

Part I
Formation and Enforcement
of the *Mulukī Ain*

1 Introduction

“[N]ew ways of thinking about society, sovereignty and law”¹ do not appear only by way of intellectual discourse. They also continuously emerge within contemporary political culture, either as part of domestic institutional practices or of global social and political developments.² Such processes should be scrutinized for typology, and for the actual impact they have exerted upon the historical development of the political culture they emerge from. In recent pre-modern Nepalese history, an epoch-making transformation of context-sensitive normative legal practice into a well-defined and operative code of law occurred with the promulgation of the *Mulukī Ain* (hereafter MA, *Ain* or *Ain* of 1854) in 1854. It was Jaṅga Bahādura Rāṅā (1817–1877) who conceived of and initiated the formulation of a standardized binding national code meant to replace the unregulated and locally diverse legal practices of his period by uniting administrative and social, as well as legal practices, within a single governing framework. Although Nepal directly bordered on British India and on China (through Tibet), it was among the few kingdoms in the region that remained autonomous, and indeed maintained its independence from both British India and China. Thus, free from direct foreign interference, the country could define its own social and legal practices as what they conceived of as the last remaining Hindu kingdom of a supposedly ‘degenerate era’ (*kaliyuga*). This renders it an especially interesting case for the study of both traditional legal practices and Hindu law, which, as stated by B.H. Hodgson, “might puzzle the *Shastrīs* to explain on *Hindú* principles.”³

The legal practices in Nepal prior to the mid-nineteenth century lack clear traceability, although there is evidence suggesting sporadic attempts to document such practices in written form since the fourteenth century.⁴ The *Nyāyavikāsinī* (hereafter NyāV), commissioned by

1 J.E. Wilson 2007: 22.

2 See *ibid.* 23.

3 Hodgson 1874: 39.

4 The legal history of Nepal will be presented below (Part I, 1.3).

King Jaya Sthiti Malla (r. 1382–1395) in the late fourteenth century, represents an initial step towards a comprehensive written law.⁵ Written in Sanskrit and Newari, it laid the foundation for further legal development. During the period between unification in 1768 and the rise of the Rāṇā regime in 1846, the king held supreme authority over all matters, supported by royal priests (*rājaguru*),⁶ members of the royal assembly (*bhāradārī-sabhā*), and various other state and local officials. With the exception of inscriptions, edicts, and administrative documents, legal texts in Nepal until the mid-nineteenth century were primarily based on customary practices or Hindu legal scriptures, adapted with modifications, under the umbrella of divine kingship. The Śāha rulers' centralized government and executive power provided a solid foundation for the establishment of concrete administrative and judicial institutions and the appointment of officials to fill these roles. For instance, the organization and structure of courts, including the Council, Sadar Courts, and District Courts, aimed to enhance control and governance over the provinces.⁷ The transition of executive powers from the king to the Rāṇā aristocracy in 1846 marked a pivotal moment in Nepalese administrative and legal history. This event paved the way for the promulgation of the *Mulukī Ain*, a unified legal code. Initiated by Jaṅga Bahādura Rāṇā and enacted during the reign of King Surendra Śāha (r. 1847–1881), the MA went into effect on January 6, 1854 (the 7th day of the bright fortnight of Pauṣa, VS 1910).⁸ Although the sources of this significant text, composed in vernacular Nepali, encompassed pronouncements of customary law and the *dharmasāstras*, they were also decisively influenced by novel political ideas, including the concept of the 'rule of law'. The territorial divisions and legal institutions depicted in the MA reflected close interactions with the Company State, particularly Calcutta, where Nepal stationed ambassadors and envoys,⁹ as well as with the Western world. Jaṅga Bahādura Rāṇā, having been the

5 This text will be discussed below (Part I, 1.3.2).

6 A preceptor or *guru* to a member of the royal family.

7 See H. N. Agrawal 1976: 7–8 and K. K. Adhikari 1979: 12–20.

8 According to J. Fezas, the mentioned date given in the Vikrama Era is equivalent to 1853 Common Era (Fezas 2000: xx). A. Höfer converted this date to 6 January 1854 (Höfer 2004: 3), and A. Michaels to 5 or 6 January 1854 (Michaels 2005b: 7). The 6th of January seems to be accurate (see <http://www.cc.kyoto-su.ac.jp/~yanom/cgi-bin/paw314.cgi>, last accessed on 01 May 2016). See Khatiwoda, Cubelic & Michaels 2021: 2.

9 See M. Bajracharya, Cubelic & Khatiwoda 2016 and 2017 for a detailed discussion of the role of envoys stationed in Calcutta based on original sources in Nepali.

first prime minister of Nepal to visit London and Paris, encountered the British and French legal systems. The present study topicalizes major problems and points of interest emerging from this first full-fledged legal codification undertaken in Nepal.

1.1 Core Questions

Until the first half of the nineteenth century, Nepal lacked a robust and functional state-led judicial system, as well as the trained ruling elites or a bureaucratic apparatus capable of implementing a codification project. Additionally, there was no colonial power pushing for such a codification. In this context, the MA stands out as a comprehensive law code with wide-ranging implications, encompassing civil and penal regulations that addressed not only the emerging concept of the nation-state and norms of international diplomacy but also a broad array of social practices. This raises a fundamental question: What were the primary factors that led to the codification of the MA? Despite K. K. Adhikari's argument,¹⁰ the origins of the idea to draft such a code in the isolated region of Nepal have largely remained unanswered. Therefore, the primary objective of this volume is to shed light on the driving forces behind the promulgation of the MA. By examining historical evidence and engaging with relevant scholarship, this study seeks to provide a better understanding of the motivations and circumstances that contributed to the codification of this significant legal document.

Secondly, broadly speaking, scholars who have contributed studies on Nepalese political and social history have developed two different theories about the nature of the Rāṇā polity. The first one, in line with the Hindu *rājyāṅga* theory of R. Kangle,¹¹ classifies nineteenth- and twentieth-century Nepal as a Hindu kingdom, which was strongly influenced by concepts of divine kingship, according to which the king was believed to be an embodiment of Viṣṇu who had the ultimate right

10 See Adhikari 1976, 1979 and 1984. Adhikari (1976: 107), for example, opines: “[...] the *Ain* as a whole was partially customary, yet partially written with the times when it was laid out.”

11 See Kangle 1988 [vol. 1 (6.1.1); vol. 3]: 127 for what he considers the main features of a Hindu state, namely a king with the status of divinity, his kingdom, his subjects and normative practices.

of controlling his officials and meting out punishment at will.¹² The second (and contrary) approach focuses on the Rāṇā regime's investiture of the prime minister with all three major state powers: executive, legislative and judicial. Thus, invested with the powers and privileges of a sovereign, he dwarfed the role of the concurrent king, now reduced more to a ritual straw man than an actual leader.¹³

However, the above-mentioned depictions of the Rāṇā regime after the promulgation of the MA need to be reanalysed within a larger frame, with consideration being given to the provisions of the MA. The legislative, administrative and judicial autonomy provided by the MA laid the foundation for a constitutional system of government, thereby making it a law code unrivalled in pre-modern South Asian legal history.¹⁴ Therefore, the present volume will attempt to re-interpret the existing theories by focusing on the following observable aspects of the MA: (i) developments within the notion of divine kingship, (ii) the conceptual separation between the king and state, (iii) the establishment of a theory of the rule of law, and (iv) jurisdictional autonomy and cooperation between the Council and judiciary.

Thirdly, the prevailing interpretation among scholars influenced by their social, anthropological, and historical perspectives portrays the MA as part of a Hinduization strategy.¹⁵ According to this view, the MA aimed to establish the supremacy of Hindu values by reinforcing the caste hierarchy and promoting other Hindu norms. However, a more nuanced philological approach is necessary to determine whether the MA indeed embodies a Hinduization strategy or, more accurately, represents an attempt to create a confessional type of theocratic state. This attempt sought to integrate the diverse social and religious cultures and customs of pre-modern Nepal within a single legal framework, wherein a modified Hindu caste system and certain explicitly Hindu elements—albeit significantly deviating from their classical Brahmanical form—held dominance. In summary, this volume will focus on the provisions of the code that most clearly necessitate a re-evaluation of existing social-anthropological theories.

12 Burghart 1996: 193. A. Michaels (2005b: 5–6) similarly argues that god and king were still treated as identical in nineteenth- and twentieth-century Nepal, meaning that there was no clear separation between state and religion.

13 See H. N. Agrawal 1976: 10.

14 See M. C. Regmi 2002: 3.

15 See, for example, Sharma 1977b: 285 and 293, 1983: 18 and Gellner 2007: 1823.

Fourthly, the theories put forth by social anthropologists who have examined the MA have led to uncertainty regarding its sources. Both Western and native scholars' studies commonly assert that the preamble of the MA draws upon Hindu legal scriptures, customary practices, and ways of life.¹⁶ This study aims to provide a more precise understanding of the blend of legal sources, customs, and new political thought influenced by both the 'rule of law' and the *dharmasāstra* that culminated in the formulation of the MA. To accomplish this, selected Articles from the 1854 and 1870 codes pertaining to 'Homicide', which have not received critical scrutiny thus far, will be translated and analysed.

Finally, the question of whether the MA was effectively implemented as the basis of legal practice or whether it remained primarily a theoretical blueprint akin to *dharmānibandhas* (Hindu legal digests)¹⁷ has long been a subject of speculation. Scholars who have studied the MA have yet to reach a consensus regarding its actual application.¹⁸ Some scholars, focused on elucidating pre-modern Nepalese political history, argue that the MA did not bring about any substantial changes in the courts of law during the nineteenth century.¹⁹ They contend that the Rāṇā aristocracy disregarded any court procedures outlined in the MA, and that there was a lack of constitutional safeguards to ensure compliance with the code's restrictive provisions. However, such arguments often overlook the extensive range of documents available in private and public institutions in the Kathmandu Valley and beyond. While only a fraction of these documents have been studied so far, the unexplored corpus provides a foundation for understanding the largely unknown history of MA practice in mid- to late-nineteenth-century Nepalese jurisprudence.

The current volume will therefore approach the problem of the implementation of the MA through a critical examination of nineteenth- and twentieth-century documents concerning criminal cases and civil law. By analysing these materials, it seeks to shed light on whether the MA was merely a legal text referenced but not universally applied or whether it held normative force across the country. To tackle these concerns, specific provisions from the 1854 edition of the

16 See 'The State of Research' below for further discussion.

17 *Dharmānibandhas* constitute a genre in the encyclopaedic commentarial tradition of *dharmasāstra* literature.

18 See, for example, Höfer 2004, K. K. Adhikari 1984, Fezas 2000 and Michaels 2005b. For more information, see Part I, 3 'The *Mulukī Ain* in its Application' below.

19 See, for example, H. N. Agrawal 1976: 12 and M. C. Regmi 2002: 4.

MA and other relevant amended editions will be edited, translated, and analysed. Additionally, a translation, examination, and comparison of the Articles on ‘Homicide’ in the 1854 and 1870 editions of the MA will be conducted, preceded by an examination of the root texts. The study will also delve into the legal practices in mid-nineteenth-century Nepal, drawing on editions and translations of various documents preserved in the National Archives, Kathmandu (NAK).

1.2 The State of Research

Both native and Western scholars have studied the MA, on account of its historical and legal significance to South Asian legal history. Most of the studies have been carried out by social anthropologists, cultural historians, historians or law practitioners focusing on specific aspects of the MA depending on their personal research interests. The core textual sources which bear the constitutional characteristics of the code, e.g., the Articles ‘On the Throne’ (*gaddī*), ‘On Legislation’ (*rājakāja*) and ‘On Court Management’ (*adālatī bandovasta*) have not been studied by those scholars who did anthropological studies being based either on only certain aspects of the MA upon their individual interest or not taking the textual evidence into account for their main arguments. For example, R. Burghart’s theory on the concept of a nation-state in Nepal during the nineteenth century would have been shaped differently,²⁰ had he consulted the Article ‘On the Throne’ as well as ‘On Legislation’.²¹ Moreover, a large corpus of documents which reflects the realities of the eighteenth/nineteenth century legal and social practices of Nepal as well as the enforcement of the code have not been so far extensively dealt with. Barring a few instances, even the available translations of some of the Articles of the code are rather a *paraphrasis* based on its first amendment.

A reprint edition of the original *Mulukī Ain* as first amended in 1865–1867 (VS 1922–1924) was published in 1965 (VS 2022) by the Ministry of Justice; His Majesty’s Government of Nepal.²² After this,

20 See, Burghart 1984: 101–125 for his discussion on kingship and identity formation in the nineteenth century Nepal.

21 See Cubelic & Khatiwoda 2017 for the detailed discussion on the kingship, patriotism and legality in the MA.

22 See MA-ED2/preface.

the MA started receiving more scholarly attention.²³ Apart from a few exceptions,²⁴ all major contributions to the MA are based not on the original code but on the first amended version of it. Scholars often consider MA-ED2 to be the original version of MA 1854²⁵—and in doing so mostly refer to A. Höfer.²⁶ Nevertheless, MA-ED2—as stated in the ‘preface’ of the printed edition—is not based on the copy of the *Ain* prepared in 1854. Rather, as stated, the edition was prepared on the basis of the amended version. The edition published by J. Fezas in 2000 is based on several manuscripts: Original manuscripts containing the all Articles of MA 1854 and what probably underlay the first amended copy composed in 1865–1867.²⁷ J. Fezas’ edition is therefore a compilation of sources, namely original folios containing the Articles prepared in 1854 and the first amended version prepared between 1865 and 1867.

The major contributions to the study of MA can be categorised under four main pillars, based on the nature of their approaches:

a) The social-anthropological approach

A. Höfer, who was assisted by the cultural historian and social scientist P.R. Sharma,²⁸ is one of the major contributors to the anthropological study of the caste system as codified in the first amended version of the MA. He published his study in 1979 and came out with a second edition in 2004. Höfer extensively treats MA Articles relating to caste, untouchability, liquor consumption, purity and pollution, and similar subjects. Sharma is right in saying that

... barring a couple of articles in the 1960s and the 70s, which amounted to no more than scratching its surface, no scholar before him [i.e., A. Höfer] had turned his attention to tap the

23 See for example, Gaborieau 1966, Macdonald 1968 (English translation in 1976), and Höfer 2004.

24 See Michaels 2005b and Cubelic & Khatiwoda 2017.

25 For example, Edwards 1977: 120–124, K.K. Adhikari 1984 and Vaidya & Manandhar 1985.

26 See Höfer 2004: 1.

27 See Fezas 1983, 1986a, 1990 and 2000 for a detailed description of the various manuscripts and versions of the MA of 1854.

28 P.R. Sharma has made numerous significant contributions to the subject, as evident in his published works (Sharma 1973; Sharma 1977a; Sharma 1986; Sharma 1993). Among these, his article titled ‘Caste, Social Mobility and Sanskritization’ holds particular importance as it addresses caste hierarchy in the MA (Sharma 1977b).

wealth of social and cultural material contained in the MA in an exhaustive manner.²⁹

Höfer has analysed most of the pronouncements that have any relevancy to caste, e.g., marriage, death, untouchability and so forth. One of the conclusions he draws is that “caste constitutes the primary organizing principle; caste status is indeed, the chief factor determining an individual’s juridical status...”³⁰ He justly notes that caste is a prime consideration in matters having to do with purity and pollution, such as marriage, adultery, the relationship between servant and master and so forth. However, his study does not deal with many other issues in which caste is of little or no relevance at all. For example, in subjects such as choice of occupation, trade and commerce,³¹ confiscation of a criminal’s property, disputes between tenants and landlords, revenue management, disagreements over debt and credit, decisions affecting women’s property (*strīdhana*) and many other important issues, caste is not a consideration. If Höfer’s study had not explicitly targeted caste-related Articles, his conclusions probably would have taken a different shape. Since it did, though, it gives readers the impression that the MA itself created a strong hierarchical caste society. However, the MA merely refashioned a caste hierarchy, which had already been firmly rooted in society evidently from Jaya Sthiti Malla’s time. It made the pre-existing system more flexible in regard to many issues, such as occupations, trade and so forth. Significantly, Höfer discusses neither about the rationale behind the codification nor the constitutional features of the code, nor does he turn his attention to its implementation.

b) Philological approach

J. Fezas and A. Michaels have been major contributors of linguistic and historical scholarship on the MA.³² Both have discussed to what extent the regulations in the MA are based on *dharmaśāstras*. Fezas has dealt among other topics with the Articles ‘On Sodomy’ and ‘The Law of Succession’.³³ He has also identified a number of sources used

29 Sharma 2004: xvi.

30 See Höfer 2004: 196.

31 Höfer (2004: 196) himself has observed that caste is irrelevant to trade and commerce.

32 See Michaels 1993, 1994, 1997 and 2005b.

33 See Fezas 1983 and 1986b.

by the code based on its first amended version.³⁴ In 1990, he completed a major archival research effort to establish the original 1854 version of the code, which had hitherto been unknown to scholars. His findings relating to the different versions of the code revealed that the printed MA (MA-ED2) lacks many important chapters, namely ones which contain most of the important parts of the MA serving to define its constitutional character. The findings resulted, in 2000, in the first published edition of the original code of 1854 (MA-ED1), which not only contains many missing chapters that were not incorporated into the MA-ED2 but also yields a clear outline of the amended version in virtue of having restored many legal provisions that were deleted. This pioneering first edition thus lays the groundwork for the philological study of the MA. However, as pointed out by Michaels, Fezas's editorial methodology is not particularly reader-friendly, and indeed sometimes barely understandable.³⁵ Therefore, further work remains to be done to prepare a critical edition of the code of 1854.

Michaels's major publications on the MA deal with ritual self-immolation (*sati*),³⁶ the law on the killing of cows (*govadha*)³⁷ and the office of religious judge (*dharmādhikārin*).³⁸,³⁹ The first two studies are based on the amended version of the MA (MA-ED2); the last is based on the original version. He has prepared an edition of the Article 'On the Religious Judges' of MA 1854 and MA 1888 based on several manuscripts from the NAK, recording variations, additions, deletions and so forth in footnotes which, in comparison to Fezas's edition, makes studying the text less arduous. His study of this particular Article, followed by translations of it in the two versions of the code (1854's and 1888's), is the result of pioneering research on the practice of religious penance as incorporated into the code. His conclusions regarding the role of the religious judge being mainly based on the normative ideas laid down in the text. More documented evidence on the implementation of the MA is needed to substantiate his argument that the religious judge was a chief judge⁴⁰ rather than a minor state agent whose

34 See Fezas 1986a.

35 See Michaels 2005b: 1 fn. 3.

36 See Michaels 1993 and 1994.

37 See Michaels 1997.

38 This personage was a royal pandit who enjoyed the specific right of granting expiation for violations of the legal code.

39 See Michaels 1993, 1997, 2001 and 2005b.

40 See Michaels 2005b: 12.

task was merely to ritually purify somebody if ordered to do so by the authorities or courts.⁴¹

c) Historical approach

M. C. Regmi, K. K. Adhikari, T. R. Vaidya, and T. R. Manandhar have made notable contributions to the historical study of the MA. M. C. Regmi played a crucial role by commissioning translations of numerous Articles from different versions of the code.⁴² Since his main goal seems to have been the collection of materials for the purpose of his research on the history of modern Nepal and its economy, his translation seems to be rather free and, as indicated by Michaels, is short on a detailed understanding and interpretation of the MA.⁴³ Regmi does briefly discuss the constitutional character of the code, focusing on some of the provisions, which granted considerable autonomy to judicial and administrative institutions.⁴⁴ However, he argues that the code was not implemented at all.⁴⁵

K. K. Adhikari's work, "Nepal under Jang Bahadur 1846–1877," is widely regarded as one of the most significant publications in Nepalese historiography, drawing references from conjectured original sources. Adhikari primarily worked with the first amended version (MA-ED2) of the code, delving into its significance, the general rules of judicial proceedings, and the observed reforms and changes from previous practices in the MA. However, his discussion of the code's sources, based solely on its preamble, does not present any new arguments.

41 Note that Michaels, along with Simon Cubelic and Rajan Khatiwoda, has successfully produced the first complete translation of the *Mulukī Ain* of 1854, accompanied by comprehensive studies and analysis. He emphasizes the importance of a thorough translation of this legal code, stating, "The (*Mulukī*) *Ain* of 1854, Nepal's first legal code, is a book that is more quoted than understood. So far, only a few Articles have been translated (see Table 1, pp 10–11). This is all the more astonishing as the text is a unique testimony for South Asia, bringing together and recording predominantly Brahmanical social ideas, legal concepts and local practice. Moreover, it captures the richness of life in Nepal in the mid-19th century—with all its social, religious and economic problems and conflicts" (Khatiwoda, Cubelic & Michaels, 2021: XV). The translation has been well received and extensively studied by scholars both in Nepal and abroad. For the initial review of this publication, refer to Hutt 2022.

42 For a detailed list of previous translations made prior to its first complete translation, please refer to Khatiwoda, Cubelic & Michaels 2021: 10–11. Also, see M. C. Regmi 1969, 1970b, 1970c and 1977.

43 See Michaels 2005b: 2.

44 See M. C. Regmi 1975: 110–111.

45 See M. C. Regmi 2002: 1–2.

Adhikari strongly opposes the notion of any British legal influence on the code but fails to address the sudden incorporation of ideas such as notional judicial autonomy, the emerging concept of the rule of law, investing the Council with executive power, and implementing checks and balances among the Council, court, and king. Regarding the law on homicide, Adhikari simply informs readers that the code addresses both premeditated and unintentional cases of homicide. He does not explore the rationale behind the codification or its implementation.

T.R. Vaidya and T.R. Manandhar for their part have jointly studied penal law in ancient, mediaeval and modern Nepal, offering during their discussion of pre-modern Nepal a short empirical overview of the law on homicide and other crimes addressed in the MA. They attempt to analyse legal history on the basis of case studies, using statistical methods targeting litigants, petitioners and other figures in the legal process. They make an initial attempt, too, to shed light on the implementation of the code, mostly based on contemporaneous accounts of Western historians, such as Captain Orfeur Cavenagh's notes, H. Oldfield's account and D. Wright's history of Nepal.⁴⁶ Therefore, a substantial study based on further documented evidence is required to validate their arguments.

d) Approaches of native law practitioners

Nepalese law practitioners represent the fourth pillar of the study of the MA. For example, the studies carried out by B.B. Karki and R.B. Pradhananga should be briefly discussed. Karki's short study, again based on the first amended version of the code, presents a cursory overview of its characteristic features, relying mainly on the preamble of the code: viz. that it (i) was promulgated by one of three monarchs (i.e., Rājendra Śāha, Surendra Śāha and Trailokya Śāha,⁴⁷ (ii) contains

46 See Cavenagh 1851: 60–63, Oldfield 1974: 245, and Wright 1877.

47 Although Trailokya Śāha is addressed as a *mahārajādhirāja* 'supreme king of great kings' in the *lālamohara* promulgating the MA, he died in 1878 as the 'crown prince' (*yuvārāja*). The *lālamohara* reads: *svasti śrīgīrīrājacakracūḍāmaṅ- inaranārāyaṇetyādivividhvirūdāvalivirājamānamānonnataśrīmanmahārājādhirājaśrīśrīmahārājatrailokyavīravikramasamserajaṅgavahādūrasāhahādhūradevānā[m] sadā samaraviḷayinām*. 'Hail! [A decree] of him who is shining with manifold rows of eulogy [such as] 'The venerable crest-jewel of the multitude of mountain kings' and *Naranārāyaṇa* (an epithet of *Kṛṣṇa*) etc., high in honour, the venerable supreme king of great kings, the thrice venerable great king, Trailokya Vīra Vikrama Samsera Jaṅga Bahādura Śāha Bahādura Deva,

the concept of equality before law—but on the basis of caste, (iii) was enacted through the Council, (iv) addressed to the authorities and subjects, and (v) proclaimed equality before the law.⁴⁸ Pradhananga's study on homicide law in Nepal provides a concise examination of the pertinent Articles of the MA as expressed in the first amended version of the code (MA-ED2). The study offers an empirical overview of the regulations governing the treatment of homicide in the MA. However, it falls short in considering the original version of the code, resulting in an incomplete depiction of the MA's homicide law. This limitation is understandable, considering that the primary objective of the study was to specifically focus on homicide law in modern Nepal.⁴⁹

There is a veritable plethora of other studies, which simply refer to the MA but do not deal with the text proper; being instead content simply with reiterating pre-existing ideas put forward by the major contributors.⁵⁰

1.3 The Legal History of Nepal

The MA did not emerge from a vacuum, but was based on practices and on pre-conceptions of the long history of Nepal's legal traditions, so that it is worth considering the earlier development of legal procedures in order to identify factors, which may have directly or indirectly contributed to the development of the later extensive and sophisticated code.

As mentioned before,⁵¹ Nepal was among the few kingdoms in the region that were not colonized; thus, the country could institute its own social-legal practices without any direct foreign (British) interference. This is made all the clearer by the fact that the referents of the Nepali vernacular term *kṛstān* (Christian) are explicitly categorized as Water-unacceptable Caste (*pānī nacalnyā*) in the MA, which indicates that the British had little if any say when it came to the legal code of mid-nineteenth century Nepal.⁵² Had they had, the status of Christians

the brave swordsman, the divine king always triumphant in war.” (See MA-ED2/preamble).

48 See Karki 1979: 1–6.

49 R. B. Pradhananga (2001: 29 and 32–39) has included “an unofficial translation” of the Article on ‘Homicide’ based on the first amended version of the code in the appendix.

50 See, for example, Riccardi 1977: 29, Levy 1990: 107, Burghart 1996: 252, and Shrestha 1999: 281–288.

51 See Part I, 1.2.

52 See MA-ED2/87 §2 and 159 §1.

would have been comparatively greater. Regarding the issue of bodily purity, the MA treats Christians similarly to Muslims (*musalmān*),⁵³ blacksmiths (*kāmī*), leatherworkers (*sārki*) and tailors (*damāi*).⁵⁴ Further, the MA explicitly defines the country as the only remaining Hindu kingdom in the Kali era, which meant that Nepal considered itself able to protect its autonomy from the British, not only politically but also culturally. For example, the MA prohibits both charitable donations to and cash investments in foreign countries, and gives the following reasons:

This is a Hindu kingdom whose *Ain* is such that it bans the killing of cows, women, and Brahmins; an independent land of such merit, with a palace, [situated] in the Himalayas (*himavat-khaṇḍa*), the land of the serpent king Vāsukī (*vāsukikṣetra*),⁵⁵ a place of pilgrimage for *Āryas*, one that contains Paśupati's Jyotirlinga and the venerable Guhyeśvarīpīṭha. This is the only Hindu kingdom in the Kali era.⁵⁶

Starting with the Malla era, the legal history of Nepal can be divided into following seven phases: i) the early mediaeval period, from the beginning of the Malla period to before Jaya Sthiti Malla (r. 1382–1395), ii) the high mediaeval period, starting from Jaya Sthiti Malla until the unification under King Pṛthvī Nārāyaṇa Śāha (r. 1743–1775),⁵⁷ iii) the early Śāha or pre-Rāṇā time, from Pṛthvī Nārāyaṇa Śāha up to the seizure of executive power by Jaṅga Bahādura Rāṇā, iv) the Rāṇā period, from 1846 to 1950, v) the initial post-Rāṇā period, from 1951 to 1990, vi) the constitutional multi-party system (1990–2015), and vii) the constitution of the Federal Republic of Nepal with the abolishment of the monarchy (since 2015). In this section, only a brief outline of the legal history of Nepal before the emergence of the MA will be discussed.

53 Dastider (2007) discusses the status of Muslims in Nepal's pluralistic society.

54 For example, *krṣṭān musalmān kamī sārki damāi gāhṛa pānī nacahnā jāta ra choi chūto smet hālanu parnyā jātale [...]* (MA-ED2/87 §2).

55 The serpent-king Vāsukī is one of the three main kings of the *nāgas*, the other two being Śeṣa and Takṣaka (see MW, s.v. *vāsukī*).

56 *hiṃduḥ rāja gohatyā nahunyā strīhatyā nahunyā vrahmahatyā nahunyā esto aina bhayāko darvāra himavatsamḍa vāsukikṣetra ārjyātīrtha jyotirmaya śrīpaