Brahmanical contexts of the Indian subcontinent. Thus, the *Ain*, while following the core Brahmanical norms, introduces and incorporates the caste divisions observed in the Nepal of its time. Similarly, in contradistinction to dharmaśāstric rules,[12] the *Ain* allows

[12] For example, see *Manusmṛti* (MDh) 9.326-335 and 10.74-80.

one to freely choose one's occupation (§ 37.1), be it pure or impure. Section 7 of Article 31 of the *Ain* (Article 33 in *Ain*-54-JF) reads:

> Occupation is not governed by caste [membership]. [The members of] all Four Varṇas and Thirty-six castes may sharpen tools, make shoes and clothing, work in mines, refine gold, fire brick kilns, pursue the potter's trade, prepare leather for *mādala* drums or do any [other] work as a profession, or earn a living by engaging in commerce. Nobody shall lose his caste status. Anyone who says in this regard that someone will lose their caste status or deprives him of his right to drink water with fellow caste members shall in either case be fined 50 rupees.[13]

Contrary to such freedom, the caste status of slaves bound them to a predetermined degree of purity or pollution that they bore or passed on to following generations. Tables 1 and 2 show implications of the caste status of a slave for the degree of punishment.

Table 1. Punishment for a male slave who raped a woman from a Non-enslavable Alcohol-drinking caste (based on Article 161 of the *Ain*)[14]

Slave's caste	*Degree of punishment*
Sacred Thread–wearing caste	6 years imprisonment
Non-enslavable Alcohol-drinking	8 years imprisonment
Enslavable caste	12 years imprisonment
Water-unacceptable and either Touchable or Untouchable caste	*dāmala*[15]

[13] इलम् भन्याको जात जातको छैन. चार वर्ण छतिसै जात सवैले. पाइन हालनु जुत्ता कपडा स्युन षानि षंन सुन धुन अवालमा आगो लाउनु कुम्हाल्को काम गर्न मादलहरूमा षरि लगाउनु गैह्र सवै कामको इलम् गर्नु वेच विषन गरि जिविका गर्न हुंछ. जात जादैन एस्मा जात जांछ भंन्या र भात पानि काढन्याइ (*Ain*-54-JF reads: काढन्यालाई) ५०।५० रूपैया दंड गर्नु.

[14] Note that this is Article 163 in *Ain*-54-JF.

[15] This replaced execution for perpetrators from castes exempted from the death penalty; the offender is branded on his left cheek, his entire property is confiscated and he is imprisoned for life (Khatiwoda, Cubelic and Michaels 2021, 858). See Art. 44 of the *Ain* 'On Shaving and Dāmala' for the *dāmala* punishment in greater detail.

Table 2. Punishment for a male slave who raped a woman from an Untouchable caste (based on Article 161 of the *Ain*)

Slave's caste	*Degree of punishment*
Sacred Thread–wearing, Non-enslavable Alcohol-drinking or Water-unacceptable but Touchable	7 years (imprisonment) with a brand on his left cheek and deprivation of his right to consume water with his fellow caste members if he has contaminated them with respect to cooked rice, and 6 years without branding if not.
Untouchable	7 years (if he pays 4 times the amount set as substitution for the prison sentence, he is released).

The tables demonstrate how a slave who raped a woman is punished to varying degrees according to the caste statuses of the culprit and victim. If the culprit's caste status is higher than that of the victim, he receives less punishment. In the example of the second table, however, a person of higher caste gets heavier punishment for raping a woman of untouchable caste because of the pollution she inflicts.

2.2. *Slavery and kinship*

The *Ain* accepts slaves as members of their master's extended household and ties them into a kinship relation with their master's family when it comes to death mourning. This may be viewed as a contradiction to natal alienation and the social death of a slave witnessed in the trans-Atlantic context.[16] A section in

[16] On the concept of social death and natal alienation of a slave, see, for example, Patterson (1982).

the *Ain* shows that slaves are fully impacted by the impurity caused by their master's death and thus required to observe the period of impurity as a full family member:

> If one's master or mistress dies, and the household is polluted by [death] impurity, a servant in servitude, a Khavāsa, a maid, or a male or female slave is fully afflicted by the death impurity. A wage-earning servant, a male or female bondservant, or a servant working for his keep are afflicted by the impurity for 3 days. A servant is not afflicted by the impurity, except when the master or mistress of his household dies, [but not] if any other of the master's [more distant] family members dies for whom a 10-day mourning period is prescribed (*Ain*-54 § 97.30).[17]

A female slave could actually enter into a familial relationship with her master by having children with him. She could then become a free person, and her children would be entitled to a share in their father's property (*Ain*-54 § 129.8).[18] If the master was from a Sacred Thread–wearing caste, their sons would even be entitled to wear the Sacred Thread, just like the master's

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[17] आफ्ना षसम् षस्मिनिहरू मरि घरमा जुठो पर्यो भन्या करीया चाकर षवास्या केटि कमारा कमारिहरूलाइ पुरो जुठो लाग्छ. दर्माहादार चाकर वाधा वधेत्यानि मानु षाइ चाकरि गरि वस्न्या एस्ता चाकरहरूलाइ ३ दिन जुठो लाग्छ. आफ्ना घरका षसम् षस्मिनि वाहेक षसंका अरू दसाहा भाइ मर्यामा चाकरलाइ जुठो लाग्दैन.

[18] आफ्ना कमारि षसमसित वस्यापछि अर्कासित पोइल गयाकि रहिनछ भन्या तेसवाट षसम्का विर्यले जन्म्याका सन्तान् जुसुकै भया पनि कमारा कमारि ठहर्दैनन् सुक्रि विक्रि गर्न हुदैन कसैले कमारा कमारि भनि वेच्यो भन्या किंन्याको थैले वेचन्यावाट तिर्न सकन्या रहेछ भन्या धन् तिराइदिनु तिर्न नसक्या कपालि तमसुक गराइदिनु ति कमारिवाट जन्म्याका संतान् अकरिया हुंछ वेचन्या वावु दाज्यू भाइ छोरालाइ वेच्याका थैलि वमोजिम् दंड गर्नु रुपैया नतिर्या ऐन वमोजिम् कैद गर्नु ऐन वमोजिम्को अंस स्मेत् दिलाइ दिनु (translated in Khatiwoda, Cubelic and Michaels 2021, 712: "If a slave woman—after she has started living with her master as his wife—does not run off with another person, the offspring born [to her] from his semen—irrespective of who they are—shall not be considered slaves. They shall not be sold. If someone sells them, stating that they are male or female slaves, the amount paid by the buyer shall be recovered from the seller, if he is able to return the amount. If the seller is not able to return the amount, he shall be made to issue a loan agreement without security. The offspring born to such a female slave shall become freed persons. If [the master's] father, brother or son sells [such offspring], [the seller] shall be fined in accordance with the amount of sale in question. If the amount of the fine is not paid, he shall, in accordance with the *Ain*, be imprisoned, and the offspring shall, in accordance with the *Ain*, be provided with their share of property.").

legitimate offspring (*Ain*-54 § 91.2).[19] This is in line with the injunction proclaimed in *Yājñavalkya* 2.137:[20]

> I have declared this rule with reference to children belonging to the same caste. Even a son fathered by a Shudra through a slave woman may receive a share of the inheritance at the pleasure of the father (translated in Olivelle 2019, 157).

3. *Slavery: A comparision between Dharmaśāstras and the* Ain

As discussed above, the institution of slavery in Nepal as implemented in the state's legal framework of the *Ain* was subject to caste-based restrictions. The code employs Brahmanical legal principles without actually citing any Hindu legal scriptures, while at the same time incorporating customary traditions into it. A comparison of different aspects of slavery in the *Ain* with Dharmaśāstras is instructive. The *Nāradasmṛti* (NārSm), a text widely circulated in Nepal, a Newari commentary on which called the *Nyāyavikāsinī* was composed in the 14th century, is chosen here as representative of the latter group of texts.

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[19] तागाधारि जात कसैले आफ्ना घरकि कमारि पार गरि स्वास्नि तुल्यायाकि हवस् वा पार नगर्दै घरका जाहानलाइ थाहा भै राषि छोरा छोरि जन्म्याका हवस् षसमले राषता अर्कासित पोइल गयाकि रहिनछ र षसम्का वीर्यले छोराछोरि भयाका रह्याछन् भन्या तेस्ता कमारीपट्टिका छोरालाइ जनै दिदा आमालाइ पार गरि वावु दाज्यू भाइ इष्टमित्रले छोरालाइ जनै दिन र छोरिको विहा गरिदिन हुंछ अर्काकि कमारि राष्यापट्टि जन्म्याका छोरा छोरिलाइ आमा पार नभया पनि धनिको षुसि राजिले निषनि ल्याइ छोलाराइ जनै दिन र छोरिको विहा गरिदिन हुंछ जनै दिन्यालाइ षत लाग्दैन (translated in Khatiwoda, Cubelic and Michaels 2021, 527: "If someone from a Sacred Thread–wearing caste emancipates a female slave of his household and keeps her as his wife, or else keeps her as his wife with the knowledge of his family members [but] without having emancipated her, and if offspring are born to her and—assuming that she does not run off with another man while she is being kept as a wife by her master—the sons or daughters are from his semen, then when it comes to sons born to such a slave woman being given the Sacred Thread, their father, other family members or relatives shall be allowed to give the Sacred Thread to such sons and to marry off such daughters after [the father] has emancipated their slave mother. If someone keeps a slave woman [belonging to someone else] and sons and daughters are born to her, he shall—even if the slave mother is not emancipated—be allowed, with the owner's consent, to ransom [the offspring] and give the Sacred Thread to his sons and marry off his daughters. The one who gives [such sons] the Sacred Thread shall not be held accountable.").

[20] सजातीयेष्वयं प्रोक्तस्तनयेषु मया विधिः । जातोऽपि दास्यां शूद्रेण कामतोंऽशहरो भवेत् ॥

3.1. *Definition and typology of slaves*

Dharmaśāstras such as the *Nāradasmṛti* define slaves on the basis of two qualities: they are dependent (*asvatantra*: NārSm 5.3-4) and engage in impure work (*aśubhakarma*: NārSm 5.5), including work of the lowest nature (*jaghanyakarma*: NārSm 5.23).[21] Nārada specifies the impure work of a slave as:

> Cleaning the doorway, the bath area, the road, or the toilet, touching private parts, gathering or disposing of waste, urine, or feces, and, last of all, attending to the master's limbs when he so desires, this is what is known as Impure work. (NārSm 5.6-7, trans. in Lariviere 2003, 345)

The *Nyāyavikāsinī* uses the term *aśubhavyāpāra* for the impure work.[22] The *Ain*, as stated above, does not characterize slaves in terms of their work. It dismisses the caste/class system of assigning occupations and allows everyone the freedom to choose their own (*Ain*-54 § 31.7). Nevertheless, it retains the idea of slaves as absolutely dependent and as commodified objects, on a par with four-footed animals (*Ain*-54 § 81.1-2). This coincides with the dharmaśāstric concept of slaves as chattel (*dravya*) and designating them as *dvipad*, "biped," in order to distinguish them from quadruped property (cf. Rocher & Rocher 2001, 250, 254).

Different Dharmaśāstras provide different typologies of slavery. MDh 8.415 classifies slaves into seven types, while Kauṭilya's *Arthaśāstra* has nine.[23] The *Nāradasmṛti* has the most elaborate list of the types of people who lack legal

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[21] For the use of the term *jaghanyakarma* in the *Smṛticandrikā*, see Davis 2020, 304.

[22] See Panta VS 2065, 88.

[23] "There are seven kinds of slaves: a man captured in war, a man who makes himself a slave to receive food, a slave born in the house, a purchased slave, a slave given as a gift, a hereditary slave, and a man enslaved for punishment" (translated in Olivelle 2005, 189). The nine types of slaves in the *Arthaśāstra* are: one who has become a slave to secure a livelihood (*udaradāsa*), one who is pledged as security (*āhitaka*), one who has sold oneself (*ātmavikrayin*), one who has to work to pay a fine (*daṇḍapraṇīta*), one who is captured in battle (*dhvajāhṛta*), one born into the household (*gṛhajāta*), one inherited (*dāyāgata*), one obtained as a gift (*labdha*) and one purchased (*krīta*) (cf. Shrimali 2018).

independence, including four kinds of workers and fifteen kinds of slaves (*dāsa*).[24]

The *Ain*, on the other hand, uses different terms for different types of slaves and other unfree persons. Unlike in the Dharmaśāstras, where slave typology can be understood as being based on the modes of enslaving, the types of slave in the *Ain* reflect the degree of dependency (see Fig. 1). A typology of slaves and related categories based on the *Ain* and other contemporary documents can be presented as follows:

- *Cākara*: a generic term for a servant attached to the master's household. *Ain*-54 § 97.30 mentions three kinds of *cākara*: *darmāhādāra-cākara*, "a wage-earning servant", *bhatuvā*, "servant working for his keep" and *kariyā-cākara*, "a servant under servitude".
- *Keṭo* (f. *keṭī*): a servant, often understood as a synonym for a male slave (see also e.g. Hamilton 1819, 20).
- *Kamāro* (f. *kamārī*): a "full" slave who is treated as a commodity and can be transferred as property. A *kamāro* was still entitled to hold private property (*Ain*-54 § 18.8), but his right to transfer it to his children was considerably restricted.
- *Kariyā*: the term is occasionally used instead of *kamāro* to denote a "full" slave (see *Ain*-54 § 82.9). It is used also, however, as a qualifier indicating a slave-like status of other types of servants such as a *cākara* (*Ain*-54 § 97.30) and a *khavāsa* (e.g. *Ain*-54 § 161.10). Since in such cases *kariyā* is often associated with the term *ghara* ("household"), it can be assumed that it refers to slaves who performed household chores (see e.g. *Ain*-54 § 161.12).

[24] The fifteen kinds of slaves in the *Nāradasmṛti* are: one born into a household, one purchased (from a previous owner), one acquired (as a gift), one inherited, one supported in time of famine, one pledged as security by his master, one freeing himself from a debt (who accepts slave status for the cancellation of debt), one obtained in battle, one won in gambling, one who voluntarily accepts enslavement, one who broke the renunciation vow, a bonded labourer (for a fixed period of time), one who becomes a slave for self-maintenance (outside of a famine), one who marries a female slave (of another household), and one who sells himself for a price (NārSm 5.24–26, cf. Lariviere 2003, 174, 348).

- *khavāsa*: an umbrella term for current or former slaves of the nobility and the offspring born of unions of nobles and slave women. The *Ain* distinguishes four types of *khavāsa*:
  - *kariyā khavāsa*: a term denoting a *khavāsa* who is currently under servitude
  - *pāryā khavāsa*: an emancipated *khavāsa*
  - *pasuvā khavāsa* (*Ain*-54 § 126.7): a term probably borrowed from Rajput courts, where *khavās-pāsbāns* were employed as personal attendants of the rulers[25]
  - *khāna khavāsa* (*Ain*-54 § 31.11): recruited among orphans with unclear caste backgrounds. The term *khāna* refers to a title bestowed by rulers in the Indo-Persian context. Therefore one might assume that *khāna khavāsas* were the slaves directly serving the king.

Other dependents and people of "slave-like" status in 19th-century Nepal are:

- *bā̃dhā* (f. *bādhetyānī*): refers to a bondservant. The *Ain* differentiates between two forms of bond servitude: *dṛṣṭibandhaka*, "non-usufructuary pledge", and *bhogabandhaka*, "usufructuary pledge".
- *devadāsī/devadāsa*: a servant attached to a temple.

3.2. *Slaves in the social order*

Dharmaśāstra verses such as YājVal 2.187[26] and NārSm 5.37[27] state that the social order of classes (*varṇa*) imposed legal bounds on slavery. A slave could never be of a higher class or caste than a master, or a master could never enslave a person of a caste higher than his own.

The *Ain*, as mentioned above (section 2.1), does not directly refer to the *varṇa* model when defining the place of slaves within the social order. It classifies people into five caste classes, of which only one caste class is designated as enslavable: *māsinyā matuvālī*, "Enslavable Alcohol-drinkers". It

[25] Chatterjee (2006, 29) mentions a *khavās-pāsbān* (lit. 'intimate servant') of the prince of Krishengarh.

[26] वर्णानामनुलोम्येन दास्यं न प्रतिलोमतः ।

[27] वर्णानां प्रातिलोम्येन दासत्वं न विधीयते ।

is strictly prohibited to enslave members of the caste classes above it in the hierarchy (*tāgādhārī*, "Sacred Thread-wearers" and *namāsinyā matuvālī*, "Non-enslavable Alcohol-drinkers"). The bottom two caste classes may be considered comparable to *śūdras*. The *Ain* lists some thirteen caste or ethnic groups within the Enslavable caste class: Bhoṭe (ethnic groups who speak Tibeto-Burmese languages), Chepāṅ (a highly marginalized, semi-nomadic ethnic group speaking a Tibeto-Burmese language), Danuvāra, Hāyū (a particular Kirā̃ta ethnic group), Darai, Kumāla, Paharī, Ghartī (descendants of freed slaves) from hill regions, also called Pāre/Pāryā Ghartī, Lāpacyā (Lepcā, originally inhabitants of Sikkim), Mājhī, Ṭhokryā, Galahaṭyā and Newar castes from whose members water is unacceptable. The list, however, does not seem to be exhaustive, so that many more caste groups than those listed here may have been enslaved.

Thus, even though the *Ain* does not strictly adhere to the *varṇa*-related terms of enslavement in the Dharmaśāstras, it nevertheless retains the idea that the level of bondage is ultimately based on the Brahmanical caste hierarchy.

3.3. *Enslaving*

The types of slaves defined in the Dharmaśāstras, as mentioned above (section 3.1), may be understood as corresponding to the modes of enslaving a person. In the *Ain*, most of these older ways of enslavement are either prohibited or not recognized. The only legal method of enslavement allowed for in the *Ain* is that of state-enforced punishment of members of Enslavable castes for offences against the caste hierarchy, such as the intentional contamination of high-caste persons or sexual intercourse with upper-caste women, and also for criminal offences such as rape, infanticide or theft. Except for persons born of slave parents or those enslaved before the promulgation of the *Ain*, the newly enslaved could only be owned by the state or state-recognized landlords or landholding institutions (Article 86 of the *Ain*). Despite the state-controlled modes of enslavement sanctioned in the *Ain*, contemporary legal documents reveal other causes of enslavement, such as impoverishment or dealing with the distress of famine (documents E_3446_0032, L_1200_0016), being captured in war or during a rebellion (document DNA_0012_0065) or being donated to a temple (documents PN_0002_0002, K_0579_0063). Moreover, the *Ain* § 81.3 and a document mentioned above (E_3446_0032) describe a ritual of enslaving

a person which called for the master to anoint the slave's head with oil. We have not found an equivalent of such a ritual in Dharmaśāstras.

3.4. *Emancipation*

Dharmaśāstras record several conditions in which a slave could be freed. For example, the *Smṛticandrikā*, following Kātyāyana, states that a female slave and her child are to be freed if the master impregnates her (cf. Davis 2020, 309). A more elaborate discussion of freeing a slave is found in the *Nāradasmṛti*. Four types of slaves could only be freed by the grace of their masters:[28]

- Those born into the master's household
- Those purchased (from a previous owner)
- Those acquired (as a gift)
- Those inherited

A slave could also free himself under the following conditions:

- By saving his master's life in a life-threatening situation. He further becomes eligible to inherit the master's property, just like a son.[29]
- By giving a pair of cows in the case of a slave who had fled famine conditions. He cannot free himself merely through service to the master.[30]
- A slave pledged as security by his master is freed once the loan is repaid. If the master does not repay the loan, the slave is considered to have been sold to the creditor.[31]
- A bondservant is freed either by paying the amount loaned together with interest or by serving the stipulated time period.[32]
- Those who voluntarily accepted enslavement, who were seized in battle or won in gambling are freed by providing a substitute.[33]

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[28] तत्र पूर्वश्चतुर्वर्गो दास्त्वान्न विमुच्यते । प्रसादाद् स्वामिनोऽन्यत्र दास्यमेषां क्रमागतम् ॥ (NārSm 5.27).
[29] यश्चैषां स्वामिनं कश्चिन्मोक्षयेत्प्राणसंशयात् । दासत्वात्स विमुच्यते पुत्रभागं लभेत च ॥ (NārSm 5.28).
[30] अनाकालभृतो दास्यान्मुच्यते गोयुगं ददत् । संभक्षितं यदुर्भिक्षे न तच्छुध्येत कर्मणा ॥ (NārSm 5.29).
[31] आधत्तोऽपि धनं दत्त्वा स्वामि यद्येनमुद्धरेत् । अथोपगमयेदेनं स विक्रीतादनन्तरः ॥ (NārSm 5.30).
[32] दत्त्वा तु सोदयमृणं ऋणी दास्यात्प्रमुच्यते । कृतकालाभ्युपगमात्कृतकोऽपि विमुच्यते ॥ (NārSm 5.31).
[33] तवाहमित्युपगतो युद्धप्राप्तः पणे जितः । प्रतिशीर्षप्रदानेन मुच्यते तुल्यकर्मणा ॥ (NārSm 5.32).

- One who became a slave for sustenance (under non-famine conditions) is freed immediately once he stops receiving food (lit. cooked rice).[34]
- One who became a slave for having married a female slave (of another master) is freed if he leaves her.[35]
- One who was abducted and sold into slavery or who was forcibly enslaved is freed by the king.[36]

When it comes to the *Ain*, it too offers multiple conditions under which a slave could be emancipated. Apart from emancipation by the master of his own free will, which is in line with NārSm 5.27, the conditions for emancipation include:

- When a person of an Enslavable caste is enslaved for a crime punishable merely by a fine, he is freed upon payment of the fine (*Ain*-54 § 35.8). This is similar to the injunction of Nārada that a person forcibly enslaved is freed by the king (NārSm 5.36).
- If a free person takes another master's female slave as a wife and has offspring by her, and if the master intends to sell them, the husband has first claim to the purchase, thereby emancipating them (*Ain*-54 § 82.2). This, in a way, contradicts NārSM 5.34cd since the necessity for a free person to become a slave in order to marry a slave woman of another master is ruled out in the *Ain*.
- When a master takes a female slave of his as a wife, the slave and all children born of her become emancipated. This regulation is directly based on dharmaśāstric principles.[37]
- A slave can be freed by court order for such mishandling on the part of the master as putting human excrement into his mouth or applying chillies to his genitals or eyes (*Ain*-54 § 60.4, 67.4).[38] The notion that a

[34] भक्तस्योपेक्षणात्सद्यो भक्तदासः प्रमुच्यते । (NārSm 5.34ab).
[35] निग्रहाद्वडवायाश्च मुच्यते वडवाभृतः । (NārSm 5.34cd).
[36] चौरापहृतविक्रीता ये च दासीकृता बलात् । राज्ञा मोक्षयितव्यास्ते दासत्वं तेषु नेष्यते ॥ (NārSm 5.36).
[37] See Davis 2020, 309 for a more detailed discussion.
[38] If a master has put human excrement into the mouth of his male or female slave, the master shall not be entitled to get such a slave back. An *adālata, ṭhānā* or *amāla* office shall emancipate such a slave and set him or her free after taking 10 rupees from him or her. The religious judge (*dharmādhikāra*) shall grant such a slave expiation by taking a fee of 2 rupees. If human excrement has been put into the mouth of a male or female bondservant, the credit [of the master] shall be nullified, and the bondservant shall be

master should not be cruel to his slaves may have been derived from Dharmaśāstras. Manu, for example, instructs masters not to lose their temper against slaves.[39]

- Sick slaves are emancipated by court order if the master fails to provide care for them *(Ain*-54 § 85.1).
- If a slave flees to Mugalāna (Indo-Gangetic plains) and then to certain parts of the country such as Morang and Surkhet districts, he becomes a free person (*Ain*-54 § 2.64-65). As the *Ain* mentions, this rule was introduced to increase the population of these districts.

In the *Ain*, freed slaves were assigned to the castes of Gharti (which the *Ain* lists under the "Enslavable Alcohol-drinking" castes) and Khavāsa (which fell among the Non-enslavable castes). The act of manumission of both slaves and bondservants is called *amalekha*, a generic term used in the *Ain* and contemporary legal documents to refer to emancipation. According to the *Ain*, a slave could be freed to different degrees. A slave could be freed from enslavement but may still have remained in servitude (*Ain*-54 § 82.16). The *Ain* and other legal documents use the term *hāḍapāra* for such a conditional emancipation. The term *hāḍa* (lit. "bone") has the connotation of blood kinship (*hāḍanātā*), and *hāḍapāra* may be understood as an act of disassociating a slave from his Enslavable state. Document L_1200_0016 mentions "purifying the bones" (*hāḍa cokho garāī*), while Document E_3446_0032 writes of "purifying the caste" (*jātabhāta śuddha garnu*) of a slave, both nullfiying a slave's enslavable status. When a slave is additionally freed of his obligations to serve a master, he is designated as being *kāmapāra* ("released from labour").[40] Another

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emancipated and be granted expiation by taking a fee of 2 rupees. Ten percent of the credit amount shall be collected from such a bondservant and he shall be set free. If [the master] has put human excrement on other body parts except the mouth, he shall not be held accountable (*Ain*-54 § 60.4, translated in Khatiwoda, Cubelic and Michaels 2021, 379).

[39] छाया स्वा दासवर्गस्तु दुहिता कृपणं परम् । तस्मादेतैरधिक्षिप्तः सहेतासंज्वरः सदा ॥ (MDh 4.185).

[40] When someone emancipates a slave, if a deed [of emancipation] is prepared, citing witnesses along with the particulars that he or she is emancipated from slavery (*hāḍapāra*), but not freed from servitude (*kāmapāra*), in accordance with such a deed [of emancipation] neither the male nor female slave shall be permitted to leave work and go somewhere else, nor shall the owner be permitted to sell [such a slave] and enjoy

term, *jiu-/jyūpāra* is also used in the documents. The *Ain* and contemporary legal documents used the term *jyū* (lit. "body"), to designate slaves and bondservants in depersonalized and commodified terms. Hence, *jyūpāra* may be understood as the de-commodification of slaves and the recognition of them as persons. We cannot trace such a nuanced level of emancipation in the Dharmaśāstras.

4. *Conclusion*

The concept of caste-based treatment within the institution of slavery, as implemented in the *Ain*, originally goes back to Brahmanical normative practice. Both the *Ain* and the Dharmaśāstras proclaim that a slave owes absolute loyalty to and is absolutely dependent on his master. If a slave has sexual intercourse with his master's wife, daughter or the like, irrespective of his caste status, he is sentenced to death. To be sure, this in some cases goes against the dharmaśāstric principle that a Brahmin may not be executed. On the other hand, when a slave commits some crime (ones mainly related to purity and pollution), his caste status is considered when choosing which among various degrees of punishment to inflict.

As Davis (2020, 306) points out, "slaves retain the most basic form of social and legal identity in the Hindu law texts" in that slaves do not seem to lose their *varṇa*. This is true of the *Mulukī Ain*, as slaves do not completely relinquish their former caste identity but rather keep the right to perform certain rituals for their ancestors. Therefore, it contradicts the idea that slavery is a form of social death and alienation from social identity. The *Ain*, though not completely in line with the *varṇa* model, carried on with the concept of varying levels of dependency based on the Brahmanical caste system.

Moreover, the *Ain* protects some basic rights of slaves, freeing them, for example, in the case of a master's mishandling. Thus the *Ain*, in most of the topics it deals with, attempts to bridge the space between normative practices, *deśadharma* and an emerging notion of positive law. It tried to establish an institution of slavery partially based on dharmaśāstric principles, while incorporating customary and Indo-Islamic elements. Although the motto of the *Ain*, as it declares in its preamble, is strongly based on the dharmaśāstric

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the sales proceeds… (*Ain*-54 § 82.16, translated in Khatiwoda, Cubelic and Michaels 2021, 470).

practice that Brahmins, women and cows should not be killed for any reason, it explicitly goes against the *śāstra* by letting subjects choose their profession freely, be it *śubha* or *aśubha*, the latter of which otherwise would have been done only by the *śūdras* or slaves.

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SIMON CUBELIC

The Code of Tribute: Law and Political Economy in the Ain *of 1854*

1. *Introduction*

The idea that law was instrumental for the formation of capitalism is a recurring trope in macro-sociological and macro-historical reasoning on the emergence of Western modernity and its global diffusion. One body of work especially influential in the formulation of this idea has been that of Max Weber, for whom law provided crucial conceptual and institutional foundations for modern occidental capitalism. The distinctive set of juristic conceptions identified by Weber as characteristic of Western legal culture are the modern bureaucratic state, which establishes a universal, well-defined and coherent legal system beneficial for commercial transactions; rule of law; natural law; the separation of the public and private law; individual contractual freedom; universal property rights; the concept of the corporation; and the emergence of a distinctive class of legal experts (that is, jurists) which systematized law based on the principles of formal rationality—elements which up to today resurface in discussions on the reasons for deficient modernization, economic backwardness and the persistence of authoritarianism and despotism.[1] According to Weber, it was especially the absence of a tradition of natural law with its capacity to obliterate the different legal status ascribed to a person on the basis of his or her estate and caste and to serve as a reference point in the systematization of the plural and

[1] For the importance of rational, calculable law, rule of law and private property, see Weber 1923b, IV § 1, 239-40; for the role of private law, see Weber 1922, Part 2, VII § 1, 394; for freedom of contract, see Weber 1922, Part 2, VII § 3, 412-13; for natural law, see Weber 1922, Part 2, VII § 7, 497-98; for business organizations, see Weber 1923b, IV § 2, 241-44; and for jurists, see Weber 1923b, IV § 6, 270. These areas are discussed in more detail in Ford 2019.

fragmented normative frameworks of different groups within a society, which prevented the emergence of a rational type of capitalism in India.[2]

However, law figures not only in historical narratives portraying Western capitalism as a progressive and benign force, but also in critically oriented studies focusing on the forms of inequality and exploitation emerging from it. A recent example of the latter strand of literature is Katharina Pistor's book *The Code of Capital: How the Law Creates Wealth and Inequality* (Pistor 2019). In this genealogical study on the legal foundations of finance capitalism, Pistor focuses on the legal coding techniques which empower the "masters of the code" (Pistor 2019, 20) (that is, jurists and lawyers) to transform almost any object, claim or idea into capital. This act of coding depends on a specific set of "modules", especially contract law, property rights, collateral law, trusts, and corporate and bankruptcy law, which allow important privileges to be transferred to asset holders and guarantee the priority, durability, convertibility and universality of their claims (Pistor 2019, 3). Therefore, for Pistor capitalism is a "market economy in which some assets are placed on legal steroids" (Pistor 2019, 11) and both wealth and inequality emerge from a legal infrastructure which is backed by state power.

The historiography on the relationship between law and economy in early modern and colonial South Asia, however, rather complicates the narrative that the advent of modern Western law inevitably determines the emergence of capitalist social forms.[3] Even though the consolidation of the colonial state in Eastern India in the late 18th century strengthened South Asia's integration into the circuitry of global capitalism, British legal policies were, at least initially, rather driven by the zeal to maintain political authority and taxation rather than to modernize Indian society or systematize local laws (Travers 2007; Wilson 2008). Indian society instead underwent a process of traditionalization through which corporate identities such as caste, sect and kin were strengthened, processes of sedentarization reinforced and neo-feudal agrarian hierarchies created (Bayly 1999; Guha 1982; O'Hanlon 2012; Washbrook 1981). Classical Hindu jurisprudence and traditional codes of purity were restored by state authority and not replaced by secular formal-rational laws (Cubelic 2021;

[2] Regarding the absence of natural law in classical Hindu law, see Weber 1923a, 141-44. The observation is taken from Ford 2017, 161-62.

[3] Fortunately, the relationship between premodern Hindu jurisprudence (*dharmaśāstra*) and the economy for one has received attention in recent times by Donald R. Davis (2017; 2018).

Rocher 1993). Throughout the 19th century and beyond, the economy had to be governed through and not against the institution of the Hindu joint family (Newbigin 2013; Sturman 2012), which led to the rise of various vernacular forms of capitalism. For example, the Indian family firm as a central commercial institution remained deeply rooted in conventions of caste and community, and operated in a normative framework beyond the private-public dichotomy (Birla 2009, 52). Therefore, D. Washbrook comes to the following conclusion concerning the role of law for the economy in colonial India:

> Above the household, colonial (and later national) laws did not seek to fully universalize either capital or the subject/citizen. Under Company rule, a thin legal realm was constructed that gave dominance over social reproduction to contract, debt, and the payment of taxation. But, elsewhere, issues such as the ownership, inheritance, and privileges of property were subsumed under 'personal' laws, specific to different communities and claiming to hark back to an Indian 'custom' that the courts pretended to maintain. In effect, the universal laws of capital were confined to Europeans and the colonial state; 'Indian' capital lived on in a realm of pseudo-tradition. (Washbrook 2020, 146)

Nepal has been rather neglected when it comes to the question how Hindu legal cultures had been shaping economic institutions and practices in the age of the modern capitalist world system. Rather in the spirit of S. Lévi's famous phrase of Nepal as "India in the making" ("l'Inde qui se fait") (Lévi 1905, 28), the law of 19th-century Nepal is often considered as being a window onto the practice of premodern Hindu law and not in relationship to its contemporaneous political economic context. However, Nepal as a non-colonial country (Des Chene 2007) which on the one hand was situated at the fringes of the 19th-century global economy, but on the other hand also came up with an elaborate local and indigenous legal codification project (Khatiwoda, Cubelic, and Michaels 2021, 1-4), provides not only unique empirical material, but also requires the formulation of theoretical approaches differing from those crafted upon the historical experiences of colonial India.

2. *Tributary relations in the* Ain *of 1854*

The formation of Nepal's first legal code, the *Ain* of 1854, which was commissioned by Prime Minister Jaṅga Bahādura Rāṇā (r. 1846-77) and

enacted during the reign of King Surendra Vikrama Śāha (r. 1847-81), is indeed a theoretical puzzle. All the factors usually put forth as prerequisites for projects of legal codification had been absent in Nepal at the time of the *Ain*'s emergence:[4] it can be attributed neither to the agency of a professional corps of jurists nor to the demands of a politically conscious bourgeoisie, nor was it imposed by a colonial authority (Cubelic and Khatiwoda 2017, 68).[5] Nevertheless, the text takes it rightful place among the other specimens of the global age of codification, not only because of its enormous extent and the vast scope of topics which regulate almost every aspect of criminal, civil, public and religious law, but also the degree of legal formalization, that is, the standardization and systematization of substantive and procedural laws, the existence of defined procedures for new legislation and amendments, and a state apparatus legitimizing legal norms and guaranteeing their enforcement.[6]

Even though the foundational conception of the text is clearly based on the model of a modern Western-type legal code, one hardly finds regulations which can be interpreted in the sense of liberal governance, which was increasingly shaping legislative attempts in colonial India at the same time. However, there are a few instances in the *Ain* where, in the areas of property and commercial law, a certain liberal influence can be perceived. For example, the right to private ownership of land could emerge both through a government grant or through labour: if someone cultivated barren land, he would receive part of the land he had made arable as *birtā* (that is, as permanent entitlement to it) (*Ain* 1854 § 2.3); similarly, building a house on the same type of land could come with *birtā* rights to the building and the building plot (*Ain* 1854 §§ 76.1). *Birtā* rights were thus not only a means of legalizing feudal land holdings; they also represented an incentive for increasing productive economic activities

[4] For a summary of the existing approaches to the emergence of legal codification from the late 18th century onward, see Kroppenberg and Linder 2014, 70-79.

[5] The formation of the *Ain* of 1854 is, rather, the outcome of a complex process which requires a multicausal explanation. Besides the already mentioned aspects of state- and nation-building in both their domestic and international dimensions, one has to bear in mind that the newly established Rāṇā order suffered from a legitimacy deficit which the *Ain* helped to fill by adding, in the form of codified law, legalistic legitimacy to the state project and distribution of power under the Rāṇās (Khatiwoda, Cubelic, and Michaels 2021, 21-28).

[6] I follow here the Weberian features of modern-rational law as summarized by Baurmann 1991.

(Khatiwoda, Cubelic, and Michaels 2021, 50). Additionally, the *Ain*—unlike the *varṇa*-system of assigning occupations according to a person's caste status and existing customary practices—explicitly states that one's occupation is not governed by caste membership (*Ain* 1854 § 31.7). Both cases show how socio-economic reform attempts were accommodated within existing vocabularies and institutions. As intriguing as these examples are, they are not representative of the 'spirit' in which major parts of the *Ain* were written. Consequently, the majority of scholars, especially those building on András Höfer's groundbreaking study *The Caste Hierarchy and the State in Nepal* (Höfer 2004), have (rightly) highlighted the *Ain*'s traditionalism and conservatism. Consequently, the *Ain*'s vision of a hierarchical stratified caste society, its consistent implementation of the pure/impure opposition and the propagation of orthodox-Hinduistic values have been identified as the text's most characteristic features; and its *raison d'être* is understood in terms of state- and nation-building: to consolidate the newly-formed multi-ethnic state, formulate a Nepalese identity in opposition to the British, and to legitimate Rāṇā rule in the idiom of traditional values (Höfer 2004, 1-2). Although this line of thought does indeed full justice to the social and political project undertaken by the *Ain*, the relationship to its economic foundation remains undertheorized: the considerable extent of matters relating to property law, land law, labour law and fiscal affairs in the text (Khatiwoda, Cubelic, and Michaels 2021, 9-15), even in chapters more concerned with purity issues, strongly points up the necessity for further research in this direction.

In the following, I will take a few initial steps in exploring the relationship between law and economy in the *Ain*. I will argue that both for the reconstruction of the *Ain*'s implicit economic order and its connection to the overarching socio-political framework, an analysis through the lens of the concept of tribute seems to be a good starting point, in contradistinction to the historiography on law and economy in colonial India, which focuses on 'capital'. My understanding of this concept is informed by the theoretical elaboration of the Byzantinist John Haldon (1993, 2013, 2015). In this view, political formations can be classified as tributary states when socio-political elite groups (irrespective of whether representatives of a centralized state bureaucracy or aristocratic landlords) appropriate agrarian surplus in the form of rent and taxes by means of non-economic coercion. In the context of the present study, I will stretch this definition further by including also fines, confiscations and even forms of unfree labour on the grounds that in the *Ain* they can be

interpreted as modes of surplus appropriation which either serve fiscal ends or come along with privileges attached to feudal landholdings.

However, this should not imply that the *Ain*, in terms of economic governance, simply provides the legal justification for existing coercive practices of resource exaction. Rather, the text can be regarded as an attempt to shape the existing societal tributary relations by defining legitimate modes of surplus appropriation and restricting illegitimate ones, by channeling the (re-)distribution and investment of the agrarian surplus, and by regulating the inherent social antagonisms emerging from the struggle over that surplus, both among different socio-political elite groups and between surplus-producing and surplus-dependent classes (Khatiwoda, Cubelic, and Michaels 2021, 54). Therefore, the *Ain* is not only unique in that it translates the ideology of a stratified caste society into a legal-bureaucratic framework, but also in that it governs tributary economic relations within a highly elaborate system of codified laws. The *Ain*'s vision of a state-regulated flow of resources, however, does not aim at weakening or even pulverizing bonds of kinship, caste and agrarian community; they are, rather, mobilized to generate additional sources of fiscal and feudal income, especially in the form of fines and unfree labour, and to enforce tax and contractual liabilities (see also Rupakheti 2016, 76).

In the following, I would like to describe four "modules" (in the above-mentioned sense of K. Pistor) through which tributary claims are legally coded and which are crucial for the perpetuation and expansion of modes of fiscal and rent extraction: 1) coding of communal land as state property; 2) prioritization of governmental fiscal claims; 3) protection of trust property; 4) expansion of revenue exaction by utilizing codes of purity.

3. *Coding of communal land as state property*

Land and the agrarian surplus derived from it was the foundation of the political-economic system of 19th-century Nepal. It was within the framework of the land-tenure scheme that communities had been integrated into the political system (Forbes 1996, 43). Additionally, the government and military officials, religious elite groups and socio-religious institutions sustained themselves on income derived from land-taxation rights. Therefore, M. C. Regmi aptly characterized the state apparatus in 19th-century Nepal as "centralised agrarian bureaucracy" (Regmi 1976, 225). The fact that land played a central role in maintaining the political, economic and social order becomes

evident right at the beginning of the *Ain* (Art. 1-10), where these issues are dealt with immediately after propounding the basic constitutional principles of the state. The different categories used to code land in legal terms are determined according to the following criteria: (1) the degree to which ownership rights or entitlements to agricultural produce from the land were transferred to its holder, (2) the extent to which the state maintained its control over the appointment of cultivators and agrarian surplus appropriation, (3) the duration for which possessory titles were granted to beneficiaries, and (to a lesser degree) (4) whether they served an extractive or rather a redistributive function. Land was classified into five main categories: *raikara* (state-owned land), *jāgira* (prebendal estates), *birtā* (feudal estates), *guṭhī* (religious or charitable endowments) and *kipaṭa* (communal land tenure) (Khatiwoda, Cubelic, and Michaels 2021, 47). *Kipaṭa* offers especially interesting insight into how local, communal and customary socio-economic practices of ethnic groups were rendered legible by the Gorkhālī state and were brought within the ambit of codified laws.[7] Originally, *kipaṭa* represented a communal land tenure system, one especially prominent in the eastern and western hill regions, which restricted access to land to members of the local ethnic group, such as the Rāi, Limbu, Sunuvāra, Danuvāra or Mājhī (Michaels 2018, 193-94; Regmi 1971, 27). However, in the course of the Gorkhālī conquest, the state steadily tried to bring land being held under this form of tenancy under its control. Headmen of communities with a *kipaṭa* landholding system were selected as representatives to whom property titles on *kipaṭa* land were granted, wherein cultivation rights could be assigned to individual community members (Regmi 1971, 49-50; 1976, 90). Besides its ethnically exclusive character in terms of landownership, the other characteristic feature of *kipaṭa* land is its inalienability (Forbes 1996,

[7] The concept of legibility referred to here is based on the work of James C. Scott who defines the term in the following way: "Legibility is a condition of manipulation. Any substantial state intervention in society—to vaccinate a population, produce goods, mobilize labor, tax people and their property, conduct literacy campaigns, conscript soldiers, enforce sanitation standards, catch criminals, start universal schooling—requires the invention of units that are visible. The units in question might be citizens, villages, trees, fields, houses, or people grouped according to age, depending on the type of intervention. […] The degree of knowledge required would have to be roughly commensurate with the depth of intervention" (Scott 1998, 183).

52).[8] For M. C. Regmi, *raikara* and *kipaṭa* represent two fundamentally opposed systems of land tenure in terms of the conception of the source of rights to land use: The former is based on statutory rights derived from a grant from the state, while the latter is grounded on customary rights predating the political unification (Regmi 1976, 19).[9] In the literature, the *kipaṭa* system is often understood as a historical compromise which combined the formal assertion of the proprietary authority of the king with local autonomy and the respect for regional customs (Burghart 1984, 109). Overall, the regulations in the *Ain* concerning *kipaṭa* land support this characterization of *kipaṭa* as a point where local and national legal and administrative systems intersect (Forbes 1996, 39), as the following section from Article 2 ("On Land") shows:[10]

> If someone advances a loan to subjects holding *kipaṭa* land, taking their *kipaṭa* as usufructuary or non-usufructuary collateral under a written agreement, and if the debtor (*tyo rūpaiyā khānyā*) flees or dies and the land is re-alloted by an *amālī*, *dvāre*, *tharī*, *mijhāra* or *gauruṅ* official, being transferred to another subject, and if that [subject] enjoys [the land,] paying the applicable taxes and levies, but then the creditor comes to seize that land, claiming that it was transferred to him under the written agreement, he shall not receive it. The debtor and his offspring, if they are able to, shall be made to pay the debt which [the creditor] advanced after accepting the *kipaṭa* as a pledge. If they are not able to pay, they shall be made to execute a loan deed without security to the creditor. The *kipaṭa* shall be re-allotted and given to a subject who [can] pay the applicable taxes and cultivate the land (*ḍoko-boko calāunu*).[11] (*Ain* 1854 § 2.23)[12]

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[8] *Raikara* and *kipaṭa* land differed, among other things, in terms of taxation. Whereas taxes on *raikara* land were assessed on the basis of the area of land and size of the homestead, on *kipaṭa* land taxes were assessed on homesteads only, with rice lands remaining untaxed (Regmi 1976, 91).

[9] See also Stiller 2017, 17.

[10] All translations from the *Ain* of 1854 are reproduced from Khatiwoda, Cubelic, and Michaels 2021.

[11] Lit. *ḍoko-boko calāunu* means "to carry a bamboo basket", an activity typical of a farmer or slave. M. C. Regmi understands this phrase as a "term used to denote the labor services and payments in cash or in kind due on kipat lands" (Regmi 1978, 857).

[12] *kasaile kipaṭiyā parjāharūlāi rūpaiyā kārjā di usko kipaṭa jagā bhoga dṛṣṭi baṃdhaka lekhāī liyāko cha. pachi tyo rūpaiyā khānyā bhāgī mari gayo ra jagā amāli dvāryā thari mijhāra gauruṃharūle pajanī gari arkā raitilāī di arkāle lāgyāko tirobharo gari khāyāko rahecha. tyo jagā hāmīlāi lekhīdiyāko cha bhanī sāhule jagā gājana āyā pāudainan. kipaṭa jagā dhito li rūpaiyā karjā diyāko thailī asāmī ra asāmīkā saṃtānale*

On the one hand, the reallotment of the land was in the hands of government officials or state-recognized local nobles, and the cultivators were supposed to pay taxes and offer labour services to the government, both indicating that the state formally asserted its ownership of the land.[13] On the other hand, the posts of *tharī*, *mijhāra* and *gauruṅ*[14] indicate that the process of selecting a suitable cultivator remained in the hands of local elites and that the protection of the *kipaṭa* land against claims of private creditors kept the communal possession intact. However, the *Ain* also includes legal provisions which reflect a subtle process of recoding of the *kipaṭa* concept. Despite the opposed ideological foundations which the *raikara* and *kipaṭa* tenure systems originally were built upon, there are several sections in the *Ain* which suggest that both concepts are also understood as related. In *Ain* 1854 § 3.5, for example, similar to the above-quoted provision in *Ain* 1854 § 2.23, mortgages of *raikara* and *kipaṭa* land are declared null and void and creditors lose their claims:

> Any irrigated paddy field or unirrigated slopes [being given in tenure] as state-owned (*raikara*) or *kipaṭa* land shall not be accepted as a deposit. An *adālata*, *ṭhānā* or *amāla* shall give [such land] to the person who cultivates it for use. The complaint of the person claiming that it belongs to him shall not be heard once he has relinquished the land. (*Ain* 1854 § 3.5)[15]

Here, the immediate juxtaposition of the two terms indicate, rather, that both are understood as a conceptual unity, which implies that also in the case of *kipaṭa* creditor claims are rejected based on the principle of sovereign ownership and not because of communal collective ownership. The precedence accorded to the

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rūpaiyā tiryā tirāīdinu. tirna sakena bhanyā usaikā nāuṃmā kapāli tamasuka garāīdinu. kipaṭa jagā pajanī gari lāgyāko rairakama bujhāī ḍoko boko calāunyā raitilāī dinu (*Ain* 1854 § 2.23).

[13] It was especially the last three officials, clearly members local elites, who were co-opted by the state to administer land administration and collect taxes.

[14] *Tharī* denotes a clan elder or headman functioning as a tax collector; *mijhāra*, the headman of an ethnic group of low caste status responsible for the collection of levies, fines or escheats from the families falling under his jurisdiction; *gauruṅ*, a village headman.

[15] *raikara kipaṭakā kheta pākhāko nāso lina pāudaina. adālata ṭhānā amālabāṭa jasale kamāyāko cha usailāī behorāī dinu. choḍī gayāpachi mero ho bhaṃnyāko phirāda nasunnu* (*Ain* 1854 § 3.5).

former becomes more visible in the following section which prescribes the punishment for a holder of *kipaṭa* land for bringing *raikara* under his possession by illegal methods:

> If a *kipaṭa* holder enjoys *kipaṭa* land of his own and steals or encroaches upon state-owned (*raikara*) land, bringing it under his *kipaṭa*, as much of his *kipaṭa* shall be turned into state-owned land as the state-owned (*raikara*) land he has encroached upon. (*Ain* 1854 § 2.27)[16]

The violation of government ownership committed by one community member entails the punishment of the whole community since, as punishment, *kipaṭa* land the size of the encroached *raikara* land is permanently converted into *raikara* land, and thus no longer available exclusively to community members. The convertibility of *kipaṭa* into *raikara* land is also observable in the following section:

> If it is ascertained that someone who holds *birtā*, *bekha*, *chāpa*, *mānācāmala*, *marauṭa*, *phikadāra*, *jiunī* or *peṭīyakharca* land oversteps his land and encroaches upon state-owned or *kipaṭa* land, the government shall restore the state-owned land (*raikara*) so encroached upon to being state-owned land. Whatever was encroached upon shall be measured and that much shall be deducted from his *birtā*, the [relevant] border pillars shall be dug up (*ukhelnu*) [and moved accordingly,] and [the seized land] shall be converted into state-owned land. If his *birtā* is less than the state-owned land he encroached upon, [the difference] shall be made up from other plots of land if he has land elsewhere. If he has no land elsewhere, whatever [*birtā*] land he has shall be taken, [but] there will be no [further] penalty. If [the state-owned land] was encroached upon during the time his father, grandfather or elder brothers [had say over matters], and he or his offspring did not encroach upon it themselves, whatever was encroached upon shall be deducted [from the *birtā*], and he shall be fined 1 rupee. (*Ain* 1854 § 2.29)[17]

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[16] *kipaṭavālāko panī āphanā kipaṭa āphaile calana gari raikara jagā kipaṭabhītra hālī coryo cāpyo bhane jati raikara cāpyāko cha uti jamīnabamojima usko kīpaṭa pani raikarai garāīdinu* (*Ain* 1854 § 2.27).

[17] *birtā bekha chāpa mānācāvala phigaṭāra marauṭa jyūnī peṭiyākharcakā jagābāṭa jagāvālāle aphule raikara kipaṭa jagā cāpī corī līyāko ṭhaharyo bhanyā coryā bāpata tyo jagā sarkārabāṭa raikara cāpyāko raikara garāī cāpyākā jagā jatī usko birtāsmeta kilā ukhelī nāpabamojima kaṭṭā garī raikara garāīdinu. cāpyākā raikara jati usko birtāle pugena bhanyā anta usko jagā rahecha bhanyā usai jagābāta bharnā linu. anta*

In this section we not only find further evidence that *raikara* and *kipaṭa* are understood as similar concepts to which identical rules apply, the silent omission of the term *kipaṭa* after its first occurrence throughout the remaining passage implies that *raikara* here is used as the generic term which subsumes *kipaṭa*. Noteworthy is that according to this section, the illegally appropriated land, irrespective of whether it is *raikara* or *kipaṭa* land, is restituted in the form of *raikara* land, which implies that for former *kipaṭa* land the exclusive communal possessory claims are suspended and the notion of state ownership is already inherent in the category of *kipaṭa*. As in *Ain* 1854 § 2.27, in the case of a property offence *kipaṭa* land is converted into *raikara* land.

To sum up, the *Ain* does not only record the existing legal and administrative practices concerning *kipaṭa* tenure, but the act of codification itself introduces substantial modifications to the very concept. By correlating the two terms or subsuming the term *kipaṭa* under *raikara*, the principle of sovereign ownership is strengthened at the expense of communal possession. This reflects a subtle process of recoding *kipaṭa* land as government property. Additionally, the law of property offences is employed to facilitate the conversion of *kipaṭa* into *raikara* land. The *Ain* thereby foreshadows later government initiatives, starting from the second half of the 19th century, aimed at undermining the *kipaṭa* system. Such measures included the increasing insistence on documents to legitimize *kipaṭa* claims, appointment of village headmen who in return for the posts they were awarded implemented the conversion of *kipaṭa* into *raikara* land and, finally, at the government's initiative, the settlement of ethnic groups from Hindu castes in areas where the *kipaṭa* system prevailed (Forbes 1996, 70; Michaels 2018, 173).

4. *Prioritization of governmental fiscal claims*

The *Ain* does not only consolidate sovereign ownership over land and favours the conversion of communal landholdings into state-owned land but also guarantees, through the formulation of priority rights, that in cases of competing claims on an asset, the government's claim supersedes all others. This is

jagā rahenacha bhanyā bhayājati jagā linu. daṃḍa pardaina. bābu bājyā dājyūkā pālāmā micyāko rahecha bhāī saṃtānale micyāko rahenacha bhanyā raikara micyā jati jagā kaṭṭā gari li 1 rūpaiyā daṃḍa garnu (*Ain* 1854 § 2.29).

especially manifest in cases where loans are to be recovered from government officials or contractors. The first example concerns holders of *jāgira,* a temporary assignment of revenue for specified plots as an emolument for state service, according to which the state temporarily yielded land-taxation rights to office holders in lieu of salaries for the duration of their tenure. The holder of such a title was called a *jāgiradāra* and was allowed to sell his rent collection rights, put them up as collateral in loan agreements (*Ain* 1854 §§ 5.1 and 5.5) or exchange them with another *jāgiradāra* (Khatiwoda, Cubelic, and Michaels 2021, 48-49). Nevertheless, the *Ain* also puts restrictions on the commercialization of these rights. For example, a *jāgiradāra*'s private loans were not allowed to be recovered from the rent assigned to him:

> No one shall seize the standing crops of a *jāgira* holder with the object of recovering a long- or short-term non-governmental loan, except [for such loans made to allow payment of] the *darśanabheṭa* to the king or a government loan, loans taken from government officials, outstanding sums from government tax collection, fines or court victory fees due by him to the government—[the collection of which is taken] in [the form of] the *jāgira* holder's crops. A clerk (*kārindā*) who makes a *jāgira* holder pay his non-governmental debt by seizing a *jāgira* holder's standing crops, even if [this *jāgira* holder] is obliged to [re]pay, shall be ordered to go find the person to whom he gave the paid amount and bring it back, and [so] return the *jāgira* holder's standing crops, and [an additional] 10 percent shall be collected [from that amount] as a court fee. The clerk shall pay damages equal to the amount in question. If he does not pay the fined amount, he shall, in accordance with the *Ain*, be imprisoned at the rate of 1 month for every 5 rupees. (*Ain* 1854 § 14.1)[18]

Whereas he is fully liable to have the revenue generated from his *jāgira* tapped for all sorts of financial obligations he might have with the government or government officials (such as loans, fees or fines), private loans are not

[18] *jāgīradārakā bālīmā sarkārako darśanabheṭa karjā tainātha pāunyāharūbāta liyāko sāpaṭṭī sarkāriyā rakam tahasīlako bākī āphulāī lāgyāko sarkāramā āunyā daṃḍa jitāuribāheka arū bāhiḍā sāhukā karjā sāpaṭṭimā jāgīradārako bāli thuni kasaile natirāunu bāhiḍā sāhu bābatmā jāgirako bālī thuni tirāunyā kāriṃḍālāi usale tirnu parnyai rūpaiñā rahechan bhanyā panī tirāyākā rūpaiyā jasalāī diyāko ho. usaisita khojī le bhanī jāgiradārako bālī kāriṃdābāṭa bharāī dasauda linu. tirāī dinyā kariṃdālāī bigābamojim daṃḍa garnu. rūpaiyā natiryā mainhākā 5 rūpaiyākā dardale kaida garnu* (*Ain* 1854 § 14.1).

recoverable from this source of income. This was probably to make sure on the one hand that government claims were always satisfied, and on the other that the *jāgiradāra* still had the financial means to sustain himself at his disposal for carrying out the duties assigned to him.

Furthermore, arrears due to the government top the list of cases when the defaulting debtor's joint family was unconditionally liable for restitution with the entire family estate, which underlines the special enforceability of government claims:

> If an amount owed a creditor needs to be recovered through an *adālata*, *ṭhānā* or *amāla* office in the following 7 cases: arrears due to the government, arrears from a revenue collection monopoly (*rakama*), arrears from a *jāgira* holder's standing crops, arrears [resulting] from expending the share of standing crops due a landlord, restitution for burning down another's house, restitution for thievery, then the share [of property of the offender's] brothers and sons who live unseparated in the same house, the paternal property being as yet unpartitioned, shall not be set aside. Restitution shall be made from the entire property of all [unseparated brothers and sons of the offender]." (*Ain* 1854 § 16.1)[19]

Priority rights for the government do not only prevail in the law of obligations, but also in criminal cases when the private property of an offender was seized by the state as punishment:

> If in a written loan agreement someone assigns *birtā* land of his to a creditor as non-usufructuary or usufructuary collateral and the government seizes it, or else land written into a loan agreement as collateral falls to the government because one of them, either the creditor or debtor, has all his property confiscated, the creditor shall not be allowed to collect [the loan] by laying hold of the debtor's offspring. If the land is released or [other] land is received in exchange [for it], the creditor shall [be allowed to] recover [his loan] from this land. If anyone

[19] *adālata ṭhānā amālabāṭa sarkāriyā bāki rakamko bāki jāgīradārakā bālīko bāki ṭalsiṃboṭiko bālī māsyāko bāki arkāko ghara polīdiyāko bigo coriko bigo sāhuko thailī bharāunu pardā eti 7 kalammā aṃśabaṃdā* [corr.*aṃśabaṃḍā*] *gari nachuṭiyākā ekāghara basyākā bhāī chorāko aṃsa para sardaina. sabaikā jmādhanabāta asula gari bharnā garāīdinu* (*Ain* 1854 § 16.1).

> comes to file a case in such a matter, he shall be fined 20 rupees and let go. (*Ain* 1854 § 20.1)[20]

In such cases, the implementation of the criminal punishment was given priority over any claims on the convict's property resulting from private contracts.

5. *Protection of feudal property through endowment law*

However, the *Ain* does not only expand and safeguard government claims on revenue, but it also provides several powerful instruments for feudal landlords to render their rights durable for their descendants and protect their property from seizure by the government or private creditors.[21] In this regard, the law on endowments is of special relevance. In the *Ain*, the Article "On Guṭhī Endowments" is one of the beginning chapters, which underlines the importance attributed to *guṭhīs* for the social, religious, political and economic order. The law on endowments in the *Ain* reflects a complex set of governmental and ideological strategies. Since the promotion of religious endowments is considered a central feature of dharmic rule, the special, quasi-constitutional, protection given to *guṭhīs* in the *Ain* adds religious legitimacy to the newly established Rāṇā rule and establishes the special historical status claimed for Nepal as the last remaining Hindu kingdom, especially in contrast to colonial India. It also aimed at engaging subjects by the combined promise of soteriological reward, material compensation and social prestige, not only to maintain the socio-religious fabric on which the state rested upon, but also to allocate resources for public infrastructure, charitable purposes and economic development (Khatiwoda, Cubelic, and Michaels 2021, 51-53). In addition to that, it also provided feudal classes with a legal framework for perpetuating and securing their wealth. This was achieved by establishing trusts (*guṭhī*) through the dedication of *birtā* land to which they enjoyed ownership rights. Through this process, landlords became trustees (*guṭhīyāra*) of the *guṭhī*, and so obliged

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[20] *sāhulāī āphnu birtā dṛṣṭī bhoga baṃdhaka lekhidiyāko jagā sarkārabāṭa japhata bhayo vā sāhu asāmīmā eka janāko sarvasva bhai tamasukamā lekhīyāko jagā sarkāra lāgyāko rahecha bhanyā sāhule asāmīkā saṃtānalāī samāī lina pāudainan. jagā phukyo vā saṭṭāpaṭṭā pāyo bhanyā sāhule tesai jagābāṭa linu. estā kurāko nālisa garna āyo bhanyā 20 rūpaiyā daṃḍa gari li choḍidinu* (*Ain* 1854 § 20.1).

[21] See also Regmi 1976, 53-55.

to use the endowment fund to carry out the mission of the *guṭhī* and to maintain its facilities. In return, they were entitled to the enjoyment of the surplus of the income from the *guṭhī* land:

> If somebody constructs a wayside public shelter with or without water facilities, fountain, plank bridge, step fountain, temple or the like, and [to support it] establishes a *guṭhī* with *birtā* land of his own, but if later [an endowed structure] collapses or is damaged, and his descendants are unable to repair it, and someone else comes and declares that he will renovate or rebuild it on the same land, he shall be allowed to do so. If someone endows a *guṭhī* with *birtā* land he himself has bought, he who rebuilds [an endowed structure] shall not take possession [of the land]. Irrespective of whether the descendants of him whose ancestors established the *guṭhī* are able to renovate it or not, they shall be allowed to uphold the tradition (*dharma*) of their ancestors and enjoy the surplus (*śeṣa*) of the *guṭhī* land, but they shall not be allowed to sell [the *guṭhī* land]. [If it is sold], the seller shall be fined 1 year's production of standing crops. If the amount [fined] is not paid, he shall be imprisoned for 1 month for every 5 rupees [of the crops' value]. (*Ain* 1854 § 1.3)[22]

As the section also indicates, trusteeship for a *guṭhī* and the right to the surplus generated from its revenue was inheritable, even if the trustees were not able or willing to maintain its facilities. The only condition for the possession of the surplus was that the customary obligations of the *guṭhī* were continued (*Ain* 1854 § 1.10). The establishment of such "family trusts" by converting *birtā* into *guṭhī* land was possible because the privileges attached to both types of land rights were almost identical. Except for certain heinous criminal offences which had to be forwarded to a state court (*Ain* 1854 § 36.6), both *birtā* holders and *guṭhīyāra*s were granted considerable judicial authority over their land (*Ain* 1854 § 45.1) and were entitled to collect court fees or fines resulting from litigation (*Ain* 1854 § 46.7). Even offenders punished by enslavement became

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[22] *kasaile pāṭi pauvā sāghu dhārā devālayagaihra banāī āphnu birtā guṭhi rākhyo pachi bhatkyo bigryo ra uskā saṃtānle banāuna sakena bhanyā tesa jagāmā jirṇoddhāra gari vā nañẽ banāuchu bhaṃna āunyālāī banāuna dinu. āphule birtā kini rākhyākā guṭhī pachi banāunyāle pāudaina. jaskā purkhāle guṭhī rākhyāko ho uskā saṃtānle jirṇoddhāra garna sakyā panī nasakyā pani āphanā purkhāko dharma ṭhāmī guṭhikā jagāko seṣa rahyāko khāna pāuchana. becana pāudainana. becanyālāī tesai jagākā 1 sālakā ubjanibamojima daṇḍa garnu rūpaiyẽ natiryā mainhākā 5 rūpaiyākā darle kaida garnu* (*Ain* 1854 § 1.3).

property of the *birtā* holder or the *guṭhī* (*Ain* 1854 § 86.2). Additionally, on both categories of land compulsory labour services from tenants were permissive as long as they were contractually agreed upon (*Ain* 1854 § 11.1). Despite these similarities of the legal status between *guṭhī* and *birtā*, there were additional privileges for *guṭhī*s which made this legal form attractive for familial interests. Since the ownership rights were vested with the trust and not the trustees, the *guṭhī* was protected from almost any claims resulting from private contracts. Selling *guṭhī* land or putting it up as collateral in a loan contract was considered null and void, as the quotes from the following three sections show:

> If a descendant of a *guṭhī* member sells [land] on the *guṭhī* established by his ancestor, and if a creditor buys it, and if it is confirmed through an examination of the *guṭhī*'s deed of gift, stone inscription or *sanada* that the land is its possession, the [act of] selling is invalid, and the [act of] buying also void. [The land] shall be restored to the *guṭhī* for it to carry out the religious purpose assigned to it. (*Ain* 1854 § 1.17)[23]

> If they (i.e., *guṭhī* members) sell or mortgage [land endowed to the *guṭhī* or *sadāvarta*], the transaction shall be nullified. Even a creditor shall not enjoy possessory rights on such land. (*Ain* 1854 § 1.10)[24]

> If a debtor repays a creditor or puts up collateral with land belonging to a *guṭhī*, having under false pretences stated that the *guṭhī* land is *birtā* land, he shall not be allowed to repay the creditor by transferring the *guṭhī* land. The *guṭhī* land shall be restored. Such a deed shall be torn up. (*Ain* 1854 § 1.20)[25]

These legal provisions could be used by wealthy families to prevent individual family members or descendants from squandering family wealth or the family estate from becoming fragmented through family feuds. In return for the

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[23] *kasaikā purkhāle rākhyākā guṭhimā guṭhiyārakā saṃtānale becyo ra kohī sāhule kinyo bhanyā tesa guṭhīkā dānapatra silāpatra sanada heri guṭhi ṭhaharyo bhanyā tesale becyāko badara. kiṃnyāko pani bīsahī jaunā kāmako guṭhi ho uhī dharma calāuna thāmīṃcha* (*Ain* 1854 § 1.17).

[24] […] *becyā bādhā rākhyā kīṃnyā becanyā dubaiko kaccā huṃcha. estā jagāmā sāhuko panī lāgdhāg lāgdaina* […] (*Ain* 1854 § 1.10).

[25] *asāmīle guṭhīko jagā birtā ho bhanī ḍhāṭī sāhu tiryo. baṃdhaka rākhyo bhanyā guṭhīko jagā di sāhu tirna hudaina. guṭhiko thāmīdinu. testā tamasuka cyātidinu* […] (*Ain* 1854 § 1.20).

diminished possessory rights of the heirs, *guṭhī*s guaranteed maintenance entitlements for the wayward family members:

> He whose ancestors—loving the Lord and loving the world, and having performed a *saṃkalpa* with barley, sesame and *kuśa* grass, and having had a signed *sanada* made—established a *guṭhī* in order to [generate] funds for a Śiva temple, *dharmaśālā*, wayside public shelter with or without water facilities, a road bridge, *ghāṭa*, step fountain or the like, or established a *sadāvarta* for regular or occasional worship or a *guṭhī* for *śrāddha*, [but] whose descendants are fools, gamblers, addicts, unskilled or unemployed and unable to earn their livelihoods, [the latter] and their families shall be entitled to receive [each] one *mānā* [of food] to eat and one piece of worn-out clothing to wear from the *guṭhī* or *sadāvarta* established by their father or forefathers. (*Ain* 1854 § 1.10)[26]

The government for its part was not entitled to satisfy its claims from a defaulting debtor from *guṭhī* land he or his ancestors had endowed:

> Even if there is an outstanding amount to be paid to the government or a private [party to a] transaction, the *guṭhī* land shall not be seized. (*Ain* 1854 § 1.17)[27]

In the case of capital crimes such as murder and treason, the culprit's endowment was treated sacrosanct and not available for confiscation or expropriation.[28] Any attempt of seizure from the side of the state is framed as a violation of both sacred and secular laws:

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[26] *jaskā bābu barājyūle iśvara priti gari duniyā̃ prīti gari sivālaya dharmaśālā pāṭi pauvā pula ghāṭa dhārāgaihra jagerānimitta ra nītyanaimītīka pujā sadāvarta śrāddha guṭhī rākhi jau tila kusa li saṃkalpa gari sahi sanada gari jasale rākhyāko cha. uskā santāna kubuddhikā juvāryā nasābāda beilamī berojagāra bhai kamāī khāna sāmartha nabhayākāle āphnā bābu barājyūle rākhyākā guṭhi sadāvartamā testākā jāhānasametale 1 mānu khānu ra eka lattā lāuna pāuchan* […] (*Ain* 1854 § 1.10).

[27] […] *sarkārako kehī rakaṃkalaṃko bā̃kī cha bhanyā pani duniyāko kārobāra cha bhanyā panī guṭhikā jagā samāuna hudaina* [...] (*Ain* 1854 § 1.17).

[28] The king or prime minister were threatened with drastic soteriological consequences for violating *guṭhī* property: "The unwise king or evil-minded counsellor who takes away someone else's *guṭhī* or *sadāvarta* will bolt closed his [own] way to heaven, will open the way leading to hell, will go begging, will become the laughing stock of the world, will not be capable of snatching any merit from someone who performs good deeds (*dharma*) and will sink into sin" (*Ain* 1854 § 1.1) ([…] *arkāko guṭhī sadāvarta harnyā anaviveki rājā kumaṃtrī jo hun svarga jānyā bāṭāko tālacā lāunyā narka jānyā*

> If someone performs a *saṃkalpa* to endow [land] for a *sadāvarta* [to feed] poor people and mendicants, or to establish a *guṭhī* to perform regular, occasional or annual worship, and in the case where he who establishes [the *sadāvarta* or *guṭhī*] or his descendants commit a heinous crime (*rājakhata*) or take someone's life, [the culprit] shall be executed if [the punishment] specified is execution, or his property shall be confiscated if [the punishment] specified is confiscation, or if he commits adultery, punishment shall be imposed on him in accordance with the *Ain*, [but] no one shall seize such a *guṭhī*. The customary observances (*dharma*) shall be carried out according to earlier practice, and [no one] shall seize the *guṭhī*. Whoever seizes [a *guṭhī*] by a *mohora* or *daskhata* shall incur the sin [of doing so]; he shall be one who has breached the whole *Ain*—has overstepped the *Ain*. (*Ain* 1854 § 1.2)[29]

It would be misleading to argue that the strong legal status assigned to *guṭhī* property was mainly designed to perpetuate the wealth of feudal landowners. Given the major role *guṭhī*s played in the country's ritual life and the manifold functions for charity and public infrastructure it had, protecting the *guṭhī* system was indeed vital for the maintenance of the socio-religious order. However, the regulations seem to have been (at least partly) drafted to empower landowners to add durability to their property rights by setting up trusts which only nominally served religious or charitable purposes. The validity of this objective was eventually also explicitly recognized in the *Ain* of 1886 (Regmi 1976, 55).

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bāṭo kholanyā lokako hāsya garāī māganya dharma garnyāko puṇyaharaṇa garna nasaknyā āphu pāpanyā [corr. *pāpam*] *ḍubanyā hun.*).

[29] *gariba gurbā phakira phakeḍalāī sadāvarta ra devadevatākā nityanaimittika varṣabaṃdhana pujālāī jasale guṭhi saṃkalpa gari rākhyāko cha rākhanyā havas rākhanyākā saṃtānale havas rājakhata gari arkāko jyāna māryāko khata lāgos tāpanī jyāna linyā bihorāmā jyāna linu. dhanako sajāya hunyā bihorā bhayā dhana linu. karaṇiko khata garyāmā ainabamojima sajāya garnu. yasto guṭhi kasaile naharnu jo aghidekhi cali āyāko cha sobamojima dharma calāunu. guṭhī harana nagarnu. jaskā mohora daskhatale harlā tyo pāpa usailāī laglā tyo sārā aina khalala gari aina nāghanya ho* (*Ain* 1854 § 1.2).

6. *Expansion of revenue exaction by utilizing codes of purity*

The last legal module to be dealt with is caste law. In line with the observation of Sumit Guha (2013, 130) that early modern Indic polities instrumentalized orthodox social regulations, especially with regard to caste, for political and fiscal ends, the *Ain* is pervaded by regulations in which, by means of penal law, social hierarchies are exploited to increase state revenue or, to a lesser extent, strengthen feudal privileges (see also Rupakheti 2016, 76). Whereas the examples for the previous modules mainly dealt with processes of legal coding of 'material' objects such as land or the revenue derived from it, this module pertains to rather immaterial, metaphysical concepts.[30] Even as land law is used to impose sovereign ownership on customary land rights, caste law becomes the vehicle through which (caste-specific collective and individual) purity and pollution are transformed into potentially revenue yielding assets for political elites.

Since the interplay between caste regulations and the penal regime, including monetary punishments, has been reconstructed meticulously and exhaustively by András Höfer, especially for the areas of commensality and illicit sexual relations such as adultery, incest and sodomy (Höfer 2004, 17-59), in the following two examples shall suffice.[31] However, whereas for Höfer the formulation of a national caste hierarchy in the *Ain* serves predominantly as a tool for the integration of ethnic and cultural diversity, consolidation of state power and assertion of cultural distinctness (Höfer 2004, 197-98)—that is, for nation- and state-building—the examples given here are meant to highlight its politic-economical dimension, without denying the importance of the aspects Höfer emphasized.

The distinction between Enslavable (*māsinyā*) and Non-enslavable (*namāsinya*) castes is a clear example of how caste status in the *Ain* is directed to practices of exploitation, namely enslavement as a form of state-imposed punishment that applied only to persons from lower castes. Moreover, ownership of the enslaved person was tied to ownership of the land where the crime (mostly sexual or purity-related offences) was committed; as a result,

[30] In Hinduism, concepts such as pollution, merit, or *karma* are understood as having substantial nature (see, e. g. Michaels 2003, 215); therefore, one should refrain from drawing a rigid material-immaterial dichotomy.

[31] For an overview of the caste system in the *Ain*, its ideological foundation and legal implications, see also Khatiwoda, Cubelic, and Michaels 2021, 29-37.

slave ownership represented a privilege of the landholding classes and the government (Cubelic, Khatiwoda, and Michaels 2022, 194; Rupakheti 2017, 183).[32] For crimes that took place on land under state control, the slaves were managed by the local *amālī* (a revenue functionary with judicial powers):

> If a man or a woman who belongs to an Enslavable caste flees to another jurisdiction and settles there after it becomes known that he or she has committed a crime that mandates enslavement, and if a confession had [earlier] been obtained, then [the *amālī* officer] of the jurisdiction from which he or she fled after committing the crime—the *amālī* that drew up the confession—shall take him or her into his possession. (*Ain* 1854 § 86.1)[33]

But if it was committed on feudal estates such as *birtā* or *guṭhī* land, the slaves came into the possession of the landlords or trustees:

> If [a man and a woman who live as tenants] on *guṭhī*, *birtābitalapa*, *bekha*, *mānācāmala*, *phikadāra*, *marauṭa* or *chāpa* land commit a [sexual] offence that mandates enslavement, and the *cāka* and *cakuī*[34] flee from that place and settle on *guṭhī* or *birtābitalapa* land or the like, the owner of that land to which they belonged [before they fled] shall take them into possession.[35] (*Ain* 1854 § 86.2)[36]

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[32] A recent publication by S. Rupakheti (2022) on the codification of slavery-related laws in the *Ain* of 1854 only became available when the editorial work on this article was already completed and could, therefore, not been considered.

[33] *māsinyā jātakā lognyā svāsni mānis kasaile māsinyā khatabāta garyāko kuro jāhera bhai bhāgī arū ambalmā gai basyākā rahyāchan bhanyā kāyalnāmā bhayāko bhayā jaunā ambalbāṭa birāva gari bhāgyākā chan usai jagākā kāyalnāmā lekhāunyā amālile pāucha* […] (*Ain* 1854 § 86.1).

[34] *Cākacakuī* is often understood as "adultery" or a fine applicable for this offence (see, for example, Regmi 1982, 135). This passage by contrast suggests that the terms *cāka* and *cakuī* refer to a low-caste man and woman respectively who are found guilty of a sexual offence.

[35] Khatiwoda, Cubelic, and Michaels (2021, 478) reads "shall have custody" for *pāuchan*. Here, however, the notion of actual possession is being expressed. The translation is accordingly modified.

[36] *guṭhi birtābitalaba bekha mānācāval phigaḍhāra marauṭ chāpa jagākā māsīnya khatmā paryākā cākacakui usa thāubāta bhāgī gai guṭhi birtābitalabagaihra jagāmā basyākā rahyāchan bhanyā jauna jagākā hun usai jagākā dhanile pāuchan* […] (*Ain* 1854 § 86.2).

However, caste was not only a means of gaining control over labour resources; monetary punishments imposed on its basis were also a handsome revenue source for the government. Many purity-related offences were treated as criminal offences rather than civil offences, allowing the state to impose heavy fines on offenders and empower the religious judge (*dharmādhikarin*) to collect expiation fees from the victim.[37] Article 62 ("On Spitting"), which regulates the punishment for spitting as a mode of transferring bodily impurity onto another person—though short—encapsulates the basic methods by which codes of purity and pollution are mobilized for generating state income. Since only accidental spitting is hard to control, especially in the context of eating or speaking, the regulations are not only formulated for ideological reasons (to create firm social boundaries in intercaste interactions), but also to criminalize hard-to-avoid practices of everyday social life, thereby rendering them finable.[38] This applies especially to the following section, which even subjects the landing of saliva on a fellow member of a commensal group to punishment:

> If someone spits on the mouth of a fellow caste member with whom he may eat rice together (*jāta bhāta milnu*), he shall be fined 5 rupees, and the *dharmādhikāra* shall grant [the victim] expiation by taking [a fee] of 4 *ānās* [from him]. If he spits on body parts other than the mouth, he shall be fined 8 *ānās*, and the person he spit on shall purify himself by taking a bath. (*Ain* 1854 § 62.3)[39]

In all other cases where the caste status of offender and victim differs, the principle of legal relativism comes into effect, which means that the offence is considered all the more severe the higher the caste status of the victim is in comparison to that of the offender. Consequently, the amount of the fine imposed varies according to the caste status of offender and victim. Another distinction is made depending on whether the saliva touches the victim's mouth

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[37] On the *dharmādhikarin* and the interplay of expiation and punishment, see Michaels 2005.

[38] Only for Brahmins does unintentional spitting remain free from punishment (*Ain* 1854 § 62.1).

[39] *āphnā jāta bhāta mildā kasaile mukhabhitra parnyā gari thukyo bhanyā 5 rūpaiyā daṃḍa garnu. cāra ānā li dharmādhikārabāṭa patiyā dinu. mukhabhitra bāhek anyatra aṃgamā thukyo bhanyā āṭha ānā daṃḍa garnu. thukyāi māgnyāle snāna gari śuddha hunu* (*Ain* 1854 § 62.3).

or only other body parts. The regulations of this article can be summarized as follows:

Table 1: Fines for spitting according to *Ain* 1854 Art. 62

Offender	*Victim*	*Fine*	
		For spitting on the mouth	For spitting on other body parts
Brahmin	Rajapūta or Sacred Thread-wearing castes	5 Rs.	
	Non-enslavable Alcohol-drinking	2½ Rs.	
	Enslavable [Alcohol-drinking]	1½ Rs.	
	Water-unacceptable castes	½ Rs.	
Rajapūta or any other Sacred Thread-wearing castes	Higher caste status than offender	7½ Rs.	1 Rs.
Non-enslavable Alcohol-drinking castes	Sacred Thread-wearing castes	10 Rs.	1½
Enslavable Alcohol-drinking castes	Sacred Thread-wearing castes	15 Rs.	2 Rs.
	Non-enslavable Alcohol-drinking castes	5 Rs.	
Water-unacceptable castes	Higher caste status than offender	20 Rs.	2½ Rs.

Both examples discussed here show how the penal system in the *Ain* served both ideological and material ends: the regulations reinforced on the one hand caste and agrarian hierarchies along with social discipline, while on the other hand they strengthened the control political elites exercised over labour resources and created additional sources of state income.

7. *Conclusion*

As in many other parts of the 19th-century world, the Gorkhālī state increasingly relied on codified law to govern economic practices. However, except for a very few instances, the economy-related law in the *Ain* was not drafted in the spirit of liberal reform, but rather validated the control exercised by the government, its fiscal intermediaries and the landowning classes over land, agrarian surplus and unfree labour. Within this preliminary survey, four legal techniques have been identified in different areas of law (land law, fiscal law, endowment law and caste or penal law) by which this aim was achieved: 1) Communal land was recoded as state-owned land; 2) Fiscal claims of the government on assets were prioritized against private claims and enforced against joint-family possession; 3) Trust law made familial wealth durable over generations and secured it from seizure by the government or private creditors; 4) Caste-specific collective and individual purity was recoded in a fashion which allowed the government and landowners to collect fines and exact unfree labour. Certainly, there are more such modules which future research needs to identify.

As instantiated in the case of the caste system, the introduction of formal-rational legal principles in the *Ain* did not dissolve traditional hierarchical social structures; indeed, the process of turning these latter into objects of state governance had a reinforcing effect. That the two processes—the consolidation of caste and agrarian stratification—might be considered as two sides of the same coin, was already noted by A. Höfer when he stated: "The political and economic base of the Nepalese society of the time of the MA [*Mulukī Ain*, S.C.] can only be touched on. This does not mean that their importance is underestimated. Rather, our concentration on the mere cultural aspect will hopefully stimulate the discussion on the interdependence that exists between the material coercions and value-conditioned coercions in the 'feasibility' of a caste hierarchy" (Höfer 2004, xxxvi). The examples discussed in this contribution, however, suggest that even bringing the political economy and the caste system into a single framework might not be sufficient. The legal code of tribute drew also on legal sources beyond land and caste, such as the law, grounded in religion, of endowments or the household as a socio-legal institution. To what extent the different institutions and social relations codified in the *Ain* are interrelated, mutually constitutive or hierarchically ordered in order to form an imaginatively coherent social totality is a crucial question

requiring further scholarship.[40] For now, it seems safe to say that in the *Ain*, borrowing Katharina Pistor's phrase, it is not only a caste society, but also a tributary economy on "legal steroids".

[40] For an initial attempt in this direction centred on the institution of slavery, see Cubelic, Khatiwoda, and Michaels 2022.

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CHIARA CORRENDO

Women's Layered Identities and Property Rights: Dowry and Women's Wealth in the Ain *of 1854*

1. *Women, property and legal discourse: a poststructuralist feminist analysis*

Despite being a critical contributor to the economic well-being and social empowerment of women, the gender gap in the control of property has been long neglected by economic analyses and policies concerning them (Agarwal 1994b, 1455). One of the reasons why research and policies are lagging behind is the controversial nature of property rights, which have always been a "prime site of cultural discord, a space where the conflict between 'modern' legal guidelines and customary notions of family and entitlement was laid bare" (Basu 1999, 2).

Furthermore, property ownership is linked with social status and prosperity, as well as economic and political power and, in this framework, access and control over land and assets stand out as key determinants for the social and economic development of the individual within and outside the family (IOM 2016a, 2).

For this reason, women's property rights have been a major concern for women's movements globally, prompting a broader, intersecting discourse on discriminatory inheritance patterns, gendered control over economic resources and the appropriation of lands (Patel and Khajuria 2016, 14).[1]

Indeed, property patterns define social status and political power within the community, structuring relationships within and outside the household, and yet, for many women, effective proprietary rights remain elusive (Agarwal 1994a, 2). It is therefore fundamental to first unpack the concept of "household" and acknowledge the fact that it is not a unit of congruent interests "among whose

[1] Also, "the ownership or non-ownership of means of production expressed in amounts of land, is a determinant for access to employment and to the monetary yield that it offers in other sectors of the economy" (I. Breman, comment in Rao 2018, 147).

members the benefits of available resources are shared equitably" and that women's economic rights need a specific focus (Agarwal 1994b, 1456).

Membership within social networks deeply affect people's ability to claim property rights: the gendered position of women within their kinship as well as their ability to access formal and informal political forums deeply impact their chance to gain control over assets (Griffiths 2011, 236).

For example, with regard to the Indian context, Nitya Rao underlines the fact that the state does not have adequate resources to provide social security to its citizens: in light of this, social groups such as families and castes intervene as a backup means for daily support. Being so crucial at the local level, kinship relationships have become mediators of entitlements and access to key resources and women must often come to terms with this, negotiating between upholding their property rights against their kinship by way of a progressive national legal framework and accepting patriarchal power structures (Rao 2005, 728-729; Basu 1999, 12).

Feminist legal theory offers several approaches to enrich the discourse on women's property rights by stressing the role of positive law in reinforcing or contrasting patriarchal settings and, in particular, how law has been "informed by male norms, male values, male experiences and male dominance and how law serves to reinforce stereotyped and patriarchal assumptions about women" (Sagade 2005, xxviii).

In legal reasoning, one of the core methods of the feminist approach is the so-called "woman question", meant to identify the gender implications of rules and practices which might otherwise appear neutral and objective. Investigating whether women have been left out of consideration, the "woman question" allows to point out the role of the law in facilitating this, through its procedural and substantial lacunas and the patriarchal ideologies informing its genealogy (Bartlett 1990, 837).

Differently from the liberal and the dominance model,[2] the poststructuralist feminist approach can indeed offer a more nuanced perspective on the issue of women and legal discourse as it draws from the postmodernist constructions of knowledge as a partial product of perspectives. The Enlightenment description of the individual as a subject existing prior to its interaction with society is criticised and substituted with a view of the subject as produced through a

[2] For an insight into these two paradigms, see Kapur and Cossman (1996, 27), Bowman and Schneider (1998, 215), Eichner and Huntington (2016, 3) as well as Cain (1989, 201).

multiplicity of discourses (Kapur 2006, 103).[3] Among these discourses, law is a particularly authoritative one as it has the power to definitively pinpoint the boundaries and features of situations and events, shaping their popular understanding (Kapur 2006, 104).[4] As a matter of fact, law is vested with a critical normative and constitutive role, in that it has the power to legitimise "certain visions of the social order, to determine relations between persons and groups and to manipulate cultural understandings and discourses" (Moore 1998, 35).

In contrast to the totalising project of the state which unifies the people as a national community, there stands its individualising attitude that constructs subjects in specific roles and ways (including law) (Rajan 2003, 6; Correndo 2016, 103). The state in its governmental function is therefore involved in producing rather than merely controlling individuals, partially affecting their experiences, self-understandings and capacities. Not only does the legal discourse constitute subjects as legal citizens, but also as gendered subjects, drawing lines between men and women or among women themselves. Likewise, it mirrors social concerns and attitudes towards women and their sexuality and, by doing so, helps perpetuate patriarchal arrangements. As underlined by Mary Joe Frug (1991-1992, 1046), "feminists should not overlook the constructive function of legal language as a critical frontier for feminist reforms. To put this 'principle' more bluntly, legal discourse should be recognized as a site of political struggle over sex differences".

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[3] The term "discourse" here is used to indicate "those specific ensembles of ideas, concepts and classifications that evolve in a particular set of practices and through which meaning is given to physical and social realities" (Menski 2003, 13). As further underlined by Werner Menski (ibid.), "the postmodern challenge can be understood at three distinct but interrelated conceptual levels. First, it challenges the modernist claim of ontology that there is a world of objects that exists independent of the way it is presented to be. Postmodernism argues that realities/phenomena depend on how they are represented to be. Second, postmodernism challenges the Descartian argument oh human rationality (…) third, postmodernism refutes the modernist assertion of epistemology, that true knowledge corresponds to how the world actually is and that observation or writing is theoretically neutral and has no effect on the thing being observed".

[4] Several scholars, among whom Nancy Fraser, have suggested that such an analysis may erase the agency of the feminist subject; nonetheless, it has been argued that it is precisely in this continuous reconstitution of the subjectivities that lies the space for resistance. According to Kapur and Cossmann (1996, 33), "we negotiate our way through a multiplicity of discourses exercising reflection, choice and action, although this agency is constituted and limited by our particular position within intersecting discourses".

In light of this theoretical framework, the present article intends to develop an analysis of women's property rights within the context of Nepal's first legal code, the *Mulukī Ain* of 1854, investigating how it contributed to shape the gendered subjectivity of women. In fact, the *Mulukī Ain* played a pivotal role in the process of nation-building deploying at the same time a homogenising attitude, bringing the population under the aegis of a Brahmanical vision of society, and an individualising one, constructing legal and gendered subjects and assigning them specific social roles. The Code excluded or included entire groups and graduated their access to resources on the basis of several axes (e.g., caste, gender, age and marriage): this contributed to a further inner layering of these groups, which should therefore not be conceived as monolithic entities but as the fragmented byproduct of a process of "social prismatisation".

In particular, this article will take into account the provisions related to dowry and, more broadly, women's property rights, shedding light on the layered role of propertied women within the social context.

Given the strong link between the *Mulukī Ain* contents and the shastric literature, in terms of categories and vision, the second section will provide an overview of women's property rights in the shastric literature, with a specific focus on dowry.

The third section is specifically devoted to Nepal, putting the 1854 *Mulukī Ain* in a diachronic perspective: the provisions of the code are analysed in light of the subsequent legislative reforms and judicial interventions in order to assess its longstanding influence and highlight the evolutionary process of women's property rights over time as well as the agents involved in its development.

The fourth section will draw a parallel with the Indian legislative framework, in order to compare the legal developmental paths and highlight the role of legal discourse in shaping and gendering the social subject.

2. Strīdhana *and dowry in the shastric literature: layering women's identities*

2.1. Strīdhana *vis-à-vis dowry: vertical and circulating wealth*

Giving a definition of dowry and drawing clearcut boundaries between the institution of dowry and the similar-but-not-equal, broader institution of *strīdhana* (literally, woman's property) is a thorny task. Actually, the two

concepts should not be conceived as concentric, as there are some elements of major divergence which make them, at best, overlapping.

Most contemporary literature uses the term "dowry" with at least three meanings:

- jewellery, household goods and other properties taken by the bride to her new home or given to her during marriage rituals
- marriage expenses
- property expected or even demanded by the husband and his in-laws as a condition for the marriage or after it (what has been termed "the new dowry" Menski 1998a, 41).

Shastric texts are certainly familiar with the first category of dowry, that is possessions that the bride brings with her to the new home. The term *vahatum* is used to indicate collectively all the assets she brings in, a sort of "dowry in a mild form" (Menski 1998b, 5), but if we conceive *strīdhana* broadly as "woman's property", there appears to be no clear differentiation between them; furthermore, as stated by Altekar, there are no references in the shastric texts to the dowry meant as "a pre-nuptial contract of payment made by the bride's father with the bridegroom or his guardian" (Altekar 1959, 70).

The *strīdhana*, as envisaged by the shastric texts, cannot be equated with the "new dowry", since the purposes the two institutions serve are different. The new dowry has been defined not so much as women's wealth but as "wealth that goes with women" (Sharma 1984, 70) and includes also gifts made to the husband and his in-laws, more often than not measured against the qualities of the husband, as a means to create alliances between families and buy a higher social status (Kishwar 2005).

Given this, it can be argued that the underlying assumption about dowry, as opposed to *strīdhana*, is that it is a circulating fund, rather than vertical wealth moving from the bride's family to the bride and, on her death, to her heirs. Following Agarwal's words (1994a, 137),

> Goody's assumption that dowry usually goes to the bride herself and serves to establish some form of conjugal fund which ensures her support in widowhood (…) is not a valid generalization and is contradicted by the north and Indian evidence. In fact, the part of dowry that passes to the girl's in-laws cannot really be seen as a form of 'devolution' since it does not get transmitted vertically as inheritance to the couple's children but rather takes the form of a 'circulating fund' that moves from the bride's family to the groom's family.

According to several authors, the ancient notion of *strīdhana* has been distorted to a dowry which is transmitted to the bridegroom and his kin (Basu 2004, 87) and thus includes "financial and material transactions around marriage that have elements of demand in them" (Gupta 2003, 109).

Taking into account the above categories, it is in the first that the boundaries between dowry and *strīdhana* blur, as the individual rights of the woman over these items are contested.

The idea of bedecking the daughter with expensive jewellery is rooted in the concept of *kanyādāna*, that is the father's gift of the daughter in marriage to a suitable groom, after which the control over her passes from one to the other or, as Manu (V.152d) specifies, "the act of (the father's) giving produces (the husband's) lordship/ownership over her" (Jamison 2017, 143). Being a pious and meritorious duty to be performed by the father in order for the ritual to be complete it had to be accompanied by an additional gift of affection (or *varadakṣiṇā*) from the father to the groom to seal the agreement (Robinson 1999, 183; Goody and Tambiah 1973, 92; Rajaraman 2005, 49). Nonetheless, as Paras Diwan (1990, 38) has observed, even if the customary practice of *varadakṣiṇā* was prevalent among higher castes only (namely, Brahmins), it soon spread among lower castes as well, due to a process of Sanskritisation which, in the view of some authors, was triggered by the very same Brahmins.[5] Since the *kanyādāna* was considered the highest form of marriage, any kind of bargaining and negotiation on the number of gifts for the daughter was kept in the background, "so that the dominant ideology (the bride and her dowry as gifts freely given by the father from the happiness of his heart and to obtain religious merit, for which he desires nothing in return) is not violated" (Sharma 1984, 64).

2.2. Strīdhana*: the legal evolution of a concept*

The issue of whether dowry and presents gifted to a bride are given to her individually or jointly to her and the groom is debated. The issue is not otiose as

[5] "One way of looking at classification of marriages by the Brahmin law-givers is to regard it as an attempt to impose the Brahminical ideology of kanyadan on a country where almost all people, including many Brahmin castes, but excluding the richer sections of hypergamous castes, practiced brideprice. That extremely popular form of marriage was dubbed asura and condemned as unsuitable for Brahmins" (Basu 2005, XIII).

in several instances there are different laws regulating the disposal of dowry and *strīdhana*.

First appearing in the Dharmasūtra of Gautama (Mayne 2005, 1028; Agnes 2004, 15), the subject of *strīdhana*, "the most difficult branch of Hindu law" (Mulla 2017, 206; Menski 2003, 496-499), varies according to the several schools as the very same definition of *strīdhana* (literally, woman's property) changes, encompassing at time different kinds of assets. In modern Hindu law, the term has been expanded so as to include the properties enumerated in the *smṛtis* and other kinds of assets acquired by a woman over which she has absolute control.

As will be explained further in this section, it is important to mention that, in legal literature, the concept of *strīdhana* should be separated from the one of "woman's estate" (also known as "widow's estate"), as the former predicates an absolute estate, while the latter implies a limited one (Mulla 2017, 251). The watershed in the legal regulation of *strīdhana* and woman's estate in India is considered to be the *Hindu Succession Act*, 1956, since it introduced fundamental changes in the property of women under Hindu law, abolishing for example the very same concept of woman's estate and turning the existing ones into full estates.

Manu (IX.194) enumerates six kinds of *strīdhana*:

1. Gifts made before the nuptial fire (to be intended as the gifts made at the time of marriage, before the fire which is the witness of the nuptial, *adhyagni*)
2. Gifts made at the bridal procession (on the way from her house to that of the husband, *adhyāvāhanīka*)
3. Gifts made in token of love (by her parents-in-law, *pitṛdattā*) and those made at the time of her making obeisance at the feet of the elders
4. Gifts made by her father
5. Gifts made by her mother
6. Gifts made by the brother

To this list, Manu also adds the so-called "gifts subsequent" (which is given by her in-laws or her own family after the marriage, *anvādheya*) and the gifts made by the husband out of affection. The Yājñavalkyasmṛti (II.143-144) also includes the gifts on supersession (that is, the gifts offered to a woman on her husband's remarriage to another woman, *ādhivedanika*), the gifts by *bandhus* (what is given to the bride by the relatives on her mother's or father's side, *bandhudatta*) and the *śulka* (which can be translated as the brideprice).

According to this framework, gifts acquired from strangers at any other time different from the nuptial fire and the bridal procession, as well as woman's acquisitions by labour and skills are not *strīdhana*.

Nonetheless, the definition given by Yājñavalkya includes also an additional, broad, category of *strīdhana*, *adhya* ("and the rest"), which has been expanded by Vijñāneśvara[6] so as to include five different kinds of property which were not recognised by previous shastric texts:

1. Inheritance
2. Purchase
3. Partition
4. Seizure (e.g., adverse possession)
5. Finding

Generally speaking, Vijñāneśvara's commentary specifies that Manu's list was meant to be non-exhaustive and that the term *strīdhana* should be intended in a non-strictly-technical sense, including therefore any property belonging to a woman (gifts from strangers made at any time, earnings and so on; Mulla 2017, 209).

It has been further specified by Mitākṣarā sub-schools that, generally speaking, no kind of *strīdhana* can be disposed of by the woman at her pleasure, with the exception of gifts from relatives, which she can dispose of without the husband's consent and are therefore called *saudāyika* (as opposed to the *asaudāyika*; Mulla 2017, 211, 224).[7]

According to the Dāyabhāga school, the properties she cannot dispose of freely are not to be called *strīdhana* (which, consequently, includes those goods she has the power to alienate and use independently of her husband's control, therefore, only gifts from relatives and gifts from the strangers made before the nuptial fire or at the bridal procession; Mulla 2017, 212).

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[6] *Mitākṣarā*, II.11.2-4 mentioned by Mulla 2017, 209.

[7] The *asaudayika* properties are subject to the husband's dominion (and only his), and he is entitled to use them even if there is no distress. This also means that in her lifetime she cannot alienate it nor bequeath it by will without his consent. On her husband's death, her power to dispose of it becomes absolute and she can dispose of it by will or by act *inter vivos*; on her death, whether before or after her husband's death, these properties pass to her *strīdhana* heirs. Technically, the properties inherited as well as those obtained on partition cannot be included in this framework since, being unable to be passed on her death to her *strīdhana* heirs, they are not *strīdhana*. See also Agnes 2004, 16.

The expansion proposed by Vijñāneśvara has been substantially discarded by the jurisprudence of the Privy Council[8] according to which property inherited by a woman from a male is not her absolute property (in that on her death it passes on to the heirs of the male from whom she inherited it).[9] Likewise, the property taken by inheritance from a female is not *strīdhana* for the purpose of inheritance, as she takes it for a qualified estate with reversion after her death to the heirs of the female who was the last full owner (Mulla 2017, 213; Mayne 2005, 1033). Furthermore, in *Debi Mangal Prasad v. Mahadeo Prasad*[10] the Privy Council held that the immovable property obtained on partition of the joint family property is not the *strīdhana* of the widow, as on her death it reverts to the next heirs of the husband. In any case, with the exception of property inherited by a woman or allotted by virtue of partition, Vijñāneśvara's views as to the other modes of acquisition have been accepted by the courts (Mayne 2005, 1035).[11]

Properties inherited by a woman from a male were further structured and sanctioned in the *Hindu Women's Right to Property Act*, 1937. Under the law prior to the Act, the widow of a Hindu governed by Mitākṣarā only had a right of maintenance with respect to the coparcenary property in which the husband had interest. *Ex* section 3.2, the widow of a coparcener inherits the same interest of the defunct husband, but in a limited way. This kind of property is defined as "woman's estate" (also known as "widow's estate"), on which bases the woman could enjoy the property during her lifetime but could not normally alienate it (Menski 2003, 512). Indeed, contrary to the *strīdhana*, over which the woman takes an absolute estate, the widow's estate implies some limitations on alienation and disposal as well as inheritance, since the properties devolve upon the next heir of the last full owner upon her death. Section 3 of the *Hindu Women's Right to Property Act* provides that, in case of a Hindu dying intestate, the widow will receive the same share as a son in his separate property if governed by Mitākṣarā or in any property if governed by

[8] *Bhugwandeen v. Myna Baee* (1867) 11 MIA 487; *Takur Deyhee v. Rai Baluk Ram* (1866) 11 MIA 140.
[9] On the question of the widow's rights to inheritance from her husband's estate, see Kane 1941, 701-13.
[10] (1912) 34 All 234.
[11] According to the Bombay school, property inherited from a male by a woman other than a widow, a mother, paternal grandmother or the widow of a *gotraja sapiṇḍa* is her *strīdhana*. Therefore, a daughter, a niece, a grandniece, a sister and daughters of *sagotra sapiṇḍas* take the property inherited from males as their absolute property (Mayne 2005, 1034).

the Dāyabhāga provisions. Nonetheless, as regards ancestral properties under Mitākṣarā, the widow inherits the interest he had in the joint family properties, but "(a)ny interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate" (section 3.3).[12] She could alienate the property only for well-defined purposes such as legal necessity, benefit of the estate or spiritual benefit of the husband (Diwan 1993, 109). The jurisprudence of the Privy Council reinforced this; in particular, in *Janaki Ammal v. Narayanasami*[13] the Council stated that "her right is of the nature of a right of property; her position is that of owner; her powers in that character are, however, limited".

2.3. *Layering identities: chastity*

Overall, it is important to underline that the status of women affected in fact their rights of disposing of their *strīdhana*. It has already been stressed how marriage represents a crucial layering factor in the process of structuring women's identities, fragmenting the legal position of women.

As seen in the previous section, when married, the woman is placed under the husband's control and loses the right to fully dispose of her *asaudāyika* properties.[14] Since the commentators of all the Mitākṣarā sub-schools mention the husband alone as the one entitled to control women's power to dispose of her properties and use them in the case of distress it can be argued that, in the case of her husband's death, such powers are not transferred to the sons. Consequently, the woman is formally free to dispose of her *strīdhana* during widowhood (Rege 1960, 244).

The regulation of property rights for women of "immoral" character is likewise nuanced. Following Leela Dube's words, "uncontrolled female sexuality is a danger to the purity of both the agnatic group and the caste group. The phenomenon of boundary maintenance characteristic of caste society places special responsibilities on women and, therefore, it is legitimate to place restrictions on their behaviour and movements" (Dube 1997, 67). The shastric provisions as regards property rights directly reflects the patriarchal concern

[12] See also Mulla 2017, 250.
[13] (1916) 18 BOMLR 856.
[14] According to the Bengal school, any property must be regarded as her *strīdhana* at her absolute disposal, except for the husband's right to take possession of it under exceptional circumstances of distress (Rege 1960, 243).

with women's sexuality, as a direct function of the purity of the caste group. This point is explained also by the feminist historian Uma Chakravarti, who states that

> women are regarded as gateways – literally, points of entrance into the caste system (…) while advocating conformity, all the detailing of norms for women in the Brahmanical texts are a powerful admission of the power of non-conforming women (…) to break the entire structure of Hindu orthodoxy (…) To prevent such a contingency, women sexual subordination was institutionalized in the Brahmanical law code (…) At the same time women's cooperation in the system was secured by various means: ideology, economic dependence on the male head of the family, class privileges and veneration bestowed upon conforming and dependent women. (Chakravarty 1993, 580)

As recognised in several judgements, it is an established rule that chastity is a condition precedent to the taking of the husband's estate on the part of the widow (Mayne 2005, 962). With reference to unchastity following the devolution of property, in the famous Privy Council "Unchastity Case", *Moniram Kolita v. Keri Kolitani*,[15] the court interpreted the Kātyāyanasmṛti[16] arguing that the conditions contained in the texts were related to the right of succession to the estate and did not lay down conditions for its retention once vested. Therefore, their violation after the succession did not entail forfeiture (Carroll 2008, 88; Mulla 2017, 197). In *Ghasita v. Musammat Ganga Jati*,[17] the Allahabad High Court clarified that the unchastity of a woman does not prevent her from inheriting the *strīdhana* of the female *de cuius*. According to Mitākṣarā, the widow is the only female liable to exclusion from inheritance by reasons of her unchastity, while according to Dāyabhāga it applies also to other female heirs, such as daughters and mother (Mulla 2017, 198). Furthermore, a female disqualified from inheriting the property of a male is not incapable of holding *strīdhana* (Gharpure 1905, 211).

[15] (1880) ILR 5 Cal 776. See also *Parvati v. Bhiku* (1867) 4 Bom HC, *Nehalo v. Kishen* (1880) 2 All 150, *Sellam v. Chinnammal* (1901) 24 Mad 441.
[16] "Let the childless widow, keeping unsullied the bed of her Lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it", mentioned in paragraph 13 of the judgement.
[17] (1875) ILR 1 All 46. See also *Nagendra Nandini Dassi v. Benoy Krishna Deb* (1902) ILR 30 Cal 521.

3. *Women's property and dowry within the* Mulukī Ain*: a diachronic analysis*

3.1. *Gendering the subject: women's property rights in the* Mulukī Ain

The normative framework sketched in the previous section can help shed some light on the institution of dowry and women's property within the complex texture of Nepal's first legal code, the *Mulukī Ain* (MA) of 1854.

The MA was the synthesis between religion and the state political project, in that within the Code much emphasis was put on the political unity of Nepal under the aegis of Hindu religion in this mutually constitutive process of Hinduisation and Nepalisation of the nation-state (Viola 2019, 227). Broadly speaking, the homogenising nature of this process entailed the subsumption of different groups and tribes under the encompassing collective Nepali identity, in disregard of the inner socio-cultural diversity of the population. In this regard, law, especially in a positivist sense, has played a pivotal role in creating and propagating this national consciousness (Malagodi 2011, 237).

Within this structure, the caste status determined the individual's juridical status (Khatiwoda, Cubelic, and Michaels 2021, 4), affecting the degree of inclusion in and exclusion from the social fabric as well as entitlement to civil and political rights. Within this state-building process, despite this intrinsic tension to political unity, the MA translated in legal terms the elite imperative powers excluding from social and political participation entire groups, women included, and nurturing social dissent that more than a century later would trigger the revolution and the transformation of the Nepali state in a consocietal sense (Viola 2019, 224).

In this light, the MA is a document in which social hierarchies shape and affect the socio-political and economic advancement of society, intersecting with other modes of stratification (Khatiwoda, Cubelic, and Michaels 2021, 29), such as gender and age which represented factors of further "social prismatisation" as well.

The concept of property in the MA is filtered by identity-markers, which create a layered property regime in which one's own status determines individual or group access to assets. The standardisation and formalisation of the property regime within the MA facilitated the collection of rents, taxes and dues to the state, as well as contributing to a better allocation of liabilities within the membership of the joint family (Khatiwoda, Cubelic, and Michaels 2021, 54). As a matter of fact, art. 16 should be read in this light in that it

excludes the mother and father being held jointly responsible with their wealth for their son's debts (in the case that they are not willing to pay).

First of all, it is important to underline that the MA differentiates between joint property and individual property. The category of "joint property" includes ancestral property inherited by the male head of household and property acquired by the household through purchase or gift. Personal property, instead, could be self-earned or received as gifts or inheritance from, for example, a woman's parents' estate (Pradhan, Meinzen-Dick, and Theis 2018, 17).

Art. 17 integrates the regulations on the repayment of debts, creating a partial shield around women's properties. Government and creditors shall not confiscate dowries as a means to repay the husband's debts or fines and, in the same vein, dowries cannot be relied upon to maintain the husband's relatives and his wives. If the husband appropriates any portion of his wife's dowry, it should be restored. The only situation contemplated by the said article is the distress of the family (wife, children and wife's relatives), which allows the husband to use her wealth as financial backup. The legislator makes a point of excluding from the scope of this legal shield any portion of the husband's wealth gifted to the wife with a view to subtracting his assets from the creditors. Likewise, any transfer of property from the woman to her daughter or the like is not valid, unless she first repays the creditors. Any debt contracted by the wife without the knowledge of the husband or of the son shall be repaid with her dowry and personal properties (art. 18.12). In any case, the "master of the house" shall give his prior consent to any transfer of properties or debt recovery performed by wife, daughter or daughter-in-law (art. 18.14).

Mother and father are under no obligation to carry out the partition of their properties when they are alive; upon the mother's death, her share of husband's properties will be divided among her sons as well as her dowry, provided that she explicitly consented to it. Otherwise, her dowry will devolve upon the son who has taken due care of her (art. 22.2). If, out of sheer favouritism, the husband devolves a bigger share of wealth upon a wife and her son to the detriment of other wives and sons the latter are entitled to ask for a reallocation of the assets (art. 22.7). The layering principle is here applied, as the only wives and sons entitled to exercise this right are those belonging to a comparable caste: the MA clearly states that wives, concubines and children from lower castes are entitled to a lesser portion of wealth. Art. 23 structures an even worse legal regime for female slaves and bondservants (whether virgins or common women) kept as wives as they are entitled to a negligible portion of his wealth.

The MA recognised, to a certain extent, the right of a daughter to claim her share of parental property, providing that unmarried daughters below the age of 35 can only claim wedding expenses while unmarried daughters above the age of 35 can obtain an equal share of parental property (art. 23.15). If the daughter marries after obtaining this share, she can bring it to her husband's home, provided that she married with her parents' consent. However, if she runs off with a man, she loses any right on her share (art. 23.15).

In the 1854 Code, the common woman kept as a wife outside the household receives the assets given to her by the husband in return for her staying for a given period, and he cannot take this wealth back. If she runs off with another man before the agreed deadline, she cannot claim any right on these properties and the husband can take them back. "She will receive, in accordance with the Ain, her share [of the joint property] as long as she remains faithful to her husband" (art. 23.28). Chastity is therefore a critical factor in shaping and graduating the woman's access to property rights: notably, art. 25.1 subordinates the possibility of a widow to control and dispose of the property (both movable and immovable) she acquired to her faithfulness. Furthermore, even if she remained faithful, she cannot freely dispose of her share of immovable property before she attains the age of 45 (art. 25.4). After turning 45, she can dispose of her share of movable properties, provided that she does not separate from the joint family.[18] In the legislative framework that followed the major 2017 amendment to civil law, the widow can dispose of the property at her discretion.[19] As per ch. 11.245 of the *National Civil Code Act* of 2017, chastity is no longer a disqualification factor for succession, as the only element coming into play is murder committed with a view to access the said succession.

The provisions strictly related to the management of dowry in the 1854 Code are scattered throughout the document and rather scanty; in addition to art. 27, specifically devoted to the regulation of dowry, there are several indications provided in a piecemeal fashion. For example, art. 24.12-13 states that a husband is not entitled to sell his wife's dowry without her consent: failing to get her approval means he is under the obligation to restore the dowry and return the purchase amount to the buyer. In the same way, he cannot misappropriate the estranged wife's dowry.

[18] The 11th amendment ensured that the widow could claim her share of property from the joint family and use this property even if she remarried (IOM 2016b, 8).
[19] See note 27 below.

Art. 27.6-8 regulates the devolution of a woman's dowry upon her death. The woman's son is the first heir in line of descent, followed by her ritually married husband and then the daughter. Nonetheless, there is again a significant restriction on the participation of the daughter to the succession based on her sexual behaviour: not only is she not entitled to her mother's dowry if she engages in any illicit sexual behaviour, but this wealth will devolve upon her ritually married husband or, in his absence, to her mother's brothers-in-law and their sons. If a woman belonging to the Sacred Thread-wearing caste, Non-enslavable Alcohol-drinking caste or the like engages in an illicit sexual behaviour, she will lose any right upon her dowry, which will devolve upon her son, her husband and then her daughter.

3.2. *Legislative amendments and judicial activity: litigating gender equality*

The 1964 amendment to the MA did not change the state of affairs sketched above as regards a daughter's entitlement to a paternal share. The framework regulated by *Muluki (Sixth Amendment) Act*, 2033 was even worse for women since it stated that if a woman remains unmarried up to 35 years of age, she is entitled to her share but, if she gets married afterwards, she is under the obligation to return it to her brothers, deducting the marriage costs (IOM 2016a, 7; Uprety and Tapa 2018, 335).[20] Following the *Gender Equality Act*, which deleted par. 16 of chapter 13 on Partition, as per the current provisions enacted through the *Muluki (Twelfth Amendment) Act*, 2064, a daughter does not need to return the inherited property to her parental family if she gets married after having obtained her share of parental property.[21] However, marital status is still relevant as the amendment did not provide for married daughters as equal coparceners (IOM 2016b): *ex* par. 1, ch. 16 of the MA "An heir means the nearest coparcener of the concerned person within seven generations" and "No other person shall be entitled to inherit the ancestral property so long as there is the husband, wife, son, unmarried daughter, son's son of the deceased or his unmarried daughter" (par. 2). It was only in 2017, with the *National Civil Code Act*, that the situation between sons and daughters and among married and unmarried daughters (as well as widows) was equalized.[22]

[20] Ch. 13.16.
[21] Ch. 16.1.
[22] Ch. 10.205 and 11.239.

When it comes to women's personal property constituted by way of gifts, the modern legal framework is built upon the two different concepts of *daijo* and *pewā*. According to the MA (ch. 14.4-5), as per the 11th Amendment to the MA:[23]

> The movable and immovable property of a woman received from her parents' family, her mother's parents' family and the property that she has increased from it shall be her Daijo (dowry). The movable or immovable property given to her with a deed of consent of all the heirs by her husband or the coparceners on the side of her husband, and the movable and immovable property given to her by other relatives or friends on the side of her husband and property she has increased from it shall be her Pewa (exclusive property).

According to this legislative wording, the source of the property determines the difference (indeed, slight) between *daijo* and *pewā*. Paragraph 5 clearly states that women enjoy absolute rights of disposal over these properties[24] and, in case of intestate succession, these assets will devolve upon sons and *unmarried* daughters or, in their absence, upon the husband and then upon the married daughter. As per the *National Civil Code Act* (ch. 11. 239), today the first heir in the line of succession is the husband, followed by son, daughter and widow daughter-in-law living in the undivided family.

As underlined by Pradhan, Meinzen-Dick and Theis (2018, 19), caste, class and structural position within the household affect women's effective control over what is, nominally, their property.[25] Malagodi (2018, 541) has stressed that the very same concept of dowry is intrinsically discriminatory as it hinges upon

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[23] *The Muluki (Eleventh Amendment) Act*, 2058.

[24] This is to be read alongwith ch. 14.1 (pre-2017 MA), according to which "An unmarried woman, a woman having a husband or a widow may use and dispose of the movable or immovable property which they have earned on their discretion". The National Civil Code of 2017 states that "No person shall use other's property without consent of that other person" (ch. 3.276).

[25] "Daughters-in-law in joint households have very little control over their dowry, which is most often considered part of the joint property of the household. The parents-in-law decide what is to be done with the dowry and who may use it. Dowry goods such as large jars to carry and store water, and furniture and consumption goods such as radio and TV, may be used by the whole household without the bride's permission. Some of the dowry goods may even be sold to meet household expenses (…) among poorer households, some of the cash gifts received at the wedding may be used by the groom's family, especially to help defray marriage expenses …) In these cases, dowry is not just a woman's personal property but becomes part of the joint property of her new household" (Pradhan, Meinzen-Dick, and Theis 2018, 26).

the idea that women enjoy a more precarious social status and thus need a financial backup in order to make their way through the new family and to secure a stable future. Furthermore, behind this endowment there is often the idea that the groom's family should be compensated for their taking on the bride (Malagodi 2018, 541; Edlund 2006; Anderson 2007). Drafting a gender-neutral legislation to curb the skewed aspects behind dowry flows is therefore difficult, giving the discriminatory etiology of dowry itself. The *Social Practices (Reform) Act*, 2033 prohibits the giving and taking of goods as consideration for the marriage. Art. 4 of the said Act stipulates that harsher penalties should be imposed on the bride's family if they ask for goods in connection with the marriage: this differentiation has been challenged in court in *Mira Dhungana v. Office of the Prime Minister* (2063b)[26], whereby the petitioner succeeded in persuading the Supreme Court to declare *ultra vires* this provision (Malagodi 2018, 541). Art. 5 of the *Social Practices Act* tries to strike a balance between the ancient custom of accompanying the daughter with some ritual gift at the time of marriage and the skewed practice of dowry extorted in connection with the marriage, punishing any overt agreement to give and take dowry and establishing a maximum of ten thousand rupees for the daughter's *daijo*.

The role of women within the family has never really been challenged by judicial activity: as underlined by Malagodi (2018, 534), over the decades the Nepali judiciary intervened to mitigate discriminatory norms against women, but the very same positionality of women (within or outside the family) determined the effectiveness and significance of the courts' intervention. Indeed, "when litigation has engaged the position of women within the family, the Court has effectively treated them as valuable and indispensable part of the larger familial unit but has not challenged their structurally subordinate position" (ibid.).

This can be seen when analysing a stream of cases dealt with by the Supreme Court as regards the issue of legal layering of identities on the basis of gender axes. In 1993 Mira Dhungana[27] had petitioned the Court under Articles 23 and 88(1) of the 1990 Constitution, with a view to get section 16[28] of Chapter 13, 'Partition', in the MA declared void (Malagodi 2012, 251). The

[26] *Mira Dhungana, v. Office of the Prime Minister*, 2063b, 48(8) NKP 972 (2006).
[27] *Mira Dhungana v. Ministry of Law and Justice*, NKP, 1995/2052.
[28] Section 16-An unmarried daughter having attained the age of thirty-five is entitled to obtain partition of property at par with the son. If after obtaining her share she marries, she shall return it [to the legal heirs] after deducting her marriage expenses from the property obtained by her in conformity with the law.

arguments of the petitioner were based on the unconstitutionality of the said section, arguably running against art. 11 of 1990 Constitution, Right to Equality, and art. 15 of the CEDAW. The Ministry of Law and Justice rebutted that the provisions do not in fact violate art. 11 as the very same end, that is ensuring women a share of property, is realised by granting them a share in their husbands' estate:

> The law of Nepal—having paid attention to the social position (*sāmājik sthiti*) of men and women—has regulated in some different manner (*kehi bhinna tavarle*) the right to secure property in the form of inheritance (*uttarādhikārko rupmā*). In Nepali society women have two different [kinds of] status (*haisiyat*): one is the status of daughter (*chorī*) living in her father's house before marriage; the other is the status of wife (*patni*) in the house of the husband after marriage. (Malagodi 2012, 252)

The core of the issue was therefore basically the legal layering operated by the Code and its constitutional character. On that occasion, despite recognising the "patriarchal bias" of Nepali society, the Court opted for a cautious, conservative approach deciding not to strike down that provision as it would have been an ad hoc, isolated intervention, whereas the issue required a more comprehensive, legislative approach. According to Mara Malagodi (2012, 253), the fact that the judges passed the ball to Parliament concealed their intention to preserve certain traditional (patriarchal) aspects of the society ("handed down from ancient times") which defined its collective national identity; in any case, "(n)one of the five judges, however, pointed out in reply to the respondent's plea that the legal status of Nepali women is that of individual Nepali citizens whose entitlement to fundamental rights should not be dependent on their marital status" (ibid.). The intrinsic discriminatory nature of the legal layering was therefore not challenged by the judges. The same position was adopted in a later judgement,[29] following a petition under articles 23 and 88.1 of the 1990 Constitution, seeking a declaration of unconstitutionality of section 26 of the *Land Act*, 1964 which excluded a daughter from the devolution of tenancy rights upon the death of the male tenant. Mentioning the institution of *kanyādāna* to justify such exclusion,[30]

[29] *Adv. Sapana Pradhan-Malla for FWLD v. Ministry of Law and Justice*, NKP, 1996/2053.

[30] "It seems that Clause 26(1) has been included in the act (…) because a daughter after contracting her marriage (*vivāha garī*) is expected to go to the other house [that is, the marital home] and become part of the other family according to the usual (*sāmānya*) social values and rituals (*rītirivāj*). Thus, it seems that with regard to tenancy rights the

the Court paved the way for a later similar case[31] where the judges had to decide upon the challenging of the constitutionality of seven chapters of the MA.[32] The Court opted for an even more overtly conservative approach, unapologetically reiterating the rhetoric of the tradition already adopted in the *Mira Dunghana* (1995) case, stating that it is almost impossible to realise absolute equality between men and women and reaffirming the underlying link between the Hindu character of Nepali nationalism and legal exclusion of women (Malagodi 2012, 258).

The cautious approach followed by the Court whenever it came to strike down any MA provision testifies to the pivotal role played by the Act in the construction of national identity (ibid., 264).

A few years later, after years of negotiation, Parliament decided to take up the challenge presented by previous Supreme Court judgements and amended the MA in 2002. Among the several subjects upon which the Act intervened, there are also inheritance rights for daughters, property rights of divorced women, maintenance rights for daughters and wife's rights to husband's property (ibid., 266).

The post-2002 case law testifies to a bolder approach on the part of the courts which engaged in a thorough testing of the new legislative framework, after the enactment of the 11th Amendment.

Among the most important cases, it is worth mentioning:

- *Mira Dhungana v. Office of the Prime Minister*,[33] challenging section 16 of chapter 13 of the MA, forcing daughters to return their share of the inherited property after marriage
- *Sapana Pradhan Malla v. Ministry of Law and Justice*,[34] on the constitutional validity of chapter 13.2 in that, upon inheritance, it differentiates among women on the basis of their marital status

daughter is in a position that is different from that of the spouse and the son" (Malagodi 2012, 255).

[31] *Dr. Canda Bajracarya v. Secretariat of Parliament*, NKP, 1996/2053.

[32] Among the provisions challenged, ch. 13 – Partition – provided that "a married woman who had no son before she has attained the age of thirty cannot live separately with her share until and unless the coparceners (*sanga basne hakavālāle*) have made provision (*prāvadhān*) for her living (*khāna lāuna*) and religious activities (*dān punya*) as per their status (*āphu saraha*)" and ch. 16 – Inheritance – "the daughter (of a deceased man) is not entitled to inheritance when the son, the wife or the grandson/s (son's son) of the deceased man are alive" (Malagodi 2012, 256).

[33] *Mira Dhungana v. Office of the Prime Minister*, 2061, 46(4) NKP 377 (2004).

[34] *Sapana Pradhan Malla v. Ministry of Law and Justice*, 2061, 46(4) NKP 387 (2004).

- *Prakash Mani Sharma v. Office of the Prime Minister*[35] (challenging chapter 13.1A and 13.16 requiring daughters to return their share of the ancestral property after marriage)
- *Lily Thapa v. Office of the Prime Minister* and *Mira Dhungana v. Ministry of Law and Justice* [36] (2063a) challenging, respectively, section 2 and section 7 of chapter 13, restricting the ability of women to dispose of immovable property and to transfer it on the basis of their marital status.

4. *Comparative perspectives: anti-dowry legislation and the protection of* strīdhana *in India*

Formal equality has not yet been guaranteed in the area of property law (Kapur and Cossman 1996, 133). There are indeed several major loopholes, starting from the Indian matrimonial statutes and the regulation of women's economic rights in marriage.

Section 405 [37] of the Indian Penal Code protects *strīdhana* against any misappropriation: therefore, if the husband or any relatives (even temporarily, or with the intention to restore it) misappropriate or refuse to return the properties entrusted they are liable to be punished for the offence of breach of trust. [38] In the fundamental judgement *Pratibha Rani vs Suraj Kumar & Anr*,[39] the Supreme Court overrules *Vinod Kumar Sethi & Ors. v. State of Punjab & Ors.*[40] stating that

[35] *Prakash Mani Sharma v. Office of the Prime Minister*, 2062, 47(8) NKP 931 (2005).
[36] *Lily Thapa v. Office of the Prime Minister*, 2062, 47(9) NKP 1054 (2005); *Mira Dhungana v. Ministry of Law and Justice*, 2063a, 48(8) NKP 979 (2006).
[37] "Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits 'criminal breach of trust'".
[38] *Rashmi Kumar vs. Mahesh Kumar Bhada* 1997 2 SCC 397. In *Bhai Sher Jang Singh vs Smt. Virinder Kaur* (1979 CriLJ 493) the High Court stated that the husband and his relatives were to be punished having committed criminal breach of trust of the ornaments and other articles owned by the wife, who entrusted the *strīdhana* to her husband for safe custody and which he dishonestly misappropriated.
[39] 1985 AIR 628.
[40] AIR 1982 Pun. 372.

> (w)e are, therefore, unable to uphold or support the view of the High Court that upon entering the matrimonial home the ownership of strīdhana property becomes joint with her husband or his relations- To this extent, therefore, we overrule this decision and hold that with regard to the strīdhana property of a married woman, even if it is placed in the custody of her husband or in-laws they would be deemed to be trustees and bound to return the same if and when demanded by her.

In addition to this, the *Protection of Women from Domestic Violence Act*, 2005 shapes an inclusive definition of violence meant to encompass also economic abuses. The definition provided in section 3.d.iv explicitly protects *strīdhana* in that it identifies these abuses as "deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom (…) including, but not limited to, (…) stridhan (…)".

According to section 18.e of the Act, among the several protection orders that can be issued by the Magistrate in favour of the aggrieved person, there is also one prohibiting the respondent from "alienating any assets, operating bank lockers or bank accounts used or held or enjoyed (…) singly by the respondent, including her stridhan or any other property held either jointly by the parties or separately by them without the leave of the Magistrate". Furthermore, "the Magistrate may direct the respondent to return to the possession of the aggrieved person her stridhan or any other property or valuable security to which she is entitled to" (section 19.8).

In a recent landmark judgement,[41] the Kerala High Court clarified the differences between dowry and *strīdhana*, pointing out that gifts voluntarily given by parents to the bride at the time of her marriage for her welfare, without any prior pressure or demand on the part of the husband in-laws, do not amount to dowry for the purposes of the application of the *Dowry Prohibition Act*, 1961.

Since India follows the common law regime of "separation of property" across all personal laws, the property acquired by each spouse is treated as his or her exclusive property (Agnes 2014, 34; Kapur and Cossman 1996, 138). On marriage breakdown, each of them keeps this property since there is no recognition of marital property, whereby they would share the assets acquired during the marriage. Despite being based on a paradigm of formal equality, according to which each spouse is free to acquire, keep and dispose of the

[41] *Vishnu R v State of Kerala & Ors* 2022 (1) RCR (Criminal) 506.

property in their own name, in a patriarchal context of sexual division of labour, the main consequence is that the woman is not entitled to claim division of the property whose acquisition she contributed to by taking care of domestic chores. As a matter of fact, in addition to the sexual division of labour, whereby the man is considered to be the breadwinner and the woman is charged with the reproductive labour, the patrilocal tradition of marriage may force women to quit their job and this loss of educational and employment opportunities is usually not compensated at the time of divorce (Kapur and Cossman 1996, 138).

The only provision addressing the issue of property division, that is section 27 of the *Hindu Marriage Act*, 1955 (HMA), is rather obscure as it states that "the court may make such provisions in the decree as it deems just and proper with respect to any property presented, *at or about the time of marriage*, which may belong jointly to both the husband and the wife" (emphasis added). Up until 2004, this provision had been restrictively interpreted by the judges so as to exclude from its scope the property acquired by the spouses subsequent to marriage through their efforts (Agnes 2014, 35).[42]

As regards inheritance rights, the opposition within the Congress to daughters inheriting property was so strong that the coparcenary system had to be maintained in the 1956 *Hindu Succession Act* (Agnes 2004, 81). Before the major reform of Hindu personal law occurred in the years 1955-1956, the position of widows and daughters under Mitākṣarā was governed by, respectively, the *Hindu Women's Right to Property Act* and the *Hindu Law of Inheritance (Amendment) Act*, 1927 according to which daughters were only entitled to a share in separate property on intestacy (section 2).

Following the enactment of the *Hindu Succession Act* in 1956, daughters had equal rights in the separate or self-acquired property of the father, but they were denied any right in the ancestral properties. In case of a Hindu male dying intestate and leaving behind male heirs, the coparcenary property will devolve by survivorship to his sons, grandsons and great-grandsons. The fact that daughters were not considered as coparceners was attenuated by the proviso to section 6, whereby if a Hindu male was survived by a female relative falling under the category of Class I heirs (thus daughters and widows), they were entitled to a portion of the interest of the deceased in the coparcenary and the

[42] In what has been regarded as a true judicial lawmaking move, that is *B. P. Achala Anand v. S. Appi Reddy* (2004), the Supreme Court ruled that section 27 could be now invoked to claim division of joint property acquired after the marriage (ibid., 37).

devolution would not take place by survivorship, but in accordance with the Act by successorship.

Furthermore, since the Act incorporated the English concept of alienation through testamentary succession, it was then possible for the male members to will away their property *ex* section 30.[43] This became a means to deprive daughters of their share in the parental property and the whole act did not provide for any form of compensation nor maintenance for them (Agnes 2004, 82).

The Act, which repeals the *Hindu Women's Right to Property Act*, reshaped the list of the so-called "simultaneous heirs" of a Hindu male dying intestate with respect to separate or self-acquired property including as Class I-simultaneous heirs son, daughter, widow and mother. Furthermore, differently from previous laws governing succession, the Act makes no distinction between married and unmarried daughters, meaning that the unmarried daughter no longer excludes the married one from succession (likewise, the married daughter without means no longer excludes the married one with means; Mayne 2005, 962).

Sections 14, 15 and 16 of the Act significantly modify the regulation of *strīdhana* in that they repeal all the previous norms related to the succession to *strīdhana* of a female Hindu dying intestate and abolish the woman's estate. Section 14 of the HSA[44] declares that properties possessed by a woman shall be held by her as full owner, while sections 15 and 16 establish a list of heirs to female *strīdhana* erasing all the legal layering devised previously on which

[43] "Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus". In the following Explanation, it is specified that "(t)he interest of a male Hindu in a Mitākṣarā coparcenary property (…) shall be deemed to be property capable of being disposed of by him".

[44] "Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner. *Explanation*.—In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *strīdhana* immediately before the commencement of this Act". For the purposes of this Act, the Supreme Court has clarified in *Vidya v. Nand Ram* (2001) 10 SCC 747 that the term "female Hindu" has to be interpreted extensively so as to include any female Hindu in any capacity (so, not only widows).

basis succession to *strīdhana* varied according to the woman being married or unmarried and the form of her marriage (Mulla 2017, 1100).[45]

Unchastity has been discarded as a ground for inheritance disqualification through section 28, according to which "(n)o person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity, *or* save as provided in this Act, *on any other ground whatsoever*" (emphasis added).

Finally, the amendment to the HSA enacted in 2005 brought in unprecedented changes to the joint Hindu family scheme: in order to bring uniformity of succession and equal treatment among the heirs, section 6 of the amending Act stipulated that the daughter of a coparcener would by birth become a coparcener in her own right in the same manner as the son and that she is to be considered as the full owner of the properties so inherited.

The ontological difference between *strīdhana* and dowry is all the more evident when analysing contemporary legislation disciplining dowry. The *Dowry Prohibition Act*, 1961 deals specifically with the issue of dowry and, carrying out a teleological analysis of the said Act, it can be argued that it corroborates the distinction made in the second section of this article, that is the "new dowry" is based upon coercion and compulsion and is pitted against *strīdhana*, which instead should be considered as exclusive property of the woman.

The Act was amended in 1984 and 1986 with a view to expand the scope of the definition of dowry. These amendments fitted within a complex interwoven legal net as they were adopted in the framework of a broader legal intervention on dowry, envisaging the creation of the dowry death crime by amending the *Indian Penal Code*, the *Code of Criminal Procedure* and the *Indian Evidence*

[45] "The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16, (a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband; (b) secondly, upon the heirs of the husband; (c) thirdly, upon the mother and father; (d) fourthly, upon the heirs of the father; and (e) lastly, upon the heirs of the mother". Despite this, section 15.2 differentiates between the heirs on the basis of the sources of the strīdhana, making sure that the properties inherited from the father or the mother will devolve to the father's heirs, in the absence of any son or daughter of the deceased. The same goes for the properties inherited from the husband or the father in-in-law, which will devolve upon the husband's heirs. See Derrett 1957, 233 for a differentiated analysis of the laws of succession applicable to females under Mitākṣarā and Dāyabhāga, on the basis of their marriage status, the approved/not approved form of marriage and the sources of the property.

Act. As per section 2 of the *Dowry Prohibition Act*, following the 1986 amendment, dowry is "any property or valuable security given or agreed to be given either directly or indirectly (..) at or before or any time after the marriage in connection with the marriage of said parties". Furthermore, *ex* section 6, "Where any dowry is received by any person other than the woman in connection with whose marriage it is given, that person shall transfer it to the woman" immediately or to her heirs if she has died in the meantime. Pending such transfer, the properties will be held in trust for the benefit of the woman. The legislative policies of the Indian government therefore intended to punish that peculiar, distorted aspect of dowry flows stemming from a more or less overt demand for goods on the part of the husband and his in-laws. All the properties given to a woman at the time of her marriage should be considered as her own, gifted for her own benefit: any misappropriation of what can then be termed as *strīdhana* has to punished according to the breach of trust norms.

5. *Conclusion*

Starting from the theoretical framework of poststructural feminism, this article intended to present the nuanced forms of women's access to property, stressing the role of positive law in creating gendered legal subjects and reinforcing discriminatory settings. In particular, the focus of this work has been the 1854 *Mulukī Ain*, whose provisions have been analysed against both the shastric backdrop that informed them and the Indian legal context.

Positing that women's access to property has always been mediated through marriage or, more generally, through the "gendered code of protection and vulnerability, rather than in terms of acquisition of power and wealth" (Basu 1999, 77), marriage and chastity have been presented as layering lenses fragmenting the legal position of women and reinforcing their commodification. In fact, structuring women as commodities that could be transacted by the male members of the family reinforced their subordinate role within 19th century Nepali patriarchal society, built upon Brahmanical ideological premises (Uprety 334). In addition to this, it has been highlighted how the reproductive roles of women within the family has never really been challenged by the courts (Malagodi 2018, 534), nor the allocation of resources and their entitlements within the community.

Nonetheless, the diachronic analysis of the relevant provisions both in the Indian and the Nepali legal contexts suggests an interesting emancipatory trend

in legal policies, pointing to greater formal equality and stronger protection through recent patterns of judicial activism. Even if the actual impact of formal rights in ensuring substantive equality is debated, "the importance of the struggle for and realization of formal equality rights" (Kapur and Cossman 1996, 314) for historically marginalised groups is without question. Even if law reform per se is insufficient to end women's oppression, having appropriate expectations towards it and acknowledging its role in triggering and assisting social change is determinant for a broader political struggle for substantive equality.

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RAMHARI TIMALSINA

The Practice of Levirate in 19th-Century Nepal and the Dharmaśāstric Discussion of Niyoga

1. *Introduction*

Geographically small, Nepal is ethnically and culturally highly diverse. The *National Population and Housing Census 2011* lists 126 caste/ethnic groups living in Nepal. Most of these communities have different customary practices, but they all live under the same constitution. Historical accounts suggest that Khas tribes that migrated from different parts of what is now northwest India and Pakistan arrived in the western part of Nepal at the beginning of the first millennium BCE. Many other groups migrated to Nepal from various parts of India during the 12th century CE, when they were dislodged during the Muslim invasions. The Newar community for one is a combination of various ethnic groups that migrated from India and Tibet at different times. The Kirati people of eastern Nepal may have lived there for some thousands of years, but some speculate that they too came from Tibet. Among the rest, many ethnic groups are considered to be aboriginals, and others to have migrated from either Tibet or India.

The territory of present-day Nepal is the result of the expansion of the Gorkha kingdom, initiated by King Pṛthvī Nārāyaṇa Śāha in 1743. In 1774, his son Bahādura Śāha invaded the Limbuwan region and subsequently annexed Sikkim. In 1789 Gorkhalis annexed Jumla, in 1804 they invaded Garhwal, and in 1805 they crossed the Satluj River and occupied some territories on the other side. The Gorkhalis' military expansion was too rapid to allow the establishment of a strong administration, nor could it maintain a status quo after the death of King Pṛthvī Nārāyaṇa Śāha in 1775, when general political instability set in Nepal that lasted until the rise of Jaṅga Bahādura in 1846. Because of the frequent changes in key political positions during that period, the royal power continuously weakened, even as an ambitious policy of conquest was still being pursued. In 1814–1816, Nepal fought with British forces of the

East India Company—a war whose outcome, the Sugauli Treaty, established the boundary line of modern Nepal.

Whenever there was a monarchy which followed Dharmaśāstra as its governing principle, the *varṇa* system inevitably prevailed in the society. Although no legal texts composed in Nepal during the Licchavi era have so far been traced, inscriptions from that time to a certain extent testify that the kings did consult the Dharmaśāstras (Panta VS 2065, *vaktavya*). The textual corpus of Dharmaśāstra including the various commentaries and treatises translated into Newari and Nepali in the Malla and Śāha periods demonstrates that princes were taught Dharmaśāstra and Nīti texts by royal pandits. The vast number of Sanskrit Dharmaśāstra and Nīti texts preserved within various archives in Nepal and the translations of some of these texts into vernacular languages indicate that lawmakers indeed read, taught, copied, translated and preserved these texts.

The decrees issued by the early Śāha kings of Nepal exhibit that they attempted to have a standardized rule within the expanded territories of the Gorkha kingdom through these administrative orders. Many decrees inaugurating new administrative regulations were issued by the kings of the early Śāha period to bring all the annexed territories under a unified rule. Since the newly formed state was not founded on a homogeneous ethnocultural basis, it was difficult for the royalty to win the loyalty of all its subjects. As Dharmaśāstra texts were the normative law codes that defined a king's rule over his realm and provided lawmakers with moral and ideological guidelines, the substance of these texts can be found reflected in the administrative orders of the kings and prime ministers. In this paper, particularly focused on analyzing one such executive order, I attempt to explore how closely these newly promulgated directives followed old dharmaśāstric values and norms.

2. *King Rājendra's executive order* (rukkā)

In 1836 (VS 1893), King Rājendra Vikrama Śāha issued an executive order (*rukkā*) through which the government tried to ban sexual relations with the widowed wives of elder brothers except among four tribal groups that lived in the eastern and western hills. First I present a translation of the document:

> An executive order (*rukkā*) of the supreme king of great kings

Henceforward (*āge*). To all the [people of] the four *varṇa*s and thirty-six castes throughout our kingdom

Be aware that having sexual intercourse[1] with the married wife of one's elder brother is a great sin. Whatever has happened till today is past. Since the [concerned] territory is of uncivilized people, it is necessary to make [new] arrangements related to caste matters. From today on we shall enforce the rule that no one except those belonging to Kirātī, Limbu, Lāpcyā and Jumlī groups may deliberately engage in sexual intercourse with the married wife of their elder brother. Anyone who does not comply with this regulatory restriction shall be punished according to his caste status, as stated in the details [below].

Details

If an Upādhyā Brāhmaṇa deliberately engages in sexual intercourse with the married wife of his elder brother, then he shall be degraded from his caste and exiled from the country after his head has been shaved.

If a Kṣatriya brother from the same family lineage as a royal family deliberately engages in sexual intercourse with the married wife of his elder brother, then he shall be degraded from his caste and exiled from the country.

If a member from another Kṣatriya Rajapūta caste deliberately engages in sexual intercourse with the married wife of his elder brother, then he shall be castrated.

If a Saṃnyāsī deliberately engages in sexual intercourse with the married wife of his elder brother, then he shall be degraded from his caste and exiled from the country after his head has been shaved.

If a Khasa deliberately engages in sexual intercourse with the married wife of his elder brother, then he shall be castrated.

If a Vaisya deliberately engages in sexual intercourse with the married wife of his elder brother, then he shall be castrated.

If a Magar deliberately engages in sexual intercourse with the married wife of his elder brother, then he shall be castrated.

---

[1] I have translated the phrase *birāu garna* as "to have sexual intercourse." Two homonymous verbs *birāu* are listed in the *Comparative and Etymological Dictionary of the Nepali Language* (Turner 1931, 446) and *Nepālī Bṛhat Śabdakośa* (Parājulī VS 2067, 914). The first means "make a mistake, spoil, to forget or do wrongly" and is derived from the Sanskrit verb root *vi-rādh*, which means "to hurt, injure" (Monier-Williams1899, 983). The second means 'to cultivate waste land' and is derived from the Sanskrit verb root *vi-ruh*, which means "to grow, to increase, to plant" (ibid., 984). In the above phrase, the meaning of the first verb root is primary, while that of the second is also relevant. Therefore, in this context the meaning of *birāu garna* can perhaps be understood as "to have illicit sexual intercourse with another's wife and produce children".

> If a Guruṃ or Ghale deliberately engages in sexual intercourse with the married wife of his elder brother, then he shall be castrated.
> If a Newar [or] a Sūdra deliberately engages in sexual intercourse with the married wife of his elder brother, then his property shall be confiscated.
> If a Damāi, Sunāra, Kāmī, Sārkī, Gāthīin (Gāine), Hurkyā or any other water-unacceptable caste deliberately engages in sexual intercourse with the married wife of his elder brother, then he shall be enslaved.
> If a Balāmī, Mājhī, Danuvāra, Sunuvāra, Murmi, Bhoṭyā, Cepāṅ, Pahari, Barai, Kumhāla, Barānu etc. deliberately engages in sexual intercourse with the married wife of his elder brother, then he shall be sentenced to death.
> Wednesday, the 7th day of Vaiśākha in the [Vikrama] era year 1893 (1836 CE). Auspiciousness.[2]

Through this executive order, the ruler tried to corral the pluralistic cultures of Nepal into a single legal arena governed by the Hindu caste system. The totality of this caste system has been paraphrased in the executive order as *cāra varṇa chattīsa jāta* (four *varṇa*s and thirty-six castes). This phrase first appears in the *Divya Upadeśa* of Pṛthvīnārāyaṇa Śāha, but in a reverse form: *cāra jāta chattīsa varṇa* (Ācārya and Naraharināth VS 2075, 59). The *Divya Upadeśa* is considered as the summa of the king's political thought, delivered towards the end of his life in VS 1831 (ibid., 40–41). It shows that the *varṇa* and *jāta* model was the main basis of social division in the Gorkha kingdom. While the root of the *varṇa* system directly goes back to the Hindu Dharmaśāstras, the notion of thirty-six *jāta*s (caste) is not found there. It either corresponds to the actual number of castes existing at that time in the Gorkha kingdom or it more probably is a symbolic number indicative of their multiplicity.

Pṛthvīnārāyaṇa Śāha listened to the Vyavahārādhyāya chapter of the *Yājñavalkyasmṛti* (see Panta VS 2065, *vaktavya*), and Raṅganātha Paudel, who was the royal priest at the time when the present document was issued, had composed a Dharmaśāstra text in Sanskrit called *Rājavidhānasāra*. This shows that the pandits of that period not only followed Dharmaśāstra texts but also composed such texts and taught them to princes, leading kings to treat these texts with great respect. This explains why echoes of the Dharmaśāstras can be heard in the executive orders of the Śāha kings.

[2] A transcription of the document is given in the appendix.

3. *The rules for the levirate in the Śāha period*

The ethnic and cultural diversity of Nepal represented a major obstacle for lawmakers intent on defining a unified rules-based order within the kingdom. In some communities, sisters-in-law are respected as mother figures, so it was illegal to marry them if widowed, while in other communities no such custom prevailed. An official order issued by the Śāha king in 1821 shows that sexual relations with the widowed wives of elder brothers did not traditionally constitute a punishable offence in the Dullu-Dailekh region (Regmi 1971, 1). Similarly, in the Khasiyā community of Doṭī, there was a practice that the younger brother took his widowed sister-in-law as his wife only with the consent of the latter's paternal relatives and on the payment of Rs 12 to them. If such relatives did not give their consent and preferred to take the woman back, they were required to pay the same amount to the younger brother. This custom was prevalent also among the Majhi community (ibid.). Some cases of junior levirate were found no more than five decades ago in the Limbu community of north-eastern Nepal (Jones and Jones 1976, 67). Not only levirate but also fraternal polyandry was customarily practised in many ethnic communities of Nepal. In north-western Nepal, some communities still practise it (Schuler 2015, 2–3; Chapagain 2018).

The present document was not the first time that the government attempted to ban sexual relations with the widowed wives of elder brothers. Some 24 years earlier, in 1811 (VS 1868), the government had tried to outlaw the practice in the whole country by introducing high penalties to Jaisis who engaged in sexual intercourse with sisters-in-law (Regmi 1970, 277–284). In 1833 King Rājendra Vikrama Śāha issued a royal order to the *bhāradāra*s in Ḍoṭī, commanding: "Take steps to ensure that traditional customs and usages that have been practised since earlier in our kingdom are followed. If bad practices are happening, then adapt the customs which are proclaimed in the Dharmaśāstra and which are consistent with the great customs that have been practised in our kingdom" (*Regmi Research Collection* 26, 508). Following this executive order, another executive order was issued in VS 1896 enjoining the Kirātī people of Eastern Nepal to end the levirate along with the custom which allowed taking a stepmother as wife after the death of one's father. The people from the area appealed to the government to maintain the earlier tradition, but the government did not listen (Nepālī VS 2012, 138–139).

Why was the Gorkha regime so interested in establishing a standardized set of laws within the expanded territories? This question is answered by the VS

1893 document itself. The document states: "Whatever has happened till today is past. Since the [concerned] territory is of uncivilized people, it is necessary to make [new] arrangements related to caste matters." From the perspective of the rulers, certain annexed territories were '*jaṃgalā muluka*' or the territory of uncivilized people, where bad traditional customs had been practised. This step can be understood as a process of Sanskritization, which in Srinivas's words "is the process by which a 'low' Hindu caste or tribal or other groups changes its customs, rituals and ideology, and way of life in the direction of a high and frequently, 'twice born' caste" (Srinivas 1973, 6). The next question to arise is: Why the three ethnic communities of Kirātī, Limbu and Lāpcyā and people from Jumla were not forced to follow the regulation? Very possibly the custom was so engrained in these communities that it would have been difficult to forcibly put a stop to it. It can be argued that in refraining from the forcible implementation the rulers were following a suggestion of the *Yājñyavalkyasmṛti* (1.343): "Whatever be the custom, laws and family usages in a country, those verily should be observed [by a king] when the country has come under his control." This śāstric advice was for the rulers' taking. Rulers understandably did not want to face waves of protest from the people, especially from larger communities. The Kirātīs are a substantial group incorporating many ethnic subgroups, among them the Limbus (Jones and Jones 1976, 8). It is possible that the Gorkhali administration categorized Kirātīs and Limbus separately based on a superficial understanding. Jumla was annexed by Gorkhalis in 1789, but before the annexation, the Jumla kingdom was one of the most powerful kingdoms in western Nepal. At its height of power, the kingdom extended from Mustang to present-day Uttarakhand in India. The Jumla kings belonging to the Kalyal dynasty were linked to the Mewar clan of Rajasthan, India, while the Malla kings of the Khasa kingdom ruled according to the norms of Hindu texts (Adhikary 1988, 86). The question remains open with regards to whether the 'Jumlī' of our text refers only to the people living in the Jumla valley or also the people living in other places occupied by the former Jumla kingdom.

4. Niyoga *in the Dharmaśāstra*

The phrase of the executive order: "Be aware that ... is a great sin" (*yo kurā ṭhūlo pāpa rahecha*) suggests that after a long discussion in the royal assembly among the lawmakers it was concluded that engaging in sexual intercourse with the widow of one's elder brother is a great sin. They must have considered

Dharmaśāstra texts during their consultations. Since Hindu Dharmaśāstras were composed by various authors at different times and in different places, divergent opinions can be found about single issues, *niyoga* being one such highly discussed topic in Dharmaśāstra. I shall attempt a survey of the Dharmaśāstras to ascertain their views on this topic to better understand the ideas the Śāha rulers of Nepal were confronted with. First I present, in chronological order, the arguments of the Dharmaśāstras which give their consent to the practice of *niyoga*, afterwards those which do not countenance the practice, and at the end the ones which present mixed opinions.

Gautama (2nd cent. BCE) gives his consent to *niyoga* only after setting many preconditions for it. According to him, a woman may bear offspring from her brother-in-law only if her husband has died, she has been allowed to undertake the task by her elders, she limits sex to periods of fecundation and she bears no more than two children.[3] Following Gautama, Baudhāyana (2nd cent. BCE) too allows the practice.[4] Vaśiṣṭha likewise allows the practice, suggesting that the father or brother of the widow should make arrangements for the *niyoga*.[5] Kauṭilya (1st–2nd cent. CE) is more flexible in this matter: he suggests that a woman whose husband is absent from home for a long time, has become a renouncer, or has died should wait for seven months (or one year if she already has children); after that period she can take a second husband from her previous

[3] "When her husband is dead, she may seek to obtain offspring through her husband's brother after she has been appointed to the task by the elders. She should not have sex with him outside her season. Alternatively, she may obtain offspring through a relative belonging to the same ancestry, lineage, or line of seers, or just a relative; according to some, however, through no one other than her husband's brother. She shall bear no more than two children." (*Gautamadharmasūtra* 18.4-18, translated in Olivelle 2000, 167).

[4] "When her husband dies, a wife should abstain from honey, meat, liquor, and salt, and sleep on the floor for one year; for six months, according to Maudgalya. After that time, if she has no son, she may bear one through a brother-in-law with the consent of her elders." (*Baudhāyanadharmasūtra* 2.4.7-9, translated in Olivelle 2000, 257).

[5] "The wife of a deceased man should sleep on the floor for six months, observing her vow and eating food without salt or seasonings. After the completion of the six months, she should bathe and make a funeral offering to her husband. Then the father or the brother should assemble the elders who taught or performed rites for the deceased person and his relatives and get them to appoint her levirate." (*Vaśiṣṭhadharmasūtra* 17.55-56, translated in Olivelle 2000, 421).

husband's family lineage.[6] Yājñavalkya (4th cent. CE) allows the practice under similar terms, but he adds that the brother-in-law has to be anointed with clarified butter when going to the widow to raise a son.[7] Nārada (5th–6th cent. CE), following Yājñavalkya, allows the practice and adds that the male and female should not embrace each other with their limbs during intercourse, and he further stipulates that the male should not have intercourse with a woman who has a son, is barren, or is beyond menopause, or who does not consent, is pregnant, is of ill repute, or has not been granted leeway by her relatives.[8]

The earliest Dharmaśāstra text, the *Āpastambadharmasūtra* (3rd cent. BCE), is completely against the practice of *niyoga*. The text mentions that both the man and woman who practise it go to hell and that the happiness resulting from abiding this restriction is far greater than that resulting from children obtained by following that custom.[9] Viśvarūpa (9th cent. CE), a commentator of the

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[6] "The wife of a man who is absent from home for a long time, who has become a renouncer, or who is dead, should wait for seven menstrual periods; for one year, if she has children. After that time she should go to a uterine brother of her husband; if there are several, to the one who is closest, the one who is righteous, the one capable of maintaining her, the youngest, or the one without a wife; and in their absence, even to one who is not a uterine brother: a man of the same ancestry or a member of the same family who is close by. This is the strict order among them. Passing over these heirs, if she remarries or takes a lover, the lover, the woman, the giver, and the man who marries her receive the penalty for adultery." (*Kauṭilīya Arthaśāstra* 3.4.37, translated in Olivelle 2013, 189).

[7] "The brother-in-law (of the widow), a Sapiṇḍa or a Sagotra, being anointed with clarified butter and with the permission of the Guru, may go to a sonless widow when she can conceive, with the desire of raising a son." (*Yājñavalkyasmṛti* 1.68).

[8] "If a woman who has no children loses her husband, she should be appointed by her elders to go to her brother-in-law in order to have a son. He should continue to receive her until a son is born, but this must cease as soon as a son is born. To do otherwise would be evil. Their limbs should be anointed with ghee or unprocessed oil, their faces averted, and they should not embrace each other's limbs. He should not have intercourse with a woman who has a son, is barren, or beyond menopause, or one who does not consent, who is pregnant, of ill-repute, or who has not been appointed by her relatives." (*Nāradasmṛti* 12.79-82, translated in Lariviere 2003, 393-394).

[9] "'A man should not introduce to an outsider the woman who has assumed his lineage, for a wife is given to the family' – so they admonish. That is now forbidden because of the weakness of the flesh, for with respect to the husband all are equally outsiders. When this is violated, both husband and wife will undoubtedly end up in hell, for the

Yājñavalkyasmṛti, after a long discussion of 1.68-69, concludes that only Śūdras are allowed to practise *niyoga* in the Kali era. Bṛhaspati (12th cent. CE) is against levirate. The opinions of Bṛhaspati are quoted in Aparārka's commentary on *Yājñavalkyasmṛti* 1.68-69 and Kullūka's commentary on *Manusmṛti* 9.68. Unfortunately, the verses quoted in these commentaries are not found in the available edition of the *Bṛhaspatismṛti*.

Manu (2nd cent. CE) presents mixed opinions regarding *niyoga*. First, he says that if the line is about to die out, a wife who is duly authorized may obtain the desired progeny through a brother-in-law or relative belonging to the same ancestry.[10] Later he says that a twice-born man should never assign a widowed woman to another man, a law of beasts that was extended to humans during the reign of Vena.[11] In conclusion, Manu allows *niyoga* only to Śūdras.

Apart from the Dharmaśāstra texts, some accounts featuring *niyoga* can be found in the *Mahābhārata*. The epic describes many instances of the practice (1.127.111, 1.126, 1.132.64, 1.1.53–54). In one of them (1.1.53–54), Queen Satyavatī orders her son Vyāsa to enter into *niyoga* with the widows of her son Vicitravīrya, who had had an untimely death. The widows Ambikā and Ambālikā and one of their maids give birth to Dhṛtarāṣṭra, Pāṇḍu and Vidura respectively.

When modern ideas contradict older practices, that is, when older customary practices are terminated or modified, Hindu Dharmaśāstras designate such

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happiness resulting from following this restriction is far greater than that resulting from children obtained by following that custom." (*Āpastambadharmasūtra* 2.27.2-7, translated in Olivelle 2000, 113).

[10] "If the line is about to die out, a wife who is duly appointed may obtain the desired progeny through a brother-in-law or a relative belonging to the same ancestry. The appointed man should smear himself with ghee, approach the widow at night in silence, and beget a single son, never a second." (*Manusmṛti* 9. 59, translated in Olivelle 2000, 193).

[11] "Twice-born men should never appoint a widowed woman to another man, for in appointing her to another man, they assail the eternal Law. The nuptial formulas nowhere mention appointment, nor do injunctions relating to marriage sanction the remarriage of widows. This Law of beasts, despised by learned twice-born men, was extended to humans also during the reign of Vena. He was a preeminent royal sage, who once ruled the entire earth and, his mind overcome by lust, created the intermixing of classes. Since that time, good people denounce anyone who is senseless enough to appoint a woman to have children after her husband dies." (*Manusmṛti* 9.64-68, translated in Olivelle 2005, 193).

practices as Kalivarjya (practices not allowed in the Kali era). Later scriptures so designate the practice of *niyoga* as Kalivarjya.[12]

Except for the *Kauṭilīya Arthaśāstra*, all the Dharmaśāstras either allow or rule out *niyoga*, and in any case solemnly declare that a brother-in-law is not allowed to take his older brother's wife as a wife. In these *śāstra*s sexual intercourse is only allowed under certain terms and with the express permission of seniors. For all that, some castes living in north-eastern and north-western Nepal customarily practised keeping sisters-in-law as wives. Similarly, in the given executive order the use of the word *birāunu*, and the words *sahyārnu* and *behornu* attested in another *lālamohara* (published in Nepālī VS 2012, 138–139) indicate that the practice was to take sisters-in-law as wives rather than just engage in sexual intercourse with them.

5. *The rules in the* Mulukī Ain

The *Mulukī Ain* of 1854 includes several pre-existing sets of legislation among its sources (Khatiwoda, Cubelic, and Michaels 2021, 20). Therefore, even though the present *rukkā* is not quoted in the *Ain*, it may have been consulted during the drafting phase. The *Ain* stipulates that from VS 1919 (1862) onwards Upādhyāyas, Jaisī Brāhmaṇas and Rājaputs (Ṭhakuri) are prohibited from practising levirate but all other castes are allowed to do so (see *Mulukī Ain*, Art. 132-133 'On Rape I and II'; Khatiwoda, Cubelic, and Michaels 2021, 723–739).

The *Ain* wanted to achieve uniformity within the penal code throughout the entire realm, but given the various ethnic groups each with its different culture and customary traditions, in the end, it could not achieve that goal. It appears that lawmakers of that period were conscious of the obstacles, and instead of forcibly implementing one rule of law for all, they were ready to modify and revise it to accommodate individual communities. Thus, while the earlier regulation had imposed high fines on the Jaisī people of north-western Nepal who practised levirate, afterwards the Jumlīs were allowed to do so. Indeed, ultimately all castes beyond Upādhyāyas, Jaisī Brāhmaṇas and Rājaputs

[12] *Aśvamedhaṁ gavālambhaṁ saṃnyāsaṁ palapaitṛkam, devareṇa sutotpattiṁ kalau pañca vivarjayet***.** "In this Age of Kali, five acts are forbidden: the offering of a horse in sacrifice, the offering of a cow in sacrifice, the acceptance of the order of renunciation, the offering of oblations of flesh to the forefathers, and a man's begetting children upon his brother's wife." **(***Brahma-vaivarta Purāṇa, Kṛṣṇa-janma-khaṇḍa* 115.112-13).

(Ṭhakuri) were granted the right. As a rule, the higher the caste in Nepalese society, the less frequent is the occurrence of levirate.

6. *Conclusion*

As Dharmaśāstra texts were the normative law codes that defined a king's rule over his realm and provided lawmakers with moral and ideological guidelines, the substance of these texts can be found reflected in the administrative orders of the kings and prime ministers of Nepal. Through their executive orders, the rulers of Nepal tried to corral the ethnically and culturally diverse cultures of Nepal into a single legal arena governed by the Hindu caste system. In some communities, sisters-in-law are respected as mother figures, so it was illegal to marry them if widowed, while in other communities no such custom prevailed. The government had tried to outlaw the practice in the whole country by imposing severe penalties upon those who engaged in sexual intercourse with sisters-in-law. Since the Hindu Dharmaśāstras were composed by various authors at different times and in different places, however, divergent opinions can be found in them on the issue of *niyoga*. It appears that lawmakers of the early Śāha period were conscious of this, and in the end, when faced with practical obstacles, instead of forcibly implementing one rule of law for all, they were ready to modify and revise it to accommodate individual communities.

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Appendix

श्रीमन्महाराजाधिराजकस्य रुक्का

आगे हाम्रा मुलुकका चार वर्ण छत्तिस जात गैह्र प्रति

विवाहिता साक्षात् भाउज्यूसंग बीराउ गर्न यो कुरा ठूलो पाप रहेछ आजसंम जो जति भयो सो भैगयो जंगला मुलुक हुनाले जातको तजविज गर्नु पर्दा हाल किराती लिम्बु लाप्च्या र जुम्लीहरू बाहिक राषी आजदेखी उप्रान्त जानीजानी कसैले साक्षात् भाउज्यू विराउ नगर्नु भंन्या थीति वंदेज बाँधि वक्स्यौं । यो थिती वमोजिम वंदेजमा जो रहदैन तसलाई जात अनुसार तपसील वमोजिमको सासना होला ।

तप्सील

उपाध्या ब्राह्मणहरूले जानाजानी भाउज्यू बीराउ गर्यो भन्या जातपतीत गरी मुडी देश निकाला गर्नु

गोतीया भाइ क्षत्रिय जातहरूले जानाजानी भाउज्यू बीराउ गर्या भन्या जात पतीत गरी देश निकाला गर्नु

अरू क्षत्रीय रजपुत जातहरूले जानाजानी भाउज्यू बीराउ गर्या भन्या लिंग काट्नु

संन्यासीहरूले जानाजानी भाउज्यू बीराउ गर्या जात पतीत गरी मुडी देश निकाला गर्नु

षस जातहरूले जानाजानी भाउज्यू बीराउ गर्या भन्या लिंग काट्नु

वैस्य जातहरूले जानाजानी भाउज्यू बीराउ गर्या भन्या लिंग काट्नु

मगर जातहरूले जानाजानी भाउज्यू बीराउ गर्या भन्या लिंग काट्नु

गुरुं घले जातहरूले जानाजानी भाउज्यू बीराउ गर्या भन्या लिंग काट्नु

नेवारहरू सुद्र जातले जानाजानी भाउज्यू बीराउ गर्या भन्या सर्वस्व लिनु

दमाइ सुनार कामी सार्की गाथीइन् हुर्क्या प्रभृति पानी नचल्न्या जातले जानाजानी भाउज्यू विराउ गर्या भन्या मासी दिनु

बलामी माझी दनुवार सुनुवार मुर्मि भोट्या चेपाङ् पहरि बरै कुम्हाल बरानु गैरहहरूले जानाजानी भाउज्यू बीराउ गर्या भन्या मारी दिनु

इति संवत् १८९३ साल मिति आषाड ७ रोज ४ शुभम् । (First published in Nepālī VS 2035, 153)

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ARIK MORAN AND CSABA KISS[1]

In the Name of Dharma*: A Himalayan Prince's Response to Colonial Oppression, Chamba 1870-74*

1. *Introduction*

In 1873, the Kashiraj Dharma Sabha, also known as the "Society for the Promotion of Religion" in Varanasi issued a shastric ruling (*vyavasthā*) – a written extract from the Dharmaśāstra, given in a decision by the pandits or dharmashastrins – regarding the right of inheritance to the throne in the West Himalayan Rajput kingdom of Chamba (present-day Himachal Pradesh, India). Substantiated by numerous shastric sources, the Sabha ruled in favor of the appellant, the late ruler's brother, thereby contradicting the decision of the British Indian Government to grant the kingdom to the claimant's half-brother instead. This study explores the context, meanings, and implications of the seeming overlap between the religious authority of the Kashiraj Dharma Sabha and Rajput state politics in British India. The Dharma Sabha's pronouncement against the colonial government's choice of successor reveals how these seemingly separate spheres of authority could become convoluted in late 19th-century India, engendering an increasingly legalistic interpretation of *rājadharma* in Himalayan states that were subjected to colonial rule.

The case in question concerns Suchet Singh of Chamba (1841-96), a Rajput prince who spent most of his adult life contesting the British Indian regime's decision to remove him from power. After being denied the throne by the British Resident of Chamba in 1870, Singh engaged in a quarter-century of legal, political, and diplomatic struggles that took him from India (1870-74) to Britain (1874-84), France (1884-94), and even to Russia (1887). By 1894, Singh had accumulated insurmountable debts (and a chronic dependence on alcohol)

[1] Research for this paper was supported by the Israel Science Foundation (grant No. 203/21).

that obliged him to return to London, where he was declared bankrupt and died shortly afterwards.

The document examined herein dates to the first (Indian) phase of Singh's struggles. It was found in the National Library of France, Paris, along with numerous other documents that Singh had presented to support his claim in the course of his struggle.[2] These documents provide important clues regarding the changing perception of Himalayan kingship under colonialism. They point to different types of sources that were considered as legitimating sovereignty, and to the shifting emphases that they received in communications with the British authorities over time. As a member of the ruling elite, Singh was expected to abide by *rājadharma*, that is, the legal, ethical, and religious decrees pertaining to Himalayan (Hindu) sovereigns. At the same time, as a subject of British India, he was also subjected to the laws and regulations of the colonial power. It is the clash between these partially overlapping and frequently contradicting conceptualizations of *dharma* that concerns this paper.

We begin with a survey of Chamba's political history in the transition to colonial rule (in 1848). Set in the wider context of the West Himalayan kingdoms' tradition of semi-autonomous existence under imperial regimes, this period reveals significant continuities between pre- and early colonial norms of Rajput rule. The congruent agendas of *parvenu* politicians in the Chamba Court and those of the British resident who oversaw the state's "development" from 1864, which were alleged to have brought about Singh's expulsion from the state (in 1870), illustrate the evolution of these continuities into effective political collaborations in the early decades of colonial rule. The prince's reaction to these motions is examined in the next section. Within a year of his deposition, Singh had created and mobilized an extensive network of supporters consisting of noblemen peers and state subjects. His attempts to petition the British authorities with the aid of this network – including an intrusive series of measures directed at the Viceroy of India's camp during a tour of the hills – reveals (at least) three sources of authority that were considered essential for sanctioning kingship: agnate succession, acceptance by noblemen peers, and popular support. The last section examines Singh's appeal to the Kashiraj Dharma Sabha of Varanasi in 1873, which resulted in the religious body of experts issuing a *vyavasthā* that nullified the British Indian Government's decision against him. Portrayed as an ostensibly "religious" matter regarding

[2] The documents are kept in a carton box with no apparent serial order, see Bibliothèque Nationale de France (BNF), Paris, Num. Indien 768.

Hindu laws of inheritance, the Sabha justified its intervention by recourse to the charter (*sanad*) that the British had granted to the rulers of Chamba in 1848, which bade successions be performed "according to the rules of the shastres [*sic*]" (Aitchison 1931, Vol 1: 325). The overlap between Hindu and colonial jurisdictions thus effectively undermined the political decision to depose Singh, illustrating the complication of colonial jurisprudence at the heyday of British India. We conclude with an evaluation of the case as an index to changing value systems in the understanding of Himalayan *rājadharma*.

2. *Chamba and the transition to colonial rule*

The leaders of Chamba claimed provenance in an ancient line of Suryavamshi Rajputs. The family formed part of a broader group of West Himalaya elites who laid claim to twenty-two kingdoms in the northwestern mountains of India and that were collectively known as the "Punjab Hill States" (*riyāsāt-i kūhistan-i panjāb*). Connected through an extensive web of political and marital alliances, the members of this elite constituted a distinct group that was united by shared cultural practices, rules of etiquette, ritual protocols, and social prestige. The relative standing of each family in the regional hierarchy correlated with the level of political and military power that it held at any given time.

For the rulers of Chamba, the 19th century was marked by a relative erosion of status following a series of military and political defeats. Signaled by the death of the raja of Chamba in battle with the raja of Kangra in 1794, the successors to the throne managed to retain a certain degree of autonomy over the next two decades owing to the state's geographic isolation between the lofty Pir Panjal Range to its north and the massive Dhauladhar Range that separated it from Kangra towards the south. Chamba autonomy was significantly reduced with the hill states' subjugation by Sikhs *c.* 1809-1845. The maharaja of Lahore, Ranjit Singh Sindhawalia (r. 1799-1839), famously exploited the predicament of the besieged raja of Kangra to extend his rule over the hills. The mountain king had originally turned to the maharaja for help in ousting the invading armies of Gorkha Shah Nepal from his territories after a lengthy siege (1803-1809) that laid waste to his kingdom. While an outbreak of cholera ultimately

forced the invaders to retreat, the soldiers from Lahore seized the opportunity to assume control of Kangra, heralding a new era in the history of the hills.[3]

Subsumed by a sophisticated, dynamic empire that rewarded its servants on the basis of merit, the Rajput elite was sidelined as an irrelevant remnant of an antiquated past. While the majority of rulers responded to the downgrading of their status with acts of micro-resistance (Sharma 2017), the Dogra Rajputs of Jammu (alias "Jamwals") welcomed the opportunity to improve their income and social standing. The Dogra leadership became crucial participants in the Court of Lahore, providing high-ranking officers and wazirs who were embedded in its politics. Within a short while, the Jamwals had eclipsed Kangra as the dominant family in the hills and became poised to assume a leading position in Lahore upon the death of the maharaja. When Ranjit Singh passed away (in 1839), the Dogras played a central part in the succession struggles that ensued, and ultimately sided with the British upon the latter's invasion of the Punjab during the so-called "First Anglo-Sikh War" (1856-46). This alliance cemented the Dogras' status as the most powerful West Himalayan Rajput group in the hills, as the colonial state's annexation of the Punjab entailed the bequeathing of the vast territories of Jammu & Kashmir to raja (henceforth, "maharaja") Gulab Singh of Jammu (1792-1857) in perpetuity; the remainder of the Hill States – including Chamba and Kangra – were parceled into directly ruled civil districts and indirectly ruled states.[4]

When Suchet Singh was born (in 1841), Chamba was still formally part of the Sikh Empire and under the influence of the powerful Jamwal faction of the Lahore Durbar. Although the British East India Company (EIC) had conquered the Punjab when Singh was only four or five years old, the political and cultural setting of the kingdom remained largely untouched by developments in the plains. Politically, the affairs of state were managed by the powerful Baratru family, whose leaders had prevented a loss of territories to Jammu in the early 19th century and consequently became hereditary wazirs at the Chamba Court (Hutchison and Vogel 1933, Vol 1: 321-2). When Singh's father died (in 1843), it was the Baratru wazir who made sure that the crown passed to his late master's son, Sri Singh (r. 1843-70). The wazir was similarly expedient in negotiating the *sanad* sanctioning the ruling family's authority (in 1848) and seemed certain to retain this leading position in the future.

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[3] The standard narrative of these events appears in Hutchison and Vogel (1933, Vol 1: 180-188). For a revised reading, see Moran (2019, 61-84).

[4] On the Dogra rise to power, see Rai (2004, 18-79).

The marriage of the young raja to a Suketi princess in 1853 threatened Baratru dominance. The incoming queen brought a host of retainers from her native state, who quickly seized control of the state apparatus, undermining the wazir's authority and – according to colonial sources – soon ran the country into debt. Within a decade, the British authorities had grown sufficiently concerned to appoint Major Blair Reid as Superintendent in Chamba State. In the course of fourteen fruitful years (1863-77), the officer extended cultivation to new tracts, opened roads, constructed bridges, and introduced scientific management to forests across the state (Hutchison and Vogel 1933, Vol 1: 329).[5]

While steps for modernization were underway, the raja's younger brother pursued the regional tradition of military service with Rajput rulers. Suchet Singh served as a commander in the armed forces of the maharaja of Jammu and Kashmir, where he developed a strong loyalty towards the latter as well as towards his patrons in the British Indian government, a loyalty which he expressed in words and deeds. In the events of 1857, while still a young man, as the prince would recall towards the end of his life, he had forcefully marched against scores of his "co-religionists" in Chamba as they attempted to assault British families in the hill station of Dalhousie. Singh thus embodied the composite ideal of Rajput leaders under colonial rule, which combined the "old world" politics of patron-client relations within the Rajput community with an unwavering support of the British Indian regime.[6]

After the prince had married and had (at least) one daughter, he deepened his commitment to the maharaja of Jammu and Kashmir by shifting residence to the latter's kingdom. However, when his brother became ill and died in October 1870, Singh hastily traveled home to attend the funeral. Since Sri Singh died without leaving an heir, it was up to Suchet Singh to perform the funerary rites. Ordinarily, the act would have customarily rendered Singh the new head of the royal household. However, under the political matrix then prevailing at court, the mere execution of the rites would barely suffice to secure his position. Thus, when the question of succession came to the fore a few weeks later, the Suketi rani's party and the British Superintendent had seemingly colluded to dispose of Suchet Singh and place an alternative person in his stead. The annals of the Hill States recount a rather terse version of these events:

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[5] For an early example of the Resident's work in Chamba, see Reid (1870).

[6] On the alliance between Indian rulers and the British, see Ramusack (2004). On the importance and development of Rajput status in the colonial setting, see Kasturi (2002).

> In the absence of a direct heir, Mian Suchet-Singh, the younger of the two surviving brothers, laid claim to the *gaddi*, basing his claim on the fact that he was the late Raja's uterine brother. The *sanad* of 1848 had, however, made provision for the succession, and, in accordance with it, Mian Gopal-Singh, the elder of the two brothers, was declared the rightful heir. The order of [the] Government directing his recognition as Raja was notified in open Darbar by Colonel Blair Reid on the 26th October, 1870. Mian Suchet-Singh then retired from Chamba, and continued to press his claim for many years, both in India and England, but always with the same result. He died in London in August, 1896, without male heirs. (Hutchison and Vogel 1933, Vol 1: 331)

We know from alternative evidence that Suchet Singh was far from complacent about his replacement with a "half-brother", and that he did, in fact, spend the rest of his life battling Reid's decision (Moran and Hasson 2023). His commitment to the cause notwithstanding, the history of British Residents' involvement in princely states suggests Singh was not entirely wrong in representing himself as the legal heir to the kingdom (Fisher 1991). As far as the empirical evidence goes, the paragraph quoted above provides important clues regarding the origin of the problem: first, that the *sanad* of 1848 was the primary document used to legitimate sovereignty in Chamba; second, that biological proximity was the determining factor in matters of succession; third, that Gopal Singh was officially recognized as raja on 26 October 1870, suggesting that Suchet Singh had indeed been king of Chamba for the better part of the month of October, and incidentally providing a start date for his quarter century-long struggle to reclaim the throne.

3. *Contesting the state, 1870-73*

Although the information regarding Singh's initial reaction to his deposition is scant, the data found in contemporary documents and newspaper publications suggests he had already gained a significant following among countrymen and peers soon after his dismissal.[7] These sources indicate that the prince employed a variety of devices to buttress his claim to power. This section delineates the

[7] Primary documents from this period – chiefly written endorsements of Singh's right to the throne signed by regional headmen – are preserved in the Bibliothèque Nationale, Paris; see Moran and Hasson (2023).

stratagems that Singh had devised between his expulsion from Chamba and his appeal to the Kashi Dharma Sabha in 1873.

An analysis of the actions taken by the prince and his supporters suggests that political authority among Rajput rulers in the hills drew from three main sources: the hereditary right of agnate succession (expressed in ritually enacted ties of kinship), the approval of peers (manifested in signed endorsements and oral pledges), and popular support (evinced in the widespread mobilization of subjects). Each of these elements carried its own weight in Singh's negotiations for restitution. The stories circulating in the Indian press soon after the prince's dismissal from Chamba provide a good indication of the way these elements were combined when contesting the state.

From the *Indian Public Opinion,* we learn that "a great disaffection" was affected by Reid's decision to prevent the person "whom the people consider the lawful heir" from mounting the throne.[8] Although the report admitted that Singh was renowned as "a dissolute character", the people still considered him the legitimate heir and were therefore considerably vexed by the appointment of his "half-brother" as king instead. Too proud to yield to the offer of a "pension" from the British resident, Singh quit Chamba and returned to his residence in Jammu. A few weeks later, a British tea planter from the Kangra Valley (due south of Chamba) wrote an anonymous piece in *The Pioneer* with an update on events in the kingdom (Anon. 1870b). The residents of Chamba, it claimed, intended to petition the British Indian Government against their new ruler, whose succession threatened to "extinguish the direct royal line" that had supposedly ruled over Chamba for three millennia. By placing an incompetent, "deformed imbecile" on the throne instead of the "clever upright man" to whom it belonged – and who was, moreover, highly esteemed by both the "maharajah of Cashmere" and "the people of Chumba" – the British Indian Government had pitted itself against the interests of the state it was meant to protect.

The stories that were published in the *Indian Public Opinion* and in *The Pioneer* stressed the importance of kinship for legitimating Rajput sovereignty. His personal merit notwithstanding, it was ultimately Singh's biological proximity to the late ruler that determined his right to inherit the throne. This point is underlined by the fact that whereas Singh was considered the lawful candidate by virtue of his having been the late ruler's "full" brother (i.e., born to the same parents), Gopal Singh was cast as illegitimate on account of his being a "half" brother (born from a different mother). Another aspect emphasized in

[8] The report was cited in Anon. (1870a).

these stories was the acceptance of the claimant as heir presumptive ("*duthain*", literally, "second [in line to the throne]") by peers in the regional leadership. The endorsement by noblemen across the region, the towering figure of the maharaja of Jammu and Kashmir included, underlined this legitimacy. These assertions are strengthened by the numerous aforementioned documents supporting Singh's claims that were written and signed by nobles from across the region at around the same period.[9] Consisting of legal depositions, private letters, and extensive genealogical charts in Hindi, Urdu and the local Tankri script, these documents (which are yet to be systematically edited and translated) include over 80 (!) individually signed papers that contain a near identical text confirming Suchet Singh's official title as heir presumptive (*duthain*) and disavowing Gopal Singh's legitimacy on the grounds of his birth from a mother of inferior standing. Presented at various stages in the course of the prince's lifelong struggle, these documents were ignored by British officials, who left most of his petitions unanswered. The visit of the Viceroy to the Kangra Valley in November 1871 is a case in point.

The prince of Chamba is somewhat tangentially mentioned in a pamphlet that was written by a British plantation owner in the Kangra Valley in commemoration of Lord Mayo's visit in November 1871, just a few months before his tragic murder in the Andaman Islands (Anonymous 1872).[10] Aimed at promoting the Kangra Tea industry, the pamphlet provides a vivid description of the Viceroy's sojourn in the valley, replete with details of the speeches and promises made during the durbar that had been held in his honour in Palampur, the so-called "capital of the tea district." The meeting with the planters and the local elite having concluded, the party prepared to leave for Chamba via "Dhurmsala" (Dharamsala), where it halted for a few days' hunt (*śikhār*). Having entered the territory of the *gaddi* shepherds, the autochthonous inhabitants of Chamba who also owned lands in the Kangra Valley, the Viceregal party was repeatedly approached by these erstwhile subjects (*prajā*) of the prince, who proved "much interested in the question of [the Chamba] succession" and strongly supported "Suchet Singh's right over the latterly appointed Rajah Gopal Singh".[11] It was, recounted the planter, impossible for the Viceroy to ignore "the strong and unanimous feeling which showed itself everywhere on this matter. Several numerously signed petitions have been

[9] BNF, Num. Indien. 768.
[10] On Palampur Fair, its history, and geopolitical context, see Moran (2020).
[11] For an overview of *gaddi* relations with the state, see Singh (2019, 154-165).

prepared; one of which was signed by eighty Rajahs and Sirdars" (Anonymous 1872, 42).

The prince of Chamba had evidently put the year since his banishment to good use. Maintaining public pressure through the press and his followers, and gaining the majority of signed endorsements that he would subsequently present to the India Office in London in order to legitimate his claims to the throne, Singh had earned the support of peers and followers across the region. There was more. According to the planter,

> Suchet Singh himself, with very questionable taste, intruded himself, on every possible opportunity, on the notice of His Excellency and the officers of his Staff. Suddenly appearing on the road, during a march, he would thrust his *nuzzur* before one or other of His Excellency's Secretaries, who, being off their guard, touched the *nuzzur* before they became aware who the person offering it was. Suchet Singh had been told before that this manner of bringing himself into notice was considered objectionable. (Anonymous 1872, 42)

Cleverly exploiting the Viceroy's visit, the claimant tricked the establishment into accepting tribute (*nazrānā*), applying political protocols of the *ancien régime* that should have, in principle, forced his interlocutors to engage. However, instead of politely acknowledging these overtures, the prince only increased the scorn of the establishment towards him. By blanking the prince and his peers, the Viceroy and his entourage hoped to discourage engagement with the exiled nobleman's party, since it was widely believed that "some concerted action will be taken by Suchet Singh's party to bring his claims prominently before His Excellency, in the hope of gaining a re-hearing for his case" once the party reached Chamba (Anonymous 1872, 42).

If the government had made up its mind to avoid the prince at all costs, it still had to account for his marked popularity in comparison with the person they chose to crown. As the planter explained,

> [t]he feeling so plainly shown in favor of Suchet Singh by the Guddees, turned out, on enquiry, to amount simply to this: Gopal Singh, they said, was an owl [i.e., an idiot]; and, moreover, so completely under the influence of the Chumba Wuzeers [the Suketi party that had allied with the British Resident], who were, by the imposition of new laws and taxes, continually annoying the people, that there could be no hope his ruling for their advantage.
>
> Suchet Singh, on the other hand, owed nothing to the Wuzeers, he was an active, business-like man, who would rule independently, with good judgment

> and to the advantage of the whole population. Under these circumstances, there is nothing to wonder at in the unanimous wish, so strongly expressed, for Suchet Singh's succession. (Anonymous 1871, 42-43)

This insightful clarification, conveyed as it was by a person with close knowledge of the region, identifies Chamba Court politics as the source of discontent, corroborating the narrative implicit in colonial histories (e.g., Hutchison and Vogel 1933, Vol 1: 329). As a colonist-settler who dealt with *gaddi* shepherds, local workers, and regional headmen on a regular basis, the author would have been well informed of events and gossip in the hills. That the *gaddi*s were especially concerned by events in Chamba is evident given their ownership of lands on both sides of the Dhauladhar Range, which would have rendered them acutely aware of the discrepancy between the oppressive decrees of the Chamba Court on their holdings in the north and the active encouragement and concessions imparted by the British authorities to encourage settlement and cultivation in Kangra to the south. To improve their standing, the *gaddi*s had even studied the "special treaty" (*sanad*) of 1848 and come up with their own legal argument in favour of Singh's succession: while the treaty dictated that "the eldest surviving brother ascend the Guddee", they argued that this rule "did not apply to the present succession, but was restricted to that of [the late ruler] Sree Singh"; it was thus Suchet Singh, "as the eldest of the leading branch of the family, [who] should be Rajah" (Anonymous 1872, 43).

For all the efforts put into petitioning the Viceroy and formulating arguments in support of Suchet Singh, the prince and his allies were doomed to fail. By the time of his encounter with the Viceroy in Kangra (November 1871), the prince had begun accumulating debts from creditors across the region in order to finance his regal lifestyle and maintain the lobbying necessary for his struggle with the colonial state. While these debts would ultimately bring his downfall, for the time being they primarily seemed to have induced a rethinking of strategy. Rather than futilely beg for an audience with colonial officials, Singh attempted to change the terms of contract altogether by adopting a new tactic that would disprove the logic underlying the British Indian regime's pretense to a rule of law. It is here that the Kashiraj Dharma Sabha of Varanasi came into the picture.

4. *Hindu inheritance law and the politics of succession*

The dearth of archival records attesting to Suchet Singh's activities in the months between his failure to meet with Lord Mayo in Kangra (November 1871) and the issuing of a decision in his favor by the Kashiraj Dharma Sabha in Varanasi (25 April 1873) is largely inconsequential. Apart from accumulating debts – a loan of 2,000 rupees from the wazir of Mandi was taken at some point in 1872, another 500 rupees were taken on credit in Lahore in October of the same year – it is safe to assume that Singh persisted in devising ways to undo his banishment from his natal state. In the meantime, the situation in Chamba was rapidly drawing to a close. In April 1873, the recently anointed Raja Gopal Singh announced his abdication, leaving the kingdom to his seven-year-old son under the "supervision" of the British Resident. The prince responded to this development by contesting the colonial regime on its own terms.

To counter the sudden change in Chamba, Singh revisited the foundational document that sanctioned his dynasty's right to rule. Signed a mere month after the EIC had annexed the Punjab, the tersely worded charter (*sanad*) consisted of a preamble and six short articles that delineate the rationale and the conditions for Sri Singh's rule. As customary, the agreement opened with a statement of the facts of annexation, a definition of Chamba territory and an acknowledgment of its prior possession by Sri Singh. It then proceeded to declare that the state was "conferred in perpetuity upon him [Sri Singh] and his heirs male, who, according to the shastres [*sic*], may be deemed his rightful successors. In the event of the Rajah leaving no male heirs, his next brother, who may be the eldest of the surviving brothers, will succeed him" (Aitchison 1931, 325). The mention of "shastres" provided Singh with a loophole that could be used to contest the British Government's decision. Within a month of his half-brother's abdication in Chamba, the prince had obtained a bona fide shastric ruling (*vyavasthā*) that supported his claim to succession from one of the finest arrays of Dharmashastra experts in all of India, the Kashiraj Dharma Sabha of Varanasi.

The Kashiraj Dharma Sabha played an important role in the reshaping of Hinduism in the late 19th century. Founded in Varanasi (Kashi) *circa* 1870, the assembly of Brahmin pandits, learned laymen, and influential literati that created and sustained the institution ranked high among the *dharma sabhā*s that dotted the South Asian landscape, its rulings reverberating beyond the plains of Hindustan to Puri, Nepal, and so forth (Dalmia 2018, 355-8; Dodson 2007, 180-1; Michaels 2018). Drawing support from the "Hindu revivalism" promoted by

the maharaja of Benares, the Sabha promoted Sanskrit learning, religious festivities, and provided shastric rulings (*vyavasthā*s) on "what was properly thought to constitute 'Hindu' *dharma*" (Dodson 2007: 181). With many of its members drawn from establishments that the colonial regime had promoted (e.g., Benares College) to increase its legitimacy among the Indian population, the Dharma Sabha of Varanasi became a nexus where "theoretical" musings about religion collided with the practical implementation of religious mores. In the case of the prince of Chamba, the ruling of the Sabha evinces a singular intersection of "religious" law with the legal mechanisms of the colonial regime in ways that were almost certainly not anticipated by the British in India.

The document at hand, which is preserved along with the various papers that the prince had collected in the National Library in Paris, consists of a large table printed on A3 size paper in Devanagari script (Figure 1). It contains six typeset columns with all the necessary information about the petition: the date, the name of the appellant, a list of the persons presiding, the question at hand, the pandits' response, and objections (*virodha*).[12] Dated to the 14th day of the dark fortnight of Vaiśākha 1930[VS] (25 April 1873), the session was presided over by 59 people: 23 pandits whose names are explicitly listed followed by "and others" (*ityādayaḥ*), after which is an unintelligible scribble in red pen with the summing up of "35 Pandit" and "24 Hindoo Lawyer[?]" to give a total of "59". The pandits in session included the famed minister of the raja of Benares and *nyāya-mīmāṃsā* expert Tārācaraṇa Tarkaratna[13] (listed fifth), but none of the other names known from recent research in English (including the founding member, maharaj Īśvarī Prasāda Nārayaṇa).

The bulk of the text appears in the next two columns (D-E), which contain an explanation of "the essence of the question" (*praśn kā svarūp*) and the pandits' "response" (*uttar*), which was unanimous (i.e., no objections appear in the last column of the document). Both the "essence of the question" and the "response" include a Hindi translation after the Sanskrit text. The "essence of the question" column presents a first-person narrative in the name of Suchet Singh, which may be translated as follows:

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[12] The document originally had seven columns, but the first indicating the number of the file in Kashiraj Dharam Sabha proceedings, is cut out. A printed sentence at the bottom of the page reveals that it was "printed by Gopinath Pathak at the Banaras Light Printing House" (*banāras lāiṭ chāpekhāne meṃ gopīnāth pāṭhak ne mudrit kiyā*).

[13] Additional information available here:
https://www.panditproject.org/entity/86628/person.

> My father, Caṛhatasiṃha, king of Campā, married thirteen wives. In our kingdom, this is the eternal practice (*sanāntanavyavahāra*): the king's first wife is called 'Paṭṭarāṇī', the second 'Mahārāṇī'. The others are called 'Rāṇī'. Among them, to the one called Mahārāṇī, to the second wife, were born three sons: Vajrasiṃha, Śrīsiṃha and Sucetasiṃha. Among the wives (*ramā*) called 'Rāṇī', one had a son called Gopālasiṃha.
> [The designated successor] Vajrasiṃha died while his father was still alive. Then the king, as soon as Gopālasiṃha – the half-brother (*vaimātreya*) of [the late prince] – was born (*jātamātreṇa*), gave wealth fit for livelihood (*jīvikopayogivibhava*), etc., to Gopālasiṃha and to his mother. He then separated (*pṛthak kṛtvā*) [them from the household] and consecrated Śrīsiṃha as king. He placed Sucetasiṃha, his little brother from the same mother, to a rank befitting of the real brother of the king (*rājasahodarocitapade*), and then departed to heaven.
> Having received it [the allowance], Gopālasiṃha was spending his time separate [from the royal household] all his life. And Śrīsiṃha ruled the kingdom together with Sucetasiṃha, sharing meals with him etc.[14]

This seemingly innocuous deliberation about Hindu inheritance law provides important information about kingship in colonial Chamba. Erroneously (if understandably) identified by the pandits as the Sanskritic kingdom of Champa (*Campā*), the drama between the brothers sheds new light on the details of the case. First, we learn the appellations used to describe the first (*paṭṭarāṇī)*, second (*mahārāṇī*), and remaining wives (*rāṇī*s) of the kings of Chamba. It also informs us that Charhat Singh (Caṛhatasiṃha) had thirteen wives, and that the first wife bore no children who survived. It was therefore the second wife (the *mahārāṇī*) who provided heirs, namely the three brothers: Vajra Singh (Vajrasiṃha), Sri Singh (Śrīsiṃha), and the appellant Suchet Singh (Sucetasiṃha), who was the youngest of the three.

The death of Vajra Singh during his father's lifetime occasioned a reorganization of the palace. Because one of the "remaining wives" (*ramā*) had a son (namely, Gopal Singh) who was actually older than the two surviving children of the Maharani (the legal successors), the late king (Charhat Singh) tried to preempt a claim on the latter's progeny. He therefore provided Gopal Singh and his mother with an allowance that would last for their entire lives, but ensured that they were removed from the palace. After this, he placed Sri Singh

[14] For a transliteration and translation of the entire document, see appendix.

on the throne (in 1843) and died. Sri Singh then allegedly ruled along with his brother, Suchet Singh, until his death in 1870.

The emphasis on commensality as the primary marker of legitimacy runs throughout the text. The division of wealth and status in the royal family is thus conditioned on biological relations: if the late raja and his brother comprised the core of kingship, Gopal Singh and his mother, who ranked among the eleven "other" wives (*rāṇī*s), belonged to an inferior category of nobles. Similarly, while the two brothers had grown up in the same household and shared food, Gopal Singh and his mother lived off a royal allowance in separate quarters. That the issue of commensality was central in the eyes of the Sabha is evident from the way it formulated the question at the end of this preamble:

> In this question (*iti praśne*) [there should be a decision]: Who deserves to receive that kingdom now? Sucetasiṃha, Śrīsiṃha's brother from the same mother (*sahodara*), who had performed the funerary rites of Śrīsiṃha [because the latter] died without leaving an heir (*uttarādhikārin*), such as a son, a grandson, etc.? Or Gopālasiṃha, who is his [Sucetasiṃha's] half-brother (*vaimātreya*)?

If the question boiled down to commensality and the evidence presented before the Sabha was correct, then the answer (*uttar*) was patently clear: "It is Sucetasiṃha who should inherit, not the one who did not even share food with Śrīsiṃha". The "response" column then quotes a series of Dharmashastra to support this decision, beginning with "*atra pramāṇāni*" ("now the authoritative sources"). The quotations are from the *Manusmṛti* (2nd-3rd centuries CE),[15] the *Yājñavalkyasmṛti* (early 5th century),[16] its commentary, the *Mitākṣarā* (12th century),[17] [*smṛti*s of] Bṛhaspati (3th-4th century),[18] Kātyāyana (4th-6th centuries),[19] and Devala (probably around the time of Kātyāyana and Bṛhaspati),[20] from Saṃgrahakāra ("Maker of the Samgraha"), the author of the *Smṛtisaṃgraha* (8th-10th centuries),[21] and the *Vivādacintāmaṇi* (15th century).[22] The pandits

[15] For this dating, which is generally acceptable, see Olivelle (2005, 25).
[16] Olivelle (2019, xiv).
[17] Olivelle (2019, viii).
[18] According to Kane (1930, 210).
[19] According to Kane (1930, 218).
[20] According to Kane (1930, 221), but before the 3rd century according to Wadekar (1996, lxx).
[21] According to Kane (1930, 242).
[22] According to Kane (1930, 404-405).

conclude their response with a clarifying remark, lest there be any misunderstanding: "In these sources, the word 'brother' should always be understood as 'born to the same mother', all the sources from Saṃgrahakāra['s *Smṛtisaṃgraha*] onwards are unanimous in this point" (*eṣu vacaneṣu bhrātṛśabdena sodarasyaiva grahaṇaṃ saṅgrahakārādivacanaikavākyatayā*).

Like most of Suchet Singh's stratagems, the recourse to the Kashiraj Dharma Sabha failed to fulfill its purpose. In a sense, the appeal to Sanskritic scholarship, fashioned as it was as a response to the legal conditions stipulated in the EIC's *sanad* of 1848, reflects the gradual reorientation of the struggle from the grassroots, regional foundations of kingship that guided the prince immediately after his deposition towards the mammoth machinery of the colonial state in Calcutta and Europe. Bereft of followers and removed from his homeland, the prince drifted from the familiar landscape and sources of support that had imbued his early life with the confidence needed to fearlessly tackle his opponents (e.g., in the Dalhousie incident of 1857) towards geographic and administrative regions that privileged formal, impersonal communication, even from members of the nobility.

5. *Conclusion*

For the rulers of Chamba, the transition to British rule entailed fundamental shifts that affected the interpretation of kingship and its foundations in numerous ways. Harking back to the shastric foundations of sovereignty, the elements that had formerly legitimated kingship – kinship, social capital, and popular support – were remodeled on a bureaucratic model favoring juridical precedent. Thus, when Suchet Singh drafted the last of his numerous petitions to the British Government in a damp Parisian apartment on 17 June 1892, his request for renewing the pensions that had been promised to him on various occasions in the past was prefaced by an explicit, if not entirely tactful reminder of his legal position:

> H.H. Prince Suchait Singh of Chamba, solicits the benevolent attention of the Imperial Government to his case. The petitioner … was deprived [of his birthright] by an arbitrary and erroneous interpretation of the Charter issued by the Government of India in 1848, an interpretation which is in discordance with

> the Shastras, or Hindoo law, by which, according to that charter, the order of succession was established.[23]

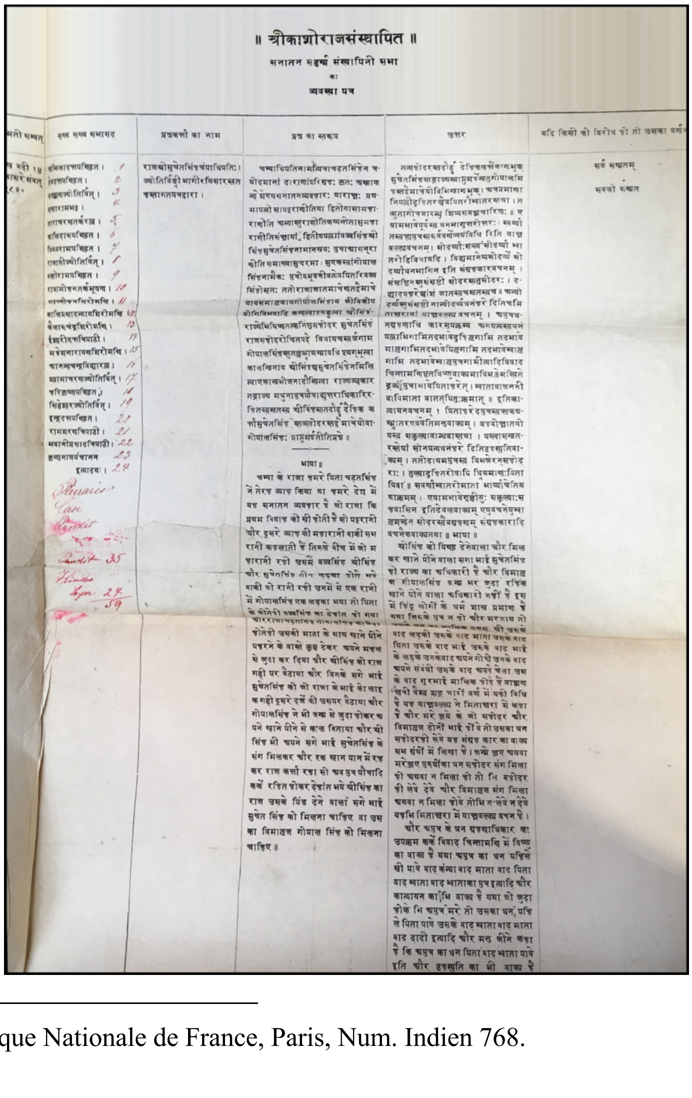
Already two decades after the events, the prince still found the "discordance" between the *sanad* and the shastric requirements it was meant to fulfill hurtful and relevant. And while the Sabha of Benares may have failed to alter the prince's fate, its consideration of the case on the purely Brahmanical basis of Sanskrit texts testifies to the gradual refashioning of West Himalayan "Rajput dharm" in the modern era, where the precolonial emphases on familial ties, camaraderie, and popular sentiment gave way to a peculiar welding of shastric scholastics to colonial policy.

[23] British Library, India Office Records, L/PS/20/H3/9, 'Petition of Suchet Singh', f. 523.

Appendix

A Ruling (*vyavavasthā*) of the Kashiraj Dharma Sabha in response to an appeal by Suchet Singh of Chamba[24]

Facsimile:


॥ श्रीकाशीराजसंस्थापित ॥

सनातन सद्धर्म संस्थापिनी सभा

का

व्यवस्था पत्र

मुख्य मुख्य सभासद	प्रश्नकर्त्ता का नाम	प्रश्न का स्वरूप	उत्तर	यदि किसी को विरोध हो तो उसका वर्ण[न]

[24] Bibliothèque Nationale de France, Paris, Num. Indien 768.

Edition and Translation:

Missing Column [torn]. *[sa]ṅkhyā* (File Number).

Column A. *Din, mitī, samvat* (Day, lunar month, year):

vaiśākha badī 14 śukravāsare [vikrama] saṃbat 1930

> Friday,[25] the 14th day of the dark fortnight of Vaiśākha 1930[VS] (corresponding to 25 April 1873 CE)

Column B. *Mukhya mukhya sabhāsad* (Pandits in session).

ambikāpaṇḍita |
devadattapaṇḍita |
lakṣmaṇajyotirvit |
sakhārāmabhaṭṭa |
tārācaraṇatarkaratna |

kālidāsapaṇḍita |
vibhavarāmapaṇḍita |
rājājīyotirvit |
bastīrāmapaṇḍita |
rādhāmohanatarkabhūṣaṇa |

madanamohanaśiromaṇi |
kāliprasādanyāyaśiromaṇi |
kailāsacandraśiromaṇi |
īśvarīdattatripāṭhī |
maheśanārāyaṇaśiromaṇi |

ānandacandravidyāratna |
śyāmācaraṇajyotirvit |
harikṛṣṇapaṇḍita |
siddheśvarajyotirvit |

[25] This is most probably the correct day, although it may also be early Saturday (i.e., Friday after sunset). Our thanks to Kengo Harimoto for clarifying the date.

indradattapaṇḍita |

rāmaśaraṇatripāṭhī |
bhavānīprasādatripāṭhī |
kṛṣṇanāthapañcānana |

ityādayaḥ | ["and others", this is followed by an unintelligible scribble in red pen with a summing up of "35 Pandit" and "24 Hindoo Lawyer[?]" giving a total of "59".]

Column C. *Praśnakarttā kā nām* (Name of appellant).

rāja-śrī-sucetasiṃha-caṃpādhipatiḥ | *jyotirvic-chrī-bhāgīrathisarasvata-hastāgata-patra-dvārā* |

> Raja Sri Suchet Singh, ruler of Champa [*sic*]. By means of a letter submitted by Jyotirvid Bhagirathi Sarasvati.

Column D. *Praśn kā svarūp* (The essence of the question):

1 *campādhipatinā matpitrā caṟhatasiṃhena tra-*
2 *yodaśānāṃ dārāṇāṃ parigrahaḥ kṛtaḥ* | *asmāka-*
3 *n deśe eṣa sanātanavyavahāraḥ* | *yā rājñaḥ pratha-*
4 *mā patnī sā paṭṭarāṇīti, yā dvitīyā sā mahā-*
5 *rāṇīti, anyās tu rāṇīti kathyante* | *tāsu mahā-*
6 *rāṇīti saṃjñāyāṃ dvitīyapatnyāṃ vajrasiṃha-śrī-*
7 *siṃha-sucetasiṃha-nāmānas trayaḥ putrā āsan* | *rā-*
8 *ṇīti samākhyāsu ca ramāsu ekasyāṃ gopāla-*
9 *siṃhanāmaikaḥ putro babhūva* | *jīvaty eva pitari vajra-*
10 *siṃho mṛtaḥ* | *tato rājā jātamātreṇa tadvaimātre-*
11 *yāya samātṛkāya gopālasiṃhāya jīvikopa-*

> My father, Caṟhatasiṃha, king of Campā, married thirteen wives. In our kingdom, this is the eternal practice (*sanāntanavyavahāra*): the king's first wife is called 'Paṭṭarāṇī', the second 'Mahārāṇī'. The others are called 'Rāṇī'. Among them, to the one called Mahārāṇī, to the second wife, were born three sons: Vajrasiṃha, Śrīsiṃha and Sucetasiṃha. Among the wives (*ramā*) called 'Rāṇī', one had a son called Gopālasiṃha.
> [The designated successor] Vajrasiṃha died while his father was still alive. Then the king, as soon as Gopālasiṃha-the half-brother (*vaimātreya*) of [the late prince]-was born (*jātamātreṇa*), gave wealth fit for livelihood (*jīvikopayogivibhava*), etc., to Gopālasiṃha and to his mother.

12 *yogivibhavādikan datvā, pṛthak kṛtvā, śrīsiṃhaṃ*

13 *rājye 'bhiṣicya, tatkaniṣṭhasahodara-sucetasiṃhaṃ*

14 *rājasahodarocitapade vidhāya ca svar jagāma* |

> He then separated (*pṛthak kṛtvā*) [them from the household] and consecrated Śrīsiṃha as king. He placed Sucetasiṃha, his little brother from the same mother, to a rank befitting of the real brother of the king (*rājasahodarocitapade*), and then departed to heaven.[26]

15 *gopālasiṃhas tu tal labdhvā janmāvadhi pṛthag bhūtvā*

16 *kālan nināya* | *śrīsiṃhaś ca sucetasiṃhena mili-*

17 *tvā ekānnabhojanādau sthitvā rājyañ cakāra* |

> Having received it [the allowance], Gopālasiṃha was spending his time separate [from the royal household] all his life. And Śrīsiṃha ruled the kingdom together with Sucetasiṃha, sharing meals with him etc.

18 *tad rājyam adhunā putrapautrādyuttarādhikārira-*

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[26] The Hindi translation is more precise, noting that Sri Singh had placed his real brother "on a throne of the second rank" (*gaddī dūsre darje kī*).

19 *hitasya mṛtasya śrīsiṃhasya tadaurdhvadaihikaka-*
20 *rttā sucetasiṃhas tatsahodaras, tadvaimātreyo vā*
21 *gopālasiṃhaḥ prāptam arhatīti praśne* |

> In this question (*iti praśne*) [there should be a decision]: Who deserves to receive that kingdom now? Sucetasiṃha, Śrīsiṃha's brother from the same mother (*sahodara*), who had performed the funerary rites of Śrīsiṃha [because the latter] died without leaving an heir (*uttarādhikārin*), such as a son, a grandson, etc.? Or Gopālasiṃha, who is his [Sucetasiṃha's] half-brother (*vaimātreya*)?

[Hindi translation follows]

Column E. *Uttar* (Response):

1 *tatsahodaras tadaurdhvadehikakartaikānnabhuk*
2 *sucetasiṃhas tad rājyam prāptum arhen na tu gopālasiṃ-*
3 *has tad-vaimātreyo vibhinnānnabhuk* | *atra pramāṇāni*

> It is Sucetasiṃha who should have that kingdom [because] he is his [the late king's] uterine brother and [because] he had performed his funerary rites and shared meals with him; and not Gopālasiṃha, his half-brother, who had meals separately. [Here are] the authoritative sources on this matter (*atra*):

Lines 4-8, *Yājñavalkyasmṛti* 2.139-140:[27]
patnī duhitaraś caiva pitarau bhrātaras tathā |
tatsutā gotrajā bandhuśiṣyasabrahmacāriṇaḥ ||
eṣām abhāve pūrvasya dhanabhāg uttarottaraḥ ||
svaryyātasya hy aputrasya sarvavarṇeṣv ayam vidhir iti ||
yājñavalkyavacanam |

[27] Verse numbers follow Olivelle (2019).

> "Wife, daughters, parents, brothers, their sons, a person of the same lineage, maternal relative, pupil, and fellow-student—among these, in the absence of each listed earlier, each listed later inherits the estate of someone who has died sonless. This is the rule for all social classes" (tr. Olivelle 2019, 159). This is the teaching of Yājñavalkya.

Lines 8-10, *Smṛtisaṃgraha*:
sodaryāḥ santy asodaryā bhrātaro dvividhā yadi |
vidyamāne 'py asodarye sodaryā eva bhāgina iti ||
saṃgrahakāravacanam |

> "If there are both co-uterine (*sodarya*) brothers and half-brothers [in the family], even if a half-brother is [physically] present, only the co-uterine ones inherit". This is the teaching of the Saṃgrahakāra.

Lines 11-14, *Yājñavalkyasmṛti* 2.142-143ab:[28]
saṃsṛṣṭinas tu saṃsṛṣṭī sodarasya tu sodaraḥ |
dadyād apaharec cāṃśaṃ jātasya ca mṛtasya ca ||
anyodaryas tu saṃsṛṣṭī nānyodaryo dhanaṃ hared iti |
ca mitākṣarāyāṃ yājñavalkyavacanam |

> "A reunited coparcener – or a uterine brother – should give the ancestral share to a fellow coparcener – or to his uterine brother – when he is born, and he should take the ancestral share of a fellow coparcener – or of his uterine brother – when he dies. A reunited coparcener who is not a uterine brother should not take the estate of a non-uterine bother" (tr. Olivelle 2019, 159). This is the teaching of Yājñavalkya in the *Mitākṣarā* [commentary].

Lines 14-19, *Vivādacintāmaṇi*:
aputradhanagrahaṇādhikāram upakramya anapatyasya dhanaṃ patnyabhigāmi, tadabhāve duhitṛgāmi, tadabhāve mātṛgāmi, tadabhāve pitṛgāmi, tadabhāve bhrātṛgāmi, tadabhāve bhrātṛputragāmītyādi vivādacintāmaṇidhṛtaviṣṇuvākyam |

[28] Verse numbers follow Olivelle (2019).

> "Starting with the rights to receive the wealth of a sonless man: a sonless man's wealth goes to the wife; if the wife is not alive, to the daughter; if there is no daughter, to the mother; if there is no mother, to the father; if the father is not alive, to the brother; if there is no brother, to the brother's son, etc." This is the teaching of Viṣṇu in the *Vivādacintāmaṇi.*

Lines 19-22, Kātyāyana 928:
vibhakte saṃsthite dravyaṃ putrābhāve pitā haret |
bhrātā vā jananī vāpi mātā vā tatpituḥ kramāt ||
iti kātyāyanavacanam |

> "When a person dies separated (or in a state of separation), on default of sons, his father takes his wealth; or his brother, or mother, or father's mother, in due order" (tr. Kane 1933, 327). This is the teaching of Kātyāyana.

Lines 22, Manu 9.185cd:
pitā hared aputrasya rikthaṃ bhrātara eva ceti |
manuvākyam |

> "The estate of a man who has no son, however, is inherited by his father or by his brothers" (tr. Olivelle 2005, 199). This is Manu's teaching.

Lines 22-25, *Bṛhaspatismṛti* 1.26.138 (*Vyavahārakāṇḍa*):
bahavo jñātayo yasya sakulyā bāndhavās tathā |
yas tv āsannataras teṣāṃ so 'napatyadhanaṃ hared iti ||
bṛhaspativākyam |

> "Where there are many relatives, and distant relatives and kinsmen, the one who is the closest among them may take the wealth of the one without offspring". This is Bṛhaspati's teaching.

Lines 26-30, Devala 1570-1571:
tato dāyam aputrasya vibhajeran sahodarāḥ |
tulyā duhitaro vāpi dhriyamāṇaḥ pitāpi vā ||
savarṇā bhrātaro mātā bhāryā ceti yathākramam |
eṣām abhāve gṛhṇīyuḥ sakulyāḥ sahavāsina iti |
devalavākyam |

> "Therefore the inheritance of a sonless person should go to the [departed's] co-uterine brothers, to [unmarried] daughters in the family [read *kulyā* for *tulyā*], a surviving father, half-brothers, the mother, and the wife, in this order. If these are absent, relatives shall inherit, or people living in the same place". This is Devala's teaching.

Closing remark:
eṣu vacaneṣu bhrāṭṛśabdena sodarasyaiva grahaṇam, saṃgrahakārādivacanaikavākyatayā |

> In these sources the word 'brother' means exclusively a co-uterine brother, for the Saṃgrahakāra and the others are unanimous on this.

[Hindi translation follows]

Column F. *Yadi kisī ko virodh ho to uskā varṇan* (Objections to this devision and their description)

Sarvasammatam ||

> All are agreed (*sabko sammat*).
>
> [bottom of the page:]

lekhādhyakṣa | *tārācaraṇa tarkaratna* | *bastīrāma dvivedī* ||

> Scribes: Tārācaraṇa Tarkaratna, Bastīrāma Dvivedī.

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DOMENICO FRANCAVILLA

Child Marriage in Nepal: Dharmaśāstra, Customs and State Reforms

1. *Introduction*

The aim of this contribution is to analyse the issue of child marriage in Nepal by providing a theoretical understanding of the complex interactions of state, religion and society in this context. This phenomenon is historically and comparatively widespread and, like caste-discrimination, is often considered typical of Hindu law. Even today, Nepal is one of the countries with the highest rates of early marriages.[1] The contribution will not attempt to provide a detailed analysis of the causes and effects of child marriage, which may be dealt with by many scientific perspectives, from anthropology to economics.[2] As regards Nepal, one can briefly remark that one of the explanations of the prevalence of child marriage could be in the strong connection traditionally existing between caste and marriage age, as the choice of appropriate spouse in caste terms tends to lower the age for marriage.[3] Caste is a very strong component of social relationships in Nepal, but other important factors may be identified in the forms of life in communities dealing with poverty and difficult living conditions in small and rural contexts.

Hindu law is characterised by great internal pluralism, so much so that it can be considered a set of laws (Menski 2003). A first point to be highlighted is that the dharmic tradition, although theoretically unitary, allows for differentiation of the rules to be followed not only based on status, such as caste and gender, but also depending on different geographical areas in which Hindu communities live. In this regard, the Nepalese experience offers insights into the contextualisation of the dharmic tradition in the Himalayan region. Historically,

[1] For a recent analysis of child marriage in Nepal, see Bhattarai *et al.* 2022.
[2] On child marriage and violations of human rights, see Sagade 2005.
[3] On caste in Nepal, see Höfer 2004. On the relation between caste and child marriage and a review of other theories about the origin of child marriages in the Hindu context, see Menski 2003.

Nepalese law, like other laws, developed from the social practices, opinions and values of religious and cultural elites, as well as from the decisions of sovereign power. The specific combination of these factors in different phases of the legal history of Nepal is crucial in the understanding of child marriage in this context.

From a methodological point of view, this contribution thus analyses the issue of child marriage in Nepal from a legal pluralist perspective and adopts the theoretical framework developed by Menski (2006). This approach tries to combine the different factors that have a role in the making of law without considering one of them prevailing in principle. These three factors are the state, ethics/morality/natural law and society, which represent the corners in the so-called Menski's triangle. In each context, for any specific issue, legal analysis can identify different combinations and interactions of these three factors. The three terms in the title of this contribution – Dharmaśāstra, custom, and state – can be easily related to the three corners of this triangle. In a following elaboration of his theory Menski added a fourth corner, which is represented by international law as an autonomous factor (Menski 2011).[4] In this integrated model of analysis, we then have a kite shape, as Menski calls it. The international law dimension is crucial in the most recent reforms of child marriage in Nepal and will also be considered here.

The first part of the contribution is devoted to the dharmic legitimation of the diversity of rules that can be followed by Hindus and to a brief analysis of the conceptions about child marriage emerging in the Dharmaśāstra tradition. Following this introductory part, the core of the contribution deals with child marriage in the *Mulukī Ain* (MA) 1854. This Nepalese general code provides a clear example of an historical manifestation of Hindu law and includes some significant rules as regards child marriage. Then the contribution analyses the normative evolution following the MA 1854 by considering the reforms on child marriage that were introduced by the state in 1963 and 2017, leading to significant changes in the regulation of this phenomenon. The concluding analysis considers the current situation of child marriage in terms of the evolution of the balance between religion, society and the state – formerly a Hindu and now a secular state – and highlights the shift towards state

[4] It is worth remarking that international law enters legal systems mostly through the state, but can be considered an autonomous factor, considering, for instance, that international principles and rules may have an impact also through NGOs and civil society.

regulation, within the framework of international law, as a new, albeit problematic, trend in the Nepalese legal system.

2. *Child marriage and the inner plurality of Hindu law*

It is a well-known fact that, on the level of basic conceptions, the Hindu tradition acknowledges the inner variety of *dharma* (Halbfass 1990). In particular, *dharma* may change depending on caste, other social groups, stage of life and many other indicators. It is worth remarking that this diversity of rules and practices also depends on territory (*deśadharma*).[5] Hindu communities in different parts of the Indian sub-continent live according to different, occasionally conflicting rules, and still consider themselves as part of the dharmic tradition. Finding a difficult balance between the unity and inner variety of *dharma*, which is widely discussed in Hindu jurisprudence, it is admitted that, depending on local areas in different parts of the country, different dharmic forms of life can emerge as the accepted rule, without negating the validity of other rules followed in other places. As a result, different rules can be legitimated in dharmic terms starting from diversity. This means that different local legal systems exist and existed, and each of them may be seen as a manifestation of *dharma*.[6]

A starting point for the analysis of child marriage in Nepal is thus the plurality of Hindu rules with reference to the marriage age. Many textual references to child marriage may be found in the Dharmaśāstras and Dharmasūtras.[7] However, one could argue that less space is devoted to this topic than might be expected and Dharmaśāstras do not provide clear and detailed guidance. If we talk generally about the Dharmaśāstra tradition, it should be considered that these are doctrinal texts of the utmost authority. Nonetheless, they need to be interpreted in context to ascertain the appropriate dharmic rules.[8] Considering the Dharmaśāstra tradition with reference to child marriage, Menski observes:

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[5] On the concept of *deśadharma*, see Wezler 1985.
[6] See, for instance, Davis 2004; Francavilla 2006; Lubin 2016.
[7] See a review in Menski 2003.
[8] On this crucial aspect see, among others, Davis 2010; Francavilla 2006; Lariviere 2004; Lingat 1998; Menski 2003; Michaels 2010.

> The gradual acceptance of child marriage may be one of the best documented examples of how the interaction of customs and *smṛti* texts may have worked in practice […] sensationalism and emphasis on the quaint rather than the normal tend to distort our perceptions of social reality. If, therefore, one cites today certain *shastric* texts in favour of child marriage, one commits a critical mistake in assuming, firstly, that such texts ever represented 'the law' and, secondly, that they fully reflected social reality at any given time. […] In fact, even according to the traditional texts, this [marriage before puberty] was no absolute rule, and there are plenty of verses to the effect that a girl should be married when the time is right and the best possible bridegroom has been found, rather than at any pre-determined early time. Social practices were thus likely in flux, and *there was no one method or agreed rule about the ideal age of marriage for all Hindus***.** (Menski 2003, 327-329, italics added)

The fact that in the Dharmaśāstra tradition we do not find strictly established norms on the age for marriage may depend on the approach of the authors, who collected some pre-existing rules and proffered their expert opinion on the issue, while the law in action was left to the dharmic practice of specific communities, also providing the flexibility that seemed necessary in this case. It is also worth remarking that the fact that we do not find clear binding rules in the Dharmaśāstra on child marriage should not be read as an undervaluation of the relevance and legitimacy of child marriage in Hindu law, which existed and exists, as in other societies, but as a critique of the idea that these rules were somehow fixed in religious texts and applied as such in a positivistic way within the many different Hindu communities.

This diversity of *dharma*, strikingly visible if one considers the Hindu tradition as a whole, does not conflict with the fact that rules needed to be established in a firm way in local contexts. Whilst rules on child marriage vary deeply among different Hindu communities and in different territories, from the point of view of those belonging to a specific community it is not a matter of choice and specific rules are established through interpretation and accepted practice. On the other hand, in normative terms the phenomenon of child marriage may be understood as its own set of interconnected rules. The most fundamental rule is clearly the one establishing marriageable age, but this rule is connected to other aspects. For instance, appropriate actions must be identified as regards what happens when a marriage is celebrated in violation of the rule, which punishment, if any, is appropriate or what is to be the fate of the marriage. These rules depend on complex interactions between doctrinal and religious aspects, involving concepts of purity and more strictly social and

economic aspects, such as life expectancy and family wealth. In addition, establishing a rule of behaviour requires a normative qualification to be set, for the marriage of a girl and a boy at a certain age may be forbidden, allowed or mandatory or even be provided with a softer normative qualification such as recommended or discouraged. In all these aspects, competing rules which reflect different views can exist.

The Hindu marriage is a sacrament and marriage rules share the nature of sacred law. The matrimonial tie is first and foremost the outcome of a ritual that must be performed with exactitude. The violation of rules regarding the marriageable age may involve social and criminal punishment, interconnected with atonement for spiritual sin, and can affect the validity of the marriage. In dharmic terms the marriage is never recognised as invalid simply because of the age of the spouses, even though punishment for the violation of these rules can be established.[9] In the traditional Hindu legal model, the state is not supposed to regulate this aspect of marriage but can intervene through criminal leverage to contrast the forms of child marriage that are not compliant with dharmic principles and accepted practice.[10]

It is difficult to identify the Dharmaśāstra rules regarding child marriage that were considered more relevant in the Nepalese context before the MA 1854.[11] However, as we just said, Dharmaśāstra rules about child marriage were not coercive rules but rather authoritative opinions and guiding principles, which were contextualised in context through learned interpretation and social practice. Importantly, Nepal kingdoms legitimated themselves in dharmic terms, as enforcers of the dharmic order. On the other hand, the social plurality of Nepal, including many different Hindu and non-Hindu communities, should also be kept in mind. What one can expect as regards child marriage is thus a plural scenario of rules followed in different communities living in Nepal and this plurality concerns the different castes and other communities outside the Hindu tradition. In addition, high caste people in Nepal could follow rules that were at least slightly different from those followed by similar castes in other

[9] Invalidity of marriage can be related to other aspects concerning the qualities of the spouses. See Derrett 1977-1978.

[10] There is a limited role for the ruler in these matters. According to the general principles of Hindu jurisprudence, the state cannot define the dharmic rules to be followed, but a Hindu ruler and his courts can provide authoritative interpretations of *dharma* that can be enforced on the subjects and through dharmic legitimation of power can contribute to defining the rules to be followed in different communities.

[11] For some general observations on the application of Dharmaśāstra rules before the MA 1854, see Cubelic and Khatiwoda 2017.

parts of the Indian subcontinent. In conclusion, law in practice came out as a combination of customary norms and dharmic legitimacy on which the state could intervene through orders and decisions in a limited but authoritative way, presenting itself as the upholder of *dharma*.

3. *The* Mulukī Ain *of 1854 and child marriage in the Nepalese context*

Analysis of the *Mulukī Ain* of 1854 (MA hereafter) with reference to child marriages allows us to consider the rules that were established in the Nepalese context in the second half of the 19th century and, more generally, some aspects of the role of this code in dealing with matters of marriage. Highlighting the importance of the MA, one can observe that it is truly a legal text, promulgated by a Hindu state. In some respects, it is expressly based on the tradition of Dharmaśāstra, but it is clearly a work that is not doctrinal in nature and is meant to have practical application and in coercive ways as necessary.[12]

The MA is a code but also substantially a constitution, a founding document which defines the relationship between the king, his officials and subjects. According to Khatiwoda, Cubelic and Michaels (2021), the MA introduces to Nepal some aspects of the rule of law. The preamble, in fact, emphasises the idea of a law applicable to all and at the same time limits the potentially arbitrary power of the state. The existence in the MA of this core idea of rule of law as a limit to power should not be seen as overly significant, as the same authors remark:

> The *Ain* makes the violation of several 'universal' rights a punishable offence. To a limited extent, this holds true for the right to life and security of person as well as property. However, there are considerable exceptions: no freedom, inhuman punishments, degrading treatments, slavery, no equality before the law and much more. True, the *Ain* punished cases of murder, assaults or theft, but it did not protect the individual against despotism and humiliation. (Khatiwoda, Cubelic, and Michaels 2021, 37).

Considering this constitutional aspect, most interesting is the arrival into the Nepalese experience of the idea of code, rather than any specific model of code. This reception of the idea of code in a modern sense is incomplete and adapted

[12] See Cubelic and Khatiwoda 2017.

to the Nepalese situation. In the history of codification in continental Europe, codes emerged as a paradigmatic form of law and were a symbolic instrument of the centralisation of power by the state and of the overcoming of a previous fragmentary system of sources which lead to arbitrary application. Codes emerged as the more effective legal instrument towards legal uniformity and certainty.[13]

These core aspects of codification can also be identified in the experience of Nepal. In this regard, one can observe a political process of simplifying the pre-existing rules while laying them down in a text that aimed to be clear, a sort of restatement which at the same time carries out an at least partial reform of the existing law. The MA arises from the influence exercised on Jaṅga Bahādura Rāṇā by the French Code Civil and less clearly by the English common law, following a journey that had brought him both to France and England.[14] Jaṅga Bahādura is primarily attracted by the character of the code as a written text aimed at providing certainty in the application of the law. Less influential was the idea of uniformity. More specifically, it seems that uniformity was a value for the *Ain*, but in a framework where status remains relevant. No complete uniformity is envisaged. In this regard, Khatiwoda, Cubelic and Michaels (2021) observe that Nepal is in a distinct position where enormous pluralism has not actually been reshaped by a modern idea of uniformity:

> In its Preamble, the Ain guarantees legal certainty, but not legal universalism. Laws differ according to one's caste status but are the same for all members of a particular caste. This unique blend of legal relativism and legal uniformity, which departs both from the context-sensitivity of the *jāti*- or *deśadharmas* of the Dharmaśāstra tradition and the formal universalism of 'Western' legal modernity, is captured in the phrase of the Four Varṇas and Thirty-six castes (e.g., §§ 1.13, 6.8, 25.5) which addresses the population as a social totality internally differentiated along caste lines. (Khatiwoda, Cubelic, and Michaels 2021, 24).

In fact, differentiation of rules based on status is a crucial feature of this text. The establishment of different rules that are to be applied in the same situation depending on subjective qualifications is a fundamental aspect of *dharma* in the

[13] For a general introduction to codification in Europe from an historical point of view, see Caenegem 1992.
[14] On the genesis of the MA, see Khatiwoda, Cubelic, and Michaels 2021. See also Khatiwoda 2018 and Fezas 1986.

Dharmaśāstra tradition. In this sense, it can be said that: "In the Ain, it is legal modernity that is traditionalised, and not tradition that is modernised" (Khatiwoda, Cubelic, and Michaels 2021, 22).

Nepal did not go through the British colonial experience which instead profoundly influenced the law in India and other territories of the Indian subcontinent. Even though the law introduced by the British administration in India was largely a case-law along the lines of the law applied in England, it is worth remarking that substantial pieces of legislation and even codes, such as the Indian Penal Code (1860), were introduced, while in matters relating to marriage and succession a system of personal laws was established, on the basis that Hindu law should be applied to Hindus and other laws to other religious communities, particularly to the Islamic one (Menski 2006). In Nepal the uniformity of the law was one of the main concerns and the trajectory of reforms of the legal system took a different path from the parallel Indian experience, finding its core legal instrument in a general code which dealt with civil, criminal and procedural matters.

Regarding the value of completeness, which, like uniformity, is a crucial aspect of legal modernity as embodied in the idea of code, the MA is a long and analytical text dealing with all sorts of issues, but it does not seem to aspire to completeness in the same sense as the French civil code. The idea of completeness in the French civil code must be understood with respect to the pre-existing system of sources and can be summarised by saying that, according to this modern legal ideology, the interpreters, and specifically the judges, could and should find a solution to a specific case within the limits of the rules established in the code, making recourse to logical hermeneutical processes and restraining themselves from finding the rule of decision in other sources or in personal sense of justice. Admittedly, this is an ideology that the interpreters adopted to legitimise their work rather than an intrinsic quality of the text.[15]

The MA aimed at certainty but did not aspire to completeness in this sense. In terms of the matters dealt with, the fact that it regulated civil, criminal, and procedural issues certainly is not unique in the history of codes. However, this inclusiveness can be seen as an aspect of continuity with the Dharmaśāstra tradition. At the same time, the code aimed to regulate many aspects of social life but did not mean to regulate everything, not even making recourse to general principles. In fact, in terms of style the MA presents in most cases

[15] For an interesting study on the completeness of the code as conceived by the drafters and subsequent interpreters, see Gordley 1994.

painstakingly detailed rules but this level of detail does not entail completeness. In addition, the MA was explicitly conceived in the Preamble as open to corrections, expansions and additions. The amended version of 1888 specifically tried to solve the many issues of repetition and prolixity that made the text unclear and difficult to apply (Khatiwoda, Cubelic, and Michaels 2021, 8).

One could argue that the MA regulated what was deemed important by the state, and by this defined the boundaries of state power. In other words, state law was not meant to completely supersede other rule-making social agents but rather left in force other such spheres of normativity. From this perspective, the MA seems incomplete from a modern Western point of view, but it was complete on its own terms by regulating what was meant to be regulated by the state.

The *Ain* can be seen as a consolidation and at the same time a transformation of pre-existing rules. Khatiwoda, Cubelic and Michaels (2021, 81) observe:

> In contrast to many law texts commissioned by the British in India, the *Ain* cannot simply be understood as a restoration of Brahmanic moral law. On the contrary, the text seems to be more 'modern' than the 18th-century Sanskrit law texts in India. The juridical situation in India was in, fact, split between British Law and the traditional Dharmaśāstra. In Nepal, however, though not directly influenced by the British, the emergence of constitutional ideas is evident, even though not clearly visible. It seems that there are hidden transcultural flows. In other words, the introduction of a written law such as the *Ain* worked to cement traditional society through 'modern' methods that would additionally claim for this small nation a place in the community of modern states.

Comparatively, in the history of codification one can remark that codes are normally preceded by a long and authoritative doctrinal tradition, and that new doctrinal orientations were developed thanks to the codes, which needed to be put in practice through interpretation. As regards the relationship between the MA and pre-existing law, even though we do not have much information about the specific works considered by the compilers of the code, one could argue that the rules adopted are not the rules of Dharmaśāstras as such but rules having origin in the application in practice of Dharmaśāstras, commentaries, customs

and various sources of royal authority. In this context, the extent of reformist intervention is difficult to assess and may vary depending on the topic.[16]

These general observations on the code are important to understand the specific issue of child marriage. Thanks to the MA, we have a clearer idea of the situation regarding child marriage starting from 1854. This is already a modern era passing through enormous transformation at the global level. In British India at that time the debate on child marriage was very intense (Menski 2003).

The rules of the MA relating to child marriage are concentrated in Article 99 ("On marriage"). Section 6 states that "When marrying a daughter from the Sacred Thread-wearing castes or the like, no one shall marry a girl below the age of 5" and identifies as particularly reprehensible the case of the marriage of a girl who is not past the age of thirty months. A detailed set of punishments for violating these rules is provided.

More severe punishments are established for marriages involving girls below the age of thirty months. In fact, section 6 establishes that in such a case:

> [T]he share of property of the person who marries her off shall, in accordance with the *Ain*, be confiscated, 10 percent [of the confiscated property] shall be collected [as a court fee] and [the rest of it] shall be handed over to the girl herself as dowry, and [the person who marries her off] shall be freed. (MA 1854 § 6)

The section continues considering the bridegroom's side:

> Among those who knowingly ask for the hand of a girl who is below the age of 30 months in marriage or marry [such a girl], if the main person [arranging the marriage] from the bridegroom's side is authorised [to do so], and if the groom is a person known to him, and if [the groom] himself is authorised [to marry], the share of property belonging to the groom shall be confiscated and he shall be set free. The bride shall belong to the [groom] who married her. (ibid.)

Awareness of the age of the girl and other aspects are considered in the final part of the section, according to which:

[16] In this regard, *satī* could be considered. In fact, according to Khatiwoda, Cubelic, and Michaels (2021: 36), "The case of *satī* is especially worth examining in a more detailed form, because it shows again how the *Ain* indirectly considers norms of the Dharmaśāstra and at the same goes far beyond them."

> If someone lies, saying that a girl who is below the age of 30 months is past the age of 30 months and marries her off, the share of property of the main person from the bridegroom's side who is authorised to arrange the marriage and the bridegroom, who himself is authorised to get married, shall not be confiscated. They shall be fined 20 rupees. The priest who officiates over the marriage of a girl below the age of 30 months shall be fined 10 rupees. If the amount of the fine is not paid, they shall, in accordance with the *Ain*, be imprisoned. (ibid.)

Considering the above rules, one can highlight the following points. The confiscation of property seems to be a very severe punishment. Interestingly, 10 percent is for the state, as a court fee, while the other 90 percent goes to the bride as dowry, a clear indication of the validity of the marriage. Equally, evidence about the validity of marriage is that, once the punishment is implemented, the girl belongs to the man who married her. In all cases, the punishment frees those involved in the marriage.

As regards the case of a marriage with a girl whose age is above 30 months but below 5 years, in section 7 one can read the following rules:

> If someone marries off a girl who is above the age of 30 months and below the age of 5 years and belongs to a Sacred Thread-wearing caste, he shall be fined 20 rupees. If such a girl is given in marriage under the false pretence that she is past the age of 5, no one from the bridegroom's side shall be punished. If someone knowingly marries a girl who is below the age of 5, the main person from the bridegroom's side who is authorised [to arrange the marriage] and the bridegroom, who himself is authorised to get married, shall be fined 20 rupees. Anyone who gives a girl in marriage who is past the age of 5 and anyone who marries her shall not be held accountable. (MA 1854, § 7)

In this case also, the MA considers the awareness of the violation and establishes that if a girl below the age of 5 "is given in marriage under the false pretence that she is past the age of 5, no one from the bridegroom's side shall be punished" (ibid.).

At the end of section 7, it is stated "Anyone who gives a girl in marriage who is past the age of 5 and anyone who marries her shall not be held accountable" (ibid.). This means that a marriage with a girl who is past the age of 5 is perfectly acceptable and there are no legal consequences. The marriage is valid, and no punishment is established for the person who gives off the girl in marriage, the bridegroom, or others involved in the marriage.

These rules apply in case of girls belonging to Sacred Thread-wearing caste. As for the marriageable age of the lower castes, there are no explicit rules. Therefore, the regulation of child marriages in the MA seems to be incomplete in the extent to which it addresses only the higher castes. This is an indication that the state did not consider necessary or convenient to regulate the aspect of the marriageable age for other castes and groups, who could follow their own rules.

The fact that the MA does not regulate the subject analytically by differentiating on the basis of caste is even more relevant if we consider other parts of the Article on marriage, where normally rules are different depending on caste. For instance, in section 8 on the re-marriage of a widow the rules consider the case of different castes belonging, and punishments for the violation of these rules vary accordingly. Interestingly, even though these rules apply to all widows' marriage, the age is mentioned along with consent and a requirement is that the girl is past the age of 11. This age and the differentiation on the basis of caste can be found in other important parts of the MA, particularly in Article 105, "On Sexual Intercourse before Marriage", and in Articles 132 and 133, on Rape, where Article 132 lays down the rules to be applied in case of rape of a married woman, widow or unmarried girl under the age of 11, while the following Article considers the case of rape of a girl above that age.

Considering the above analysis of the rules about child marriage in the MA, state intervention in this matter seems to be very soft. In fact, the normative provisions lay down a particularly low age, even lower than in the main rules one can find in the Dharmaśāstra, which, on the other hand, are doctrinal in nature and should not be strictly identified with local practice in different Hindu kingdoms in the history of the Indian subcontinent.

It is worth remembering that, even if marriages celebrated at a very early age were perfectly legal, this does not suggest that all marriages were celebrated at that age. In fact, by their very nature the rules about the marriageable age lay down the minimum age and do not prevent a higher age for marriage, even though the standard was for an early age due to religious and social factors. On the other hand, it could also be that those rules were violated in practice and marriages of girls below the age of 30 months could still have occurred. In fact, lack of effectiveness is not a modern phenomenon and could have happened under the MA 1854 as well. In fact, if the MA regulates marriage below the age of 5, there was a need to prevent, so to say, the worst forms of child marriage. One could argue that the MA is conservative and limits itself to consolidate

under the king's rule previously existing rules that were followed by the Brahmanical elite, but it might be that state intervention was meant to counteract the rules regarding child marriage that were adopted at least in some communities.

As a conclusion, rules on child marriage are present in the *Mulukī Ain* and supported with external sanction. However, they are not complete and intervene only on some specific aspects, aiming to limit what we could call the worst forms of child marriage in the elite Brahmanical community, but more generally leaving the question of the rules to community practices. This should be of no surprise considering that child marriage seems to be one of the most difficult phenomena to reform in Hindu contexts, as also evidenced in the Indian experience in colonial and post-colonial times. This reluctance of the state and positive law to enter this field could depend on the legal postulates (Chiba 1986) of Hindu Law according to which the state should recognise the entitlement of communities to define their dharmic marriage rules. However, a determining factor seems to be that child marriage was not immediately concerned with life and death, in an epoch when the rights of children and women, including the right to health, were not a primary concern. As we will see, the situation is changed with the emergence of the public importance of the protection of fundamental rights of children and women, which calls for the state to play a new role.

4. *After the* Mulukī Ain

This part of the contribution considers the reforms on child marriage following the MA 1854. From the outset the MA was explicitly conceived as a code to be progressively amended. Many of the following amendments related to structure and style, as the MA 1854 appeared to be unsuccessful in providing clarity and certainty. A crucial change is the new *Mulukī Ain* of 1963, which introduces important innovations in the legal structure of Nepalese society by reforming many rules and institutions, including child marriage. The reforms have had a second important manifestation with the Civil code and the Penal code, both promulgated in 2017.

This legal evolution has happened in a new phase in which the Nepalese state underwent deep political and constitutional transformations in an increasingly international context. The MA 1963 aimed at deep reforms following the new Constitution of 1962. Even more radical political

transformations, including the end of the monarchy, and the promulgation of the new Constitution in 2015 led to a new level of protection of fundamental rights reflected in the new codes of 2017. In this phase, and increasingly in the last decades, the state had to find its place within the international community. Nepal is a party in important international conventions, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child. In recent years, Nepal also assumed a prominent role at the regional level in addressing the issue of child marriage within the framework of the Sustainable Development Goals.

An important factor to be considered is the circulation of models and the importation into the Nepalese legal system of global principles and rules.[17] The internal legal evolution and pressure towards adherence to the standards of the international community clearly prompted important changes in the regulation of child marriage. As in the previous paragraph on the MA 1854, the contribution analyses the reforms of 1963 and 2017 considering the specific rules on child marriage within the framework of the general change that occurred in the sources of law and the attitude of the state in pursuing a reformist process.

Considering the MA of 1963, the reformist attitude of King Mahendra led to what is considered a "landmark in the legal history of Nepal":

> The MA of 1963, proud project of King Mahendra, was based on the first constitution of the country and eventually came to replace prior editions of the MA that had been prepared and operative during the Rāṇā regime. The new MA, which introduced the formal abolition of the caste system, child marriage or polygamy, was a landmark in the legal history of Nepal, because its main objective was to establish equality before law to all citizens, irrespective of caste, religion and colour. (Khatiwoda, Cubelic, and Michaels 2021, 9)

[17] The new codification process in Nepal has been carried out with the involvement of Japanese jurists. The cooperation of external jurists is one of the drivers of legal transplants, even if cultural awareness about the receiving legal system is considered. On the general theory of the diffusion of law and legal transplants see Twining 2005.

The MA 1963 provides a new regulation of child marriage, which represents a change from the pre-existing situation. In fact, in Article 17 ("On Marriage"), section 2, as amended in 2002, it is established that:[18]

> While contracting a marriage, no one shall arrange to marry nor cause to be married where the male and the female have not completed the age of Eighteen years with the consent of the guardian and that of twenty years in case of absence of the consent of the guardian.

Differently from the MA 1854, which did not aim to regulate child marriage for all communities and was intended to intervene only on high-caste practices, the MA 1963 establishes a general rule, which is applicable to all, irrespective of caste. In this sense, the MA 1963 for the first time makes child marriage illegal in all cases. Malla points out the general and uniform character of child marriage rules, which not only do no longer depend on caste but also apply to tribal communities with no exceptions:

> Even if Nepal is a multi-religious and multi-ethnic country, the uniform pattern of marriage law is applicable to all religious and ethnic communities irrespective of their culture and religion. Though the law has recognized the tribal or clan traditions with regard to incestuous marriage, this recognition is not legally applicable in the matters of child marriage. (Malla 2007, 205)

The age for marriage is raised to eighteen with parental consent, a rule that, as we will see soon, has been amended in 2017, and twenty without parental consent. It is also noteworthy that explicit mention is made of "the male and the female", while the rules we find in the MA 1864 regard only the female. The same minimum age is established for both sexes, which is an innovation of the Eleventh Amendment 2002, and a very significant one if we observe that in India the age is still differentiated for men and women.[19]

Given this, the qualifying aspect of the discipline of child marriage is what happens when the rule regarding the age for marriage is violated, and in this regard it is important to distinguish between criminal punishment and civil consequences affecting the marriage. Article 17.2 provides for the criminal

[18] All quotations of the Civil and Penal codes are taken from the texts available on the website of the Law Commission of Nepal.
[19] This is again interesting in comparison with the Indian legal situation, where since 1976 the marriageable age is 21 for men and 18 for women. Recently a Bill has been introduced to establish the marriageable age at 21 for both men and women.

punishment of the persons who marry, or cause to be married, someone in violation of the established age. Of course, the punishment applies only to persons having attained majority and is differentiated into four cases. The first three cases focus on the age of the female only. If the girl who is married or caused to be married is below the age of ten years, the punishment is imprisonment for a term from six months to three years and a fine from one thousand to ten thousand rupees. In the case of a girl above the age of ten but below the age of fourteen, the imprisonment is for a term from three months to one year and the maximum fine is five thousand rupees. Imprisonment and fine can be cumulative. In the case of a girl who is above fourteen years but below eighteen, the punishment is imprisonment for a maximum of six months and/or a fine of maximum ten thousand rupees. A final provision establishes that the same punishment applies in the case of a female who is above eighteen years but below twenty and, importantly, to males below twenty without further distinctions:

> If a male or female who has not completed the age of twenty years is married or cause to be married, punishment of imprisonment for a term not exceeding six months or a fine of a maximum of Ten Thousand Rupees or both shall be imposed.

If these changes attain to criminal punishment, the crucial novelty of the MA 1963 regards the validity of marriage, which was previously untouched. In fact, the same Article 17.2 says:

> In case either a male or a female below the age of Eighteen years is married and no offspring has been born from the marriage, the male or female who is below the age of Eighteen years may get such a marriage declared void if he or she does not agree with such a marriage upon having attained the age of Eighteen years.

The legal possibility of getting the marriage declared void means that this is a path to be chosen by the interested party. In other words, the code establishes that a child marriage is a voidable marriage on the initiative of the parties. However, the code also includes a provision regarding a case in which the marriage is null and void. Article 17.7, as amended by the Sixth Amendment, establishes that:

> No marriage shall be solemnized or arranged without the consent of both the male and the female parties thereto. If a marriage is solemnized or arranged by force without consent, such a marriage shall be void. One who concludes or arranges such a marriage shall be punished liable to punishment of imprisonment for a term not exceeding Two years.

When the marriage is solemnised or arranged by force the legal consequence is that the marriage is absolutely void, irrespective of the initiative of the parties. A specific criminal punishment is also established. When dealing with child marriage, it is important to remark that the legal requirement of consent is always a problematic one. In fact, reasonably the consent, and awareness, of a very young girl is uncertain, at best. However, it is still possible to distinguish the case where the marriage happens by force and coercion. Based on this distinction, the general rule is that a child marriage is voidable except in the case of force, when it is absolutely void. This distinction is used also in the Indian legal position emerging in the Prohibition of Child Marriage Act 2006.

Notwithstanding the reformist push of the MA 1963, read along with following amendments, many critical aspects have been highlighted. Particularly two aspects were considered problematic in this regulation. The first was that the MA 1963, as amended in 2002, required the consent of the guardian for marriages of women and men aged 18 to 20. Even more problematic was the fact that the possibility of making the marriage void was allowed only in the case in which there were no children. Both aspects have been reformed. The requirement of the consent of the guardian was removed by a subsequent amendment to the *Mulukī Ain* in 2015, while the second issue was removed in the new regulation in the Civil Code 2017.

The new Nepalese Constitution of 2015 put an emphasis on the protection of fundamental rights in general and particularly those of children and women. Article 39 of the Constitution is devoted to the rights of the children and, along with a series of other provisions, states explicitly that: "5. No child shall be subjected to child marriage, transported illegally and kidnapped or taken hostage". In 2017 a series of six Acts were promulgated that, together, substitute the MA 1963, which is no longer in force. Particularly important are the new Civil Code and Penal Code. In both codes we can find provisions regarding child marriage. This is particularly interesting because, as we saw, child marriage involves both civil and criminal law and the regulation was earlier unitary, due to the presence of the relevant provisions in the same code.

Considering first the Civil Code 2017, one of the conditions established for a marriage to be concluded between a man and a woman is that both have twenty years of age (Article 70.1.d). Article 73 regards voidable marriages and establishes that:

> (1) If a marriage is concluded in any of the following circumstances and any person who concludes such a marriage does not accept it, the person may get such a marriage voided: (a) If the marriageable age set forth in clause (d) of sub-section (1) of Section 70 has not been completed, […]
> (2) Notwithstanding anything contained in sub-section (1), a marriage shall be void only with the consent of the woman if she is pregnant or has delivered a baby as the consequence of the marriage.

Under the Civil Code 2017, child marriages are then confirmed as voidable. Differently from the MA 1963, the requirement of not having children is not strict and is meant as a protection for the woman. In fact, her consent will always be necessary to make the marriage void, but the novelty is that she can choose to ask for the annulment of marriage even when she has children. Article 72 regulates void marriages, which are invalid *ab initio* (*ipso facto* void). Differently from the MA 1963 we do not find a specific reference to the case of child marriage. However, in the formulation "(1) A marriage concluded on any of the following conditions shall, ipso facto, be void: (a) A marriage concluded without consent of the man or the woman", the lack of consent can be read as including child marriage by force.[20]

Considering the Penal Code 2017, the relevant provisions may be found in Article 11 ("Offences Relating to Marriage"). Article 173 on "Prohibition of concluding child marriage" states:

> (1) No marriage shall be concluded or cause [sic] to be concluded unless parties to the marriage have attained twenty years of age. (2) A marriage concluded in contravention of sub-section (1) shall, *ipso facto*, be void. (3) A person who commits the offence referred to in subsection (1) shall be liable to a sentence of imprisonment for a term not exceeding three years and a fine not exceeding thirty thousand rupees.

[20] The other case of *ipso facto* void marriage in Article 72 is: "(b) A marriage concluded between the relatives, punishable by law on incest."

These rules may be seen as included in the more general Article 171 (Prohibition of concluding marriage without consent), which applies to all marriages irrespective of the age of the spouses and requires their consent. More specifically, the article states that a marriage concluded without the consent of the persons getting married shall be void, and the person who concludes, or causes to be concluded, the marriage shall be liable to imprisonment for a term not exceeding two years and a fine not exceeding twenty thousand rupees. The term of imprisonment and the fine for child marriage, as established in Article 173, are thus higher. An explanation is added in Article 171 according to which: "For the purposes of this Section, a consent given by a person who has not attained the marriageable age under Section 173 shall not be deemed to be consent". This explanation is important because it legally excludes the existence of consent of a person below twenty years of age. In fact, the formulation of Article 171 does not consider the case of voidable marriages and declares that marriages solemnised under the marriageable age are *ipso facto* void.

The Penal Code enters the field of the validity of marriage, which is the core regulation of the Civil Code and produces an overlapping of the two codes. One can observe that while the Civil Code establishes a general rule according to which child marriages are voidable, the general rule emerging from the Penal Code is that child marriages are null and void, irrespective of the initiative of the parties. However, in the following year the Civil Code was amended in order to make marriages solemnised under the marriageable age null and void. In fact, the clause on marriageable age was deleted from Article 73 and moved to Article 72 (clause 1.c).

As important as the discipline emerging from the Civil and the Penal codes is policy. In 2016, Nepal adopted a National Strategy to End Child Marriage by 2030. This strategy is to be implemented through six pillars, which are the empowerment of girls and adolescents, the quality of education for girls and adolescents, the engagement of boys, adolescents, and men, the mobilisation of families and communities, access to services, the strengthening of laws and policies and their implementation. Overall, there is a drive towards reforms in Nepal, which is also due to the involvement of organisations such as SAIEVAC (South Asia Initiative to End Violence Against Children), in which Nepal has a leading role in trying to curb the problem of child marriage at the regional level, clearly within the framework established by the agenda of Sustainable Development Goals.

5. *Conclusion*

The Nepalese state, particularly after the Constitution of 2015, seems to have taken a strong stance against the application of Hindu law. In fact, the legal system does not acknowledge personal laws, and state law, which was distinctively Hindu till 1963, has been formally detached from traditional concepts and rules. In this regard, one can observe that the trajectory of state secularism in Nepal is different from India, where a personal law system is still in force, notwithstanding the long-standing debate on the promulgation of a Uniform Civil Code.[21] However, the situation in practice is much more complex and dharmic conceptions and rules are still important in Nepal, as well as in India, irrespective of state law.

The state is only one of the factors having a role in the making of law in context. Child marriage, the more general phenomenon of arranged marriages, the incidence of caste membership in matrimonial matters, dowry, the relationships of spouses and with children, are deeply influenced by traditional Hindu conceptions (Menski 2003; Francavilla 2011). The state interacts with this set of rules and conceptions and can adopt different policies aiming to enforce a secular marriage or limit itself to addressing the more worrying aspects of social and religious practice.

The evolution of child marriage can be better understood within global tendencies towards uniformity in family law. There is no single model of the Hindu family. However, family models interact with what could be seen as a paradigmatic family model emerging at the global level. As regards the age of marriage, and other issues such as polygamy, a series of principles have been consolidated that, at least in principle, are no longer questioned in Western countries and tend to spread globally, prompting imitation or conflict with other family models. This produces pressure towards uniformity, even though the outcome is not granted.

If we consider the case of India, we note that some reforms to restrain child marriage were started in the colonial period, more due to the initiative of Hindu reformers than to the British colonial administration (Menski 2003). Even after Independence it has taken more than fifty years to establish, in addition to criminal punishment, the invalidity of child marriage under Indian law, which has been introduced by the Prohibition of Child Marriage Act, 2006, as already mentioned. In some specified cases a marriage may be null and void, but the

[21] On secularism in Nepal, see Malagodi 2012; Gellner and Letizia 2019.

general rule is that child marriages are voidable, leaving the initiative to the parties. This leaves the possibility open that the practice persists legally and prompts the objection that the state legal system is allowing for the continuance of the practice. In fact, if a child marriage is merely voidable, the annulment may not be requested. A debate for further legal reforms tending towards the *ipso facto* invalidity of child marriages is ongoing in India. On the other hand, the choice of the general rule of a voidable marriage is supported by many, because it seems to be more protective of women in context.[22] Menski (2011, 19) observes:

> 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. 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, 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.

In fact, state intervention and international norms are only one part of the picture. People's value and social norms must also be considered when seeking effective regulation. In the conceptual framework of Hindu law, it is still very important that Hindu communities, rather than the state, decide how to marry. It is important to note, however, that none of the interacting laws in each context can simply be ignored, be it Hindu law or the law of international conventions.

In the Nepalese context, as in India, the outcome of these tensions between different interacting normative orders depends on self-understanding and dynamic identity processes of the society at large, judges and legal professionals, and of course politics. The rules in the Civil Code and in the Penal Code are coherent with international standards. However, many social and cultural conflicts underlie those rules. The crucial issues are the implementation of these reforms in the courts and real change in social practice.[23]

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[22] The main objection is that *ipso facto* void marriages could bring a double victimisation of women. See Malla 2007, with specific reference to the Nepalese context.

[23] For an analysis of trends and attitudes of the Nepalese judiciary see Malagodi 2018; Pradhan 2013; for specific reference to child marriage, see Malla 2007.

The theoretical approach used in this contribution is based on the model of legal pluralist analysis developed by Menski and the contribution tries to highlight the role of state, religion, society and international law, and their interaction in the Nepalese context as regards child marriage. The image of the flying kite used by Menski is unambiguous though perhaps not fully understood. Menski is no advocate of simple and neat solutions. The image of the kite refers to a necessary balance between the four corners, otherwise the kite does not fly at all, and reminds us that this balance is unstable and difficult to maintain.

When one identifies different interacting factors in the making of law in any specific context, a point to highlight is that one should be careful when setting neat divides between them. In fact, the interaction cannot be understood merely in terms of opposition but also as cooperation or coalescence. If Dharmaśāstra can be equated to a kind of natural law and customs is placed in the space of society, one can observe that state law is neither the opposite of justice, or natural law, because the state can adopt rules that are legitimised in ethical terms nor the opposite of custom and social acceptance, because state law at least partly needs social acceptance and the embodiment of rules in social customs. In addition, as regards the relationship between the religious and the secular spheres, one can observe that, even though Dharmaśāstra rules are in the religious realm, they can be applied in a social context irrespective of personal belief and that state law is not necessarily in the secular realm.[24] In fact, the power of the king, as the upholder of *dharma*, can be legitimised in dharmic terms, as we saw.

Nonetheless, it is true that state law may be seen as secular, as being a concurring power that has its own reasons and may be guided by political expediency. It is also true that the state has the power to impose rules that subjects consider in conflict with dharmic duties and even more significantly can impose rules that have to be followed irrespective of religious affiliation. Besides the personal application of law, a principle that is clearly present in the Hindu pluralist tradition, not all laws can be left to the decision of a specific community, for instance in the sphere of criminal law, nor can one simply assume that the pluralist picture that is always highlighted in studies on classical Hindu law did not maintain wide spaces where law was simply a matter of

[24] On the complex interactions between the state, the secular and the religious sphere, see Menski 2002 and, with specific reference to the Nepalese legal history, Michaels 2005.

obedience to the will of the sovereign. Another opposition to be clarified is the one between written and non-written rules. Scholarship in Hindu law is aware that the written texts of the Brahmanical expert tradition often include norms that at the outset were customary in nature and later integrated within the written tradition. Equally interpreters of texts were mindful of customs when deciding the correct behaviour in dharmic terms. Dharmaśāstra rules, as all rules consolidated in written texts, needed to be accepted and followed in practice and, in this specific sense, written rules became customary rules. The same dynamics can be envisaged considering the relationship between modern written legislation and customs. Arguably, the most important rules are the rules that are supported by state, international principles, religion and society acting as concurring forces in the same direction to uphold certain standards of behaviour. One should not expect a full coherence between all these factors and different combinations are possible. At the end of the day, this dynamic interaction provides for change and adaptation within a legal system.

The above analysis of the main changes in Nepalese legal history can offer a perspective on the interaction in context between multiple types of regulatory orders. It is important that different balances and combinations may be identified in different historical phases as regards child marriage and, more generally, the evolution of the legal system. In this framework the attitude of the state from the MA 1854 to the present day is crucial. In the Hindu tradition, marriage is conceived of as being left to the sphere of a *dharma* that is autonomously defined by communities. In traditional conceptions the idea of state intervention in these matters is very limited. However, in modern times the question of reforms and contrast to child marriage has become a duty of the state, something of which the state is in charge, due to the public connotations that it has assumed in terms of protection of children and women, and more specifically in terms of specific fundamental rights, such as the right to life, the right to health, the right to education and work. This concept of protection is crucial and highlights a transcultural dimension of law that is encoded both in the ancient concept of *dharma* and in modern constitutions, and whose meaning changes over the course of time, also depending on social evolution. The Nepalese legal system is evolving in ways that are not identical to those of Indian law or to other countries and efforts should be made to better understand this fascinating but not sufficiently studied legal system, individually and within a truly global legal perspective.

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MARIE LECOMTE-TILOUINE

Understandings of Dharma *in Nepal After 1950*

1. *Introduction*

The evolution of the vast semantic field associated with the term *dharma* in ancient India has been the subject of numerous investigations (Olivelle 2009). By contrast, fewer studies deal with what is understood by *dharma* in the contemporary period, which this paper hopes to remedy. It is intended to contribute to our knowledge of modern *dharma* in the context of Nepal after 1950. By investigating booklets written in Nepali for the general public, we attempt to sketch out the singular trajectory of *dharma* hand in hand with the major socio-political transformations in contemporary Nepal, the last Hindu kingdom until its transformation into a secular republic in 2008.[1]

In a reversed process to the one outlined for Ancient India by Robert Lingat (1967), which starts from *dharma* understood as a set of religious and moral precepts to end up with the framework of Hindu law, we observe in post-1950 Nepal the emergence of a body of literature addressing *dharma* as good practices at a time when its standing as rules defined and enforced by the law was no longer legitimate under a so-called "democratic" regime. This is particularly the case regarding the question of caste, purity and impurity, which formed the religious basis of the socio-political order.

The 1950s, our focus as a starting point, is of particular interest for the study of *dharma* in contemporary Nepal. In 1951 the Rana regime fell. Its founding member, Jang Bahadur, had fixed rules of *dharma* in the form of laws for the entire population when he promulgated the Code of the Country, *Mulukī Ain*, a century earlier in 1854.[2] This code, which takes caste status into consideration

[1] I am grateful to Boyd Michailovsky and John Whelpton for their comments on an earlier version of this text.

[2] For the first analysis of the Nepalese code, see: Höfer 1979, and for the English translation of the text, see: Khatiwoda, Cubelic, Michaels 2021.

when assessing the seriousness of crimes and offences and their corresponding punishments, can be defined as Hindu. Its contents had changed little up to the fall of the authoritarian Rana regime in 1951, which gave way to a period of transition during which the Shah kings, back in power, were supposed to encourage democracy. However, in 1961, following his ousting of the elected government at the end of 1960, the King banned political parties, while simultaneously encouraging grass-roots democracy. Such a paradoxical situation went a step further in 1963, when the State was officially declared Hindu, while the Hindu "law of the country" was secularized by being decoupled from its main religious basis, that is any reference to caste.

To investigate the conception of *dharma* prevailing in the transitional period of the 1950s, we chose to focus more specifically on social aspects, in order to grasp what was understood by *dharma* at a time when a substantial part of its field of meaning, relating to social status and relations, was still ruled by Hindu law. Indeed, before the *New Mulukī Ain* was promulgated by King Mahendra in 1963, which prohibited judgment related to caste without criminalizing caste discrimination, the old rules were still prevalent. Prior to this, they had just been progressively losing their force, at least officially, first with the Civil Liberties Act of 1955, which prohibited discrimination on the basis of "*varṇa*, *jāt*, or *jāti*",[3] and then with the 1959 Constitution, which declared all citizens to be equal before the law.

The 1950s thus preserved characteristics of the Rana period, which is depicted as the darkest age in Nepal. Interestingly, in the words of Late Damai, a bard of far western Nepal born around 1930, whom I recorded in 2009, this epoch of oppression was ruled by *dharma,* bringing an unusual presentation of what is supposedly "the good order of things":

> [The king] only kept his title, "Śrī 5". Command and government fell into the hands of the Ranas. There was no school then, *dharma* guided everything. They seized the scholars, the thinkers, and the dreamers. Only the notables knew the letters of the alphabet and everybody was busy doing evil. In those days, simple and straight-forward people were murdered and many sins were committed. The police, dressed in black, assassinated the people. People got eaten, they drank their sweat. Every hard-earned half a kilo of grain passed immediately into their

[3] In the Nepali spoken in the Kathmandu area, which is used in official texts, these terms are translated as "class, caste, and ethnic group".

> hands; the riches were stolen. Judges, governors, administrators, prefects, they all took money. Those with nothing were locked up by the police.

We will come back to this opposition between *dharma* and the secular or "scientific" body of knowledge transmitted through school education. For now, let us note that the poem —*kavitā*, as he calls it— by Late Damai is accurate concerning the state of education in Nepal at that time. Indeed, even at the end of the Rana period in 1951, only 5% of the Nepalese population was able to read. By contrast, the transition period that followed saw a boom in publications in Nepali (Parajuli 2012, 58) in tandem with an increase in the literacy rate and the development of a literature in Nepali —a language which, in written form, had been limited to administrative purposes and, to a lesser extent, to translation of Sanskrit religious texts until the end of the 19th century.

The boom of printed Nepali material served to disseminate both a conservative literature within Nepal, where publications were still subject to censorship up until 1964, and a progressive one in neighbouring India. Yet, considering that the distribution of the latter in Nepal was limited when censorship was still operating,[4] I will base my analysis on the first category here, before examining briefly what the progressive views on *dharma* consisted of at the time.

2. *The transition of the 1950s*

In order to anchor my observations in an in-depth reading, I specifically focus on two booklets in Nepali, which are both meant to offer a basic introduction to *dharma*. The first one, *Dharma praveś (*Introduction to *dharma*), was written by Buddhisagar Parajuli Postacharya and published in 1953 in four small volumes. It's print-run of 2000 copies was very large, in view of the small number of people who could read at that time and is an indicator of its wide diffusion. In addition, the volumes were published by the very institution in charge of the censorship of printed matter, the *Nepālī bhāṣā prakāśinī samiti*, conferring an official character on *Dharma praveś*. We may therefore consider its contents as representative of what were acceptable views on *dharma* at the time. And this

[4] If "censorship of imported published books was very strict during the Rana regime in Nepal", according to Chudal (2021, n.p.), it is probable that it was less so between 1951 and 1964.

assumption is further reinforced by the fact that the author held a prestigious position within the small Nepalese scholarly world of the 1950s: born in 1913, Parajuli Postacharya studied in Varanasi and became the head (*hākim*) of the National Archives when they were still hosted at the Bir Library. He continued to hold this position when the National Archives were founded and moved to a new building in 1967.[5]

The second booklet examined, entitled *Sadupadeś*, "Good counsels", was written by Bhanubhakta Man Simha Varma, and published by the author, in Kathmandu, with no date. However, it must, have come out between 1948 and 1963, given that the text refers to the August 1947 partition of India, and that it was published with the permission of the *Nepālī bhāṣā prakāśinī samiti*, which existed from 1933 until 1964.[6] We could not gather any biographical information on the author, but he presents himself with these words in the introduction of his book: "I am not a pundit, nor a M.A. or a B.A., nor a lawyer, [...] and I did not take advice from scholars to write my small book." Yet, Varma adds that he was influenced by the books and journals he could read and by the teachings of ascetics (*sādhu satsang*). He most certainly received a classical education in a *pāṭhśālā*, and was learned in Sanskrit, as evidenced by the more-than-one-hundred quotations of Sanskrit verses that pepper his 85-page text and which, according to him, provide as many proofs (*pramāṇ*) supporting his points.

Interestingly, these two booklets, as well as others, do not address the provisions of the law, though at that time the *Mulukī Ain* still prescribed an important number of daily practices on religious grounds: with whom one can have sex, from whom it is a fault to accept food or to whom it is criminal to offer water, etc. In fact, the two authors make few mentions of intercaste relations, though these were central in evaluating crime and punishment in the *Mulukī Ain*. One of the reasons for this silence is probably related to the fact that these booklets were addressed, in a tacit manner, to members of the upper castes only, among whom the few people who could read were to be found at the time.

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[5] I wish to thank Mahes Raj Pant for this information. Buddhisagar Parajuli is the author of numerous publications in Sanskrit and in Nepali, notably on coronation rituals. See https://worldcat.org/identities/lccn-n86838487/, accessed 8/6/22.

[6] On this institution, see Ghimire (n.d.). Varma's book was also most probably written before 1960 because it includes criticism of the Panchayat system in India without mentioning the system's implementation in Nepal.

For example, the *Judgments on jūṭho and sūtak impurity,*[7] published in early 1964 by Nilahari Sharma, provides precise instructions on the number of days of impurity to observe in a great variety of circumstances, without ever specifying for which group of people it is valid. Yet, this becomes explicit in one of the few paragraphs (43-44) mentioning different categories of beings, in the case of a dog, an Untouchable (*śūdra)*, a Degraded one (*patit*) or a Barbarian (*mleccha)* dying at the house of a Twice-born, *dvijā*. [8] The consequences for the reverse situation or any other relational configuration are not stated, suggesting that the book is addressed to the Twice-born only, rather than offering, as the law does, a multi-caste perspective.[9]

If the booklets on *dharma* avoid speaking of the law and make few references to the caste organization that structured it, it is also probably due to the conception of the law as a field apart, forming the core of a set of rules called *rājdharma*, which are presented as rules to be obeyed, rather than explained and justified. Such a dichotomy within *dharma,* depending on the receptive attitude its different fields command, is found in Varma's *Good counsels*, which states that "devotion to the king" consists in "functioning according to the rules (*niyam*) made by the king" (Varma n.d., 50). Those who obey these rules are "happy and at peace", and "no one can do anything" to them, adds Varma. On the contrary, the king has an obligation to punish those who object to his rules, just as parents must punish their disobedient child (ibid.). Yet, for Varma, the non-disputable character of the law is clearly determined by the virtues he attaches to monarchy. In his view, it is "a foremost duty to defend the system (*praṇālī*) of the royal power", whereas the

[7] *Sūtak* designates the impurity caused by birth, *jūṭho* the impurity caused by death. Yet while *sūtak* has this narrow definition only, *jūṭho* also designates social impurity, as well as the impurity induced by decay, fermentation, menstruations, contact, ingested food, etc.

[8] The Twice-born are those who receive initiation, i.e. Brahmans and Kṣatriyas. Impurity lasts 10 nights for the death of a dog, one month for a *Śūdra*, two months for a Degraded one, four months for a Barbarian (Sharma 1964,12).

[9] Apart from this passage, intercaste relations appear in the rule that stipulates that the corpse of a high caste person must never be touched by a *Śūdra* and that conversely a *Dvijā* must not proceed to the cremation of a *Śūdra* (Sharma 1964,13), as well as, more interestingly, in a sort of impurity induced by sentimental attachment, i.e. a notion that breaks radically with the usual relations, which are regulated mechanically by caste status and kinship: if a Brahman cries at the death of a *Śūdra*, says the text, he must observe three days of impurity (Sharma 1964, 21).

"panchayati regime" in India would have caused its division. The Hindu pundit even adopts here a Muslim perspective to support his argument, adding that: "During the reign of the Emperors, when it was not panchayati, Muslims lived without fear" (ibid.). Varma therefore makes clear that *rājdharma* becomes debatable when it no longer corresponds to a set of rules fixed by a king, even a foreign one, but by the head of another type of political regime.

This combination of a strict classification—which establishes here the apartness of *rājdharma*— and of dependence for validity on contingent factors —in this case the nature of the power holder— applies to numerous domains covered in these booklets, such as hospitality or gift giving. The act itself is classified in the register of *dharma*, but its value varies thoroughly depending on whom it is addressed to, from whom it comes, or even the intentions that motivate it, opening a space for both freedom and uncertainty. Thus, welcoming strangers is a principle of *dharma* so strong that not respecting it can annihilate one's entire *dharma*, according to Parajuli Postacharya (2010 VS, part. 1: 8). The author explains that a rejected stranger would indeed take away with him all the *dharma* that the members of the household may have accumulated, while he would leave them instead all the faults, *pāp*, that he himself had committed. On the other hand, hospitality produces good fruits only if the welcomed stranger is on his way "for the good of the world", carrying a message of "truth and *dharma*", and if he is "an accomplished scholar", says Varma, (n.d., 51). Welcoming an impious (*pākhaṇḍī*) stranger would make the householder responsible "for the increase in bad behaviour (*dūrācārī*) in the country" (ibid., 52). In spite of the universal dharmic value of hospitality, due to all castes, even, as Varma notes, the impure Cāṇḍāl, its concrete criteria for application restrict its practice to certain caste groups, in order to minimize the two dangers of losing all *dharma* by not welcoming a stranger on the one hand, and of accumulating the worst faults by welcoming a bad stranger, on the other.

With regard to the gift, consideration is to be given not only to the qualities of the recipient, but also the intention of the donor, as well as the origin of the thing which is given.

To guide oneself in the uncertainty of the action, one of Varma's good counsels is to rely on what he calls "natural" good conduct. This recalls the notion of "natural law", with the difference that natural good conduct is not apprehended by the reason as in the Hobbesian notion of natural law: rather it can be comprehended by the effect the action has on the soul and the mind. The action that satisfies the soul and the mind is *dharma*, the action causing fear, shame, doubt or exhaustion is not, says Varma.

In contrast to the king's *dharma*, which lays down commands, the brahmanic *dharma* serves therefore as a body of knowledge used as a pathfinder to avoid the pitfalls of action in a world described as a "jungle entangled with the nets of *karma*" as Nilahari Sharma (1964, 1) puts it. Such a knowledge must be acquired early in order to be imprinted on the mind, as Parajuli Postacharya says in his preface (2010VS, part 1: n.p.). And in accordance with this necessity, the two booklets examined here are both said by their respective authors to be addressed to children in spite of their rather abstruse contents.

The two of them devote a long section to good conduct, *sadācār*, described over the course of an ideal day beginning at dawn, so as to enjoy a long life, *āyu*.[10] They provide knowledge and methods to capture beneficial substances at favourable times: treading with bare feet the dew full of ambrosia that the stars rain down on the earth by going out at sunrise; increasing one's vital breath (*prāṇ*) by confronting oneself with the "great vital breath of the sun" at the moment when "it takes on a new form"; charging oneself with the *śakti* of the sun by bathing in ponds where the lukewarm water has accumulated its energy all night, and this at a time when the microbes have not yet risen to the surface, because as Varma says (n.d., 66), *dharma* is *swāstha*, good health.

Next comes the description of the daily ritual activities to be performed in the morning. They culminate in the "great sacrifice of the meal", object of all attention, and with it, the question of the relation to the Other is finally addressed.

Given the danger another's glance poses to food, the rule is to eat in a line, and among people of the same status group. According to Parajuli Postacharya (2010VS, part 4: 15), such a line creates an invisible chain, which forces the participants to start eating all together. They should also finish all together, the risk being that if one person gets up alone, either he will draw away the other eaters' *śakti* with him, or his own *śakti* will be retained by them, depending on the balance between the participants' pre-existing *śakti* levels. In addition to this variability in quantity, the bodily *śakti*, which the author also calls electricity, *bijulī,* is said to differ in quality between different groups of people.[11] Let us have a closer look at this passage:

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[10] Parajuli Postacharya 2010 VS: part 3: 5-13 and part 4; Varma n.d., 60-68.

[11] "Between the bodily centers of each is built a kind of continuous chain of electricity. This is why, if one gets up before everyone has finished eating, there is a tension between the electricity of the one who gets up and that of the others. If the electricity of the one who gets up is weak, that of those who are seated will attract it to them and

> In the body of each person there is electricity (*bijulī*), which is specific to each person, according to their nature and conduct. In "virtuous" *sātvik* people, electricity is virtuous, in passionate (*rājasī*) people, electricity is passionate, and in those of a dark and impure (*tāmasī*) nature, there is dark electricity. As a consequence, when one sits down or stands up, when someone touches what we eat, that person transmits the result (*asar*) of their electricity (…) and it does not leave us. This is why you must not eat what has been given to you, lest you receive this electricity. This is the main reason that explains why it is written in the *dharmaśāstra* that it is forbidden to eat what has been touched by a person of low caste, or one uneducated, or sinful or untouchable, and that the Brahmans, Kṣatriyas, Vaiśyas and Śūdras should not eat [sitting] in one line. In each *jāt*, from birth, there is a different energy in the nature of the body and it is natural that it can have an effect on the body of others. If the effect of the electricity of lower-ranking people penetrates the electricity of higher-ranking ones, it is natural that this causes a depression, a downgrading (*malīn*). There is a struggle between the electricity of the different groups (*nānātharī*) and the electricity gets reshaped into that which it does not get along with, when it comes in contact with it, and in the end it is not beneficial to anybody. Therefore, the different castes (*jāt*) of human beings should not eat by sitting in line together. (Parajuli Postacharya 2010 VS, part 4: 14-15).

In Parajuli Postacharya's pseudo-scientific approach, what initially appears as an individual diversity is progressively made to coincide with the hierarchy of castes, which the author ends up presenting as a moral hierarchy at once inherited and acquired.

Varma's *Good Counsels* offers another portrayal of the same kind, by presenting the Non-Aryas, *anārya*, i.e. those who are today called 'Indigenous peoples", *janajāti*, as the offspring of Kṣatriyas who settled in areas where "they could not perform their *karma"*. For this reason they became similar to Non-Aryas, but in fact "they should be considered as non-initiated Kṣatriya children" (Varma n.d., 24). Concerning the Untouchables, *achut*, they would be the progeny of sinful people, *pāpi*. As the author explains, "when sinful people are touched, their fault/sin is passed on to others, and that is how they became

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seize it to the detriment of the one who gets up: he will suffer from weakness, illness, indigestion, etc. Or else, if the energy (*śakti*) of the one who stands up is great, he will take away all the electricity of the others by rising." (Parajuli Postacharya 2010 VS, part 4: 16).

untouchable, *achut*" (Varma n.d., 25). For Varma these two lower classes are thus the result of infringements: of good conduct, *sadācār,* in the case of the middle ranking *anārya* (Varma n.d., 55), and of *dharma*, in the case of the *achut,* whose sinful actions he either calls *adharma*, *pāp*, or *pāp karma*.

In these two depictions of Nepalese society, social division is ternary, with the Twice-born, *dvijā,* being equated with virtue (*satva*) and *dharma*, the Non-āryas (or *janajāti*) with passion, *rājas,* and with bad conduct, *anācār,* the Untouchables, *achut*, with darkness, *tāmas,* and fault, *pāp*. Interestingly, such a ternary structure is also found in the categorization of the social groups enforced by the law in the *Mulukī Ain*. The code distinguished three main classes of people: the Twice-born, called "cord-wearers" *tāgādhārī*, the Alcohol drinkers (*matwālī*), and the People from whom water cannot be accepted (*pānī nacalne*), although the last two classes were each sub-divided in their turn. On the other hand, the Nepalese ternary caste organization constantly needs adjustments to fit with the "dharmaśāstric" model of the four *varṇa* born of the sacrifice of Puruṣa, which is also mentioned, along with the bipartition into wild and civilized people born of King Vena's sacrifice, in Varma's *Good counsels.* In particular, the Kṣatriyas oscillate between the first and the second category in these presentations, because of their association with passion and the non-Aryas, whereas in the *Mulukī Ain*, they are blurred with the different categories of Brahmins, or the first category, underlying the Kṣatriya perspective of the law. In the same way, in the eyes of the Nepalese Brahmins of the 1950s, indigenous peoples are located somewhere between the Kṣatriyas and the Śūdras, with each of whom they share common features, or as a specific class of lower rank, which is not considered apart from the rest of society, and only exists in Nepal. In India by contrast, indigenous peoples are in theory classless people, ranked at the very bottom of the hierarchy.

It should be stressed that there is no mention of social purity and impurity (*cokho*/ *jūṭho*) in the two presentations of the social hierarchy examined here, but of something which shares with impurity in the Hindu sense its ability to be transmitted from person to person, both horizontally (by contact) and vertically (by inheritance), be it the bodily *śakti*, bad conduct, *anācār* or sinful actions, *pāp*. A second similarity is that, like the Hindu impurity, which is both individual and collective, bad bodily *śakti, anācār* and *pāp* are also conceived as being attached to each person depending not only on his or her individual behaviour, but also on the status group.

Śakti and *pāp* are both external and internal, and can be gained or lost, through actions and through contact, as we have seen. The two *dharma* booklets

describe many techniques to get rid of, or rather "separate", *chuṭnu,* bad actions from oneself, ranging from lengthy ritual procedures, to simply talking about them. "The more one tells to others the *adharma* one has done, the more they are separated from one's body, *śarīr*" (Varma n.d., 54). Because of the efforts it requires to get rid of it, "bad" *karma* (*kharāb karma*) is presented as an expenditure (*kharca*) and even as a debt (*riṇ*), unlike [good] *karma*, which is conceived as an income (*āmdāni*) (Varma n.d., 61). Yet, it is unclear if this way of conceiving *dharma* also provides a model for the economic classes that castes also represent. In any case, the two booklets do not speak of any technique to get rid of collective bad *śakti* or *karma* for that time period.

Contemporary with these texts, *Hāmro samāj*, "Our society", written by Man Bahadur Pradhan from Darjeeling, and published in 1953, also seeks answers to the same question: what is *dharma*? But the author is clearly a progressivist and warns the reader that he could get angry because of his answers. Indeed, he has tough words for the Bāhuns (local name for Brahmins). Many of them, he says, have a "poor intellectual level" and a "false *dharma".* They "do not understand the *dharmaśāstra"* and therefore "confuse the statue (*murti*) with a god, and *himsā* with *pujā »,* killing with worship (Pradhan 1953, 13). The notions of *choī chito hālnuparcha* ("purify yourself with water if touched") and *choeko khān hunna* ("don't eat if it was touched") are mere devices invented by vile Bāhuns (*nīc prakrtikā bāhunharu)* to divide society, whereas the *dharmaśāstra* only spoke of division of labour (Pradhan 1953, 35).

Pradhan's criticism targets the priestly class but seeks to preserve the sacredness of the ancient *dharmaśāstra*. He does this by attributing the Hindu practices that are currently negatively perceived to a perversion of these texts by the Brahmins. This position became widespread over the following years in Nepal, and consequently, it gradually became a rather conservative stance, especially when presented without the charge of fraud by the Brahmins, as it often is by Brahmin authors.

3. *The Panchayat era*

Three decades after Pradhan's pamphlet, a booklet written by a representative of this class, the pundit Chavilal Pokharel, and published in 1983, will serve as an illustration of the evolution of *dharma* during the Panchayat era (1960-1990). During these three decades of "basic democracy", political parties were banned and freedom of expression restricted, while the State developed an egalitarian

facade. Pokharel was an elderly man, who embraced the changes he had witnessed in the book.[12] As he explains in the preface, he had started writing it a long time before but had not been able to publish it earlier for economic reasons. His thesis is that some customs, such as *satī*, exclusion of women and Śūdras from the study of the *Vedas*, child marriage, and slavery do not come from the sacred contents of the *Vedas* but were "invented" in the Middle Ages, in reaction to the establishment of foreign religions. Pokharel examines some of these customs, which he qualifies as "deformations" (*vikriti*) or "errors" (*galtī*), starting with the discrimination against the Untouchables in eastern Nepal. He recalls that in Dharan, which passes for a modern and progressive town, the Untouchables did not get to go to school until after 1951, following the revolt which overthrew the Rana government, and that they could not drink tea sitting inside a stall until 1963.[13] In Dhankuta, they were not allowed to enter the market until 1951, and were chased and beaten by the police at the slightest attempt. Thus, says Pokharel, they could only buy goods through the "goodness" of their patrons (*biṣṭa*), who "thought at the time that they were protecting the *dharma*. And the Indians who heard this said: in Nepal there is *dharma*" (Pokharel 1983, 6).

The condition of women, which is then addressed as another "bad custom", is treated in a less clear-cut way. Pokharel focuses his discussion on polygamy, forbidden by King Mahendra, and wonders if it is preferable to monogamy,

[12] The author gave me a copy of his book in 1999 when I met him at Varahakshetra, but I have no information on his biography. Entitled *Ved dekhikā dharma ra matharu, nepālkā anek jāt ra samskārharu*, it was printed in Benares, with a print-run of 500 copies. It is prefaced by swami Prapannacharya (alias Kale Rai, 1923-2015), who is famous for holding a PhD in Sanskrit although he only learned to read and write at the age of 30, because of his indigenous origins. On his life and publications, see: https://nepal24hours.com/swami-prapannacharya-passes-away/). His preface, entitled "The Kirants are Kṣatriyas", argues that the Indigenous peoples are "pure Hindus". A second preface, signed by Tulsi Prasad Bhattarai explains that the book provides proof that all humans, women and Untouchables included, can read the *Veda* and that, more generally, in the pure climate of the mountains of Nepal "all *jāt* and *jāti* must be considered to be Aryas". A third preface, by Lakshmi Acarya, claims that caste is made by "our occupation, our work and our actions ".

[13] In western Nepal, this custom lasted much longer. During my fieldwork in the Gulmi district in 1986-1990, Untouchables used to drink their tea outside, even in pouring rain, and to wash their glass themselves once empty before putting them back on the ground for further purification by the tea-shop's owner.

insofar as it is mentioned in the *Vedas*. With figures to support his arguments, the pundit considers that it is not currently adapted to Nepal or India where women are less numerous than men, but acceptable in contexts where there are more women than men: "If both parties agree", he says, it is good to allow all women to be mothers, thanks to polygamy. Here the *dharma* is made entirely dependent on the context rather than based on principles related to the form of marriage, allowing the author to solve the contradiction between two sacred authorities: the law of the king, on the one hand, and the holy scriptures, on the other.

A "new problem" emerged from the reform of the law. Pokharel explains that in the past rules were fixed: the child of a Brahman and a Kṣatriya woman was Khatri and any union with an *achut* woman would exclude one from the community as "one was made *achut*". However, following the *New Muluki Ain* [of 1963] there was now a question of "what is the caste of the children born of intercaste marriages?" (Pokharel 1983, 18). Once again, it is clear that the major changes which occurred in the *rājdharma* unsettled the *dharma*. However, ancient texts contain solutions for all these problems: Rama addresses Ravana as Brahman, though he was born from a Brahman father and a demoness (*rakṣaśni*) mother, notes the author, and the child born of Krishna's union with a "wild girl" has a *kṣatriya* status. Notwithstanding the fact that in both cases, the mother has no caste in the proper meaning, Pokharel concludes, "we see that the children take the caste (*jāt*) of the father, whatever that of the mother". Such a patrilinear rule once validated, Pokharel continues to explore the same sources to argue that caste is not acquired at birth, but through "work" (1983, 19), seemingly without noticing any contradiction in this. In his eyes, this ancient principle blurs the social picture in the current context where "all the castes have done the work of fighting, reserved for Kṣatriyas, to overthrow the Rana regime" and "do the work of the Vaiśyas: trade, agriculture, breeding, etc., as well as the work reserved for the Śudras: crafts and manual work". Last comes the question of untouchability, which Pokharel considers already settled, both by the *rājdharma* and by the (Brahmanic) *dharma*. Indeed, he notes, the government decreed that "considering someone as untouchable was a punishable crime" and, on their side, "all Hindu organizations have declared it as *adharma*". Pokharel clarifies what the declaration covers precisely: "It is considered *adharma* to prevent the castes which were once considered untouchable from accessing communal wells and fountains, temples, shops, etc." Hence, with regard to untouchability, the Brahmanic *dharma*, in a rather unusual way, takes legal form, by applying to public places and common goods,

without offering guidance and explanations regarding individual conduct or private property.

Pokharel lives in eastern Nepal where the Indigenous peoples, *janajāti,* refer to themselves by the name Kirant, which designates wild people in ancient Indian textual tradition. Despite his assertion that caste is acquired by occupation, Pokharel now asks the question: "In which *jāt* should we count the Kirants? Should we count them within the four *jāt* [i.e. the four classes constitutive of Hindu society], and if so, which one?" Using his usual genealogical method, he notes that official documents dating from the reign of King Prithvi Narayan Shah and Rana Bahadur Shah (18-19th century) address them with terms reserved for Kṣatriyas, such as *rajbhār sāmartha* [i.e. "fit for royal service"]. Yet, he distinguishes two currents—without specifying "among the Upper-castes". First, the "traditionalists" (*paramparāvādī*), who consider that even if they were Kṣatriyas in ancient times, the Kirants have abandoned the *dharma* proper to their rank, *swadharma,* and became Śūdras: they are no longer entitled to study the *Veda* and cannot be initiated (Pokharel 1983, 25). "Reformist scholars" (*sudhārvādī*), by contrast, consider that it is possible to "purify people of low status by invoking the name of God, which removes the fault, *pāp"*. As for Pokharel, he considers that all humans, forming the same "family", are all Aryas, except for the "thieves, criminals and violent people", who are Non-Aryas (Pokharel 1983, 35).

4. *After 1991*

Given the numerical weight of the Indigenous peoples in Nepal, which became a political weight when the multi-party system was restored in 1991, this situation could not last, and indeed, the decade of the 1990s was a time of contestation. First, Indigenous peoples fought for their rights and the acknowledgement of their different cultures in a movement that was in the spotlight from 1991 to 1996.[14] During these years, parallel to the Janajati's violent denunciation of their treatment in the Hindu kingdom of Nepal, new works by Brahmanic authors dried up. Bhattarai (1998, 6) in his "*Dharmic Revolution*", attributes this to a lack of consideration for *dharma*: today, he says, among the four "rules (*anuśāsan*) of *dharma*", i.e. *dharma*, *artha* (wealth),

[14] On the criticism of Hindu *dharma* by the Indigenous peoples of Nepal, see Lecomte-Tilouine, 2010.

kāma (desire), *mokṣa* (liberation),[15] "only *wealth* and *desire* are important in the eyes of people, [while] many people consider *dharma* as superstition (*andhaviśvās*) and *liberation* as something imaginary (*kalpanā*)".

After a few years, with the launch of the People's War (1996-2006) and the great spread of Marxism-Leninism-Maoism, the questioning of *dharma* took on a new form. This time, it was no longer formulated as misunderstandings or perversions of a sacred body of texts itself left unquestioned, and the type of criticism of the Hindu *dharma* which was commonly found in Indigenous journals in the early 1990s was now made by the *dharma*'s own traditional guardians, the Twice-born, *dvijā*.

The most extreme among then could now identify *dharma* in its entirety as a source of evil. This is the claim of Chudamani Giri in his novel *Adharma within dharma* (2004), for instance. Biplov, the young hero of the novel, is repulsed by his father's behaviour from an early age. He asks embarrassing questions about the way he, a Brahmin priest, treats his mother. He sees her eat his leftovers, wash his feet and drink the dirty water, stay awake late at night in spite of her hard day in order to massage his legs before he sleeps when he finally comes back home. Biplov reaches the age when he is sent to school, and becomes friends with Dalit schoolmates. His father assaults one of them for daring to enter his house on Biplov's invitation. From that day on, there is constant conflict as Biplov continually confronts his father, who decides to send him away to a Sanskrit school, for the sake of his *dharma*. But Biplov is not kept there for long due to his constant criticism of the texts. Back home, his father now decides to "bind" him to *dharma*, by organizing his initiation ritual at an early age. Once bound by the bonds of the *vratabanda*, Biplov complies with the Brahmanic rules and performs his daily rituals, but only "mechanically". He continues his studies at the local school, and constantly evaluates in a negative manner the contents of the *dharmaśāstra,* measuring it against the "science" he learns there. He starts mobilizing his village to "bring down the invisible wall between the *chut* and *achut* people like the Berlin wall fell". There comes the moment of the final exam, the SLC., and while Biplov and his comrades are working on their answers, an infernal noise, coming from a fire sacrifice ceremony organized by his father and other Brahmins, disturbs them. This episode provides an illustration of the conflict between scientific knowledge and *dharma* that permeates the novel. The students ask that the volume be lowered, without success. Then things get worse and the police intervene,

[15] More often, these are called the four "goals of life", or the four *dharmas*.

backing up the Brahmins engaged in *dharma* to the detriment of their "own children's science". Now, the novel turns into a long exposé by Biplov on the practices and ideas proving that *dharma* is the main source of social domination. He qualifies it as *daman dharma,* "religion of domination" and renames the ancient *dharmaśāstra* as *pāpśāstra,* "treatises on sins/faults/wrongdoings". For Biplov, accepting the ideas they legitimate, on male supremacy and caste hierarchy, as well as venerating Hindu gods whose behaviour is "criminal" (such as Rama, Vishnu and Shiva) is itself a *pāp* (Giri 2004, 68). Biplov's egalitarian and spiritual conception of *dharma* pushes the Hindu *dharma* as a whole into the register of amorality. The youngster finally convinces even his Brahmin priest father, who ends up burning his own copy of the *Laws of Manu,* which represent the core of the *dharmaśāstra*. Yet Biplov and his *achut* girlfriend come to rescue the copy from the flames, explaining that these books should be carefully kept, "so that our descendants know how the so-called *dharmaśāstra* were brutal (*niṣṭhur*) and unjust". Somehow, he thus advocates retaining traces of the Brahmins' infamy for an eternal expiation, which recalls that collective *pāp* is an endless debt.

5. *Conclusion*

This sample of contemporary texts on *dharma* composed by Nepalese Brahmins may serve to trace a trajectory of *dharma* in post-1950's Nepal, without claiming to offer a representation of majority opinions, but only identifying meaningful steps. The different views examined here underline the difficulty faced by Upper-caste Hindus of conceiving of otherness to their *dharma* as anything but negative. Ignoring the category of "Non-Hindu", *ahindu*, which became central in the Indigenous peoples' self-determination of the 1990's, they focused on that of Arya and its opposite, Non-ārya, making group status coincide with their own values and the idea of "good conduct", in a variety of combinations. Whether the *anārya* are seen as "those who could not perform their *karma*" (Varma n.d., 24), "abandoned their *dharma*" (the "traditionalists"), committed crimes (Pokharel), or are the recipients of a lower type of energy (Parajuli Postacharya), all these statements are related in their purpose. Even when seeking to "reform" traditional views by offering a possibility of redemption (the "reformists"), this amounts to offering one's neighbour redemption from the fault of being categorized as a member of a group of sinful people. One had to wait for the emergence of a new societal ideal, the classless

society of the Maoists, which manifested the ideological rejection of hierarchy under way in Nepal since the 1950s, to finally create a breach in this tautological world, and turn *dharma* into *adharma*, at least with regard to social norms.

As early as the 1950s, we have seen the Brahmins distancing themselves from the *rājdharma* as it was codified in the *Muluki Ain* by not using its codified categories, and using an older vocabulary taken from the *dharmaśāstra*. Similarly, we saw them hesitate to define caste as a hereditary status, even if the notion repeatedly reoccurs in their discussions. Moving away from the mythical creation of the four classes from the sacrificed body of Purusha, resulting in a sanctified hierarchy, they seek to trace the genealogy of this organization through different paths, using the classificatory potential of transgression or the contrasting natures within the human species. In parallel, some authors already blamed the Brahmins for having perverted the texts and setting up caste and gender discrimination for their own benefit. This idea of the perversion of the ancient sacred texts even gained support among the Brahmins themselves, who, however, found other causes than their own interventions, such as the protection of their culture against the danger of foreign religions. However, their authority as "doctors" was challenged starting from this idea of perversion, in which Indigenous peoples found a perfect opportunity to reinterpret their domination in the 1990s. A double crisis then affected *dharma* among its own priests, taking the form of both a lack of interest in *dharma* and a demonization of the social rules related to it. This contributed to the detachment of *dharma* from its social dimension some decades after its detachment from the law to finally push it back to the fields of spirituality and the good way of life.

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Contributors

MANIK BAJRACHARYA is researcher and Deputy Project Leader at the research project *Documents on the History of Religion and Law of Pre-modern Nepal* of the Heidelberg Academy of Sciences and Humanities.

FABRIZIA BALDISSERA is former Associate Professor of Indology at the University of Firenze.

CHIARA CORRENDO is post-doctoral researcher in Comparative Law and Legal Anthropology at the Department of Law, University of Torino, and a member of the Institute of Asian Studies (ISA) at the University of Torino.

SIMON CUBELIC is Deputy Librarian at the South Asia Institute Heidelberg and Research Associate at the research project *Documents on the History of Religion and Law of Pre-modern Nepal* of the Heidelberg Academy of Sciences and Humanities.

FLORINDA DE SIMINI is Associate Professor in the Ancient and Medieval History of India at the Dipartimento Asia, Africa e Mediterraneo of L'Orientale University of Naples and Principal Investigator of the ERC-starting grant project *Translocal Identities: The Śivadharma and the making of regional religious traditions in premodern South Asia* (GA 803624).

DOMENICO FRANCAVILLA is Professor of Comparative Law at the Department of Law, University of Torino, and a member of the Institute of Asian Studies (ISA) at the University of Torino.

RAJAN KHATIWODA is Research Associate and Head Coordinator at the *Nepal Heritage Documentation Project*, Heidelberg University.

CSABA KISS is Research Associate, Taskforce D of the DHARMA Project (ERC GA no. 809994, 'The Domestication of "Hindu" Asceticism and the

Religious Making of South and Southeast Asia') at the Dipartimento Asia, Africa e Mediterraneo of L'Orientale University of Naples.

MARIE LECOMTE-TILOUINE is Directrice de recherche CNRS, Laboratoire d'Anthropologie Sociale (CNRS-Collège de France-EHESS), Paris.

TIMOTHY LUBIN is Jessie Ball duPont Professor of Religion and Adjunct Professor of Law at Washington and Lee University.

AXEL MICHAELS is Senior Professor of Indology at Heidelberg University and Head of the research project *Documents on the History of Religion and Law of Pre-modern Nepal* of the Heidelberg Academy of Sciences and Humanities.

ARIK MORAN is Senior Lecturer in the Department of Asian Studies, University of Haifa.

RAMHARI TIMALSINA is researcher at the research project *Documents on the History of Religion and Law of Pre-modern Nepal* of the Heidelberg Academy of Sciences and Humanities.

ASTRID ZOTTER is Assistant Professor at the Department of Cultural and Religious History of South Asia (Classical Indology) at the Heidelberg University and until 2023 was Deputy Project Leader at the research project *Documents on the History of Religion and Law of Pre-modern Nepal* of the Heidelberg Academy of Sciences and Humanities.

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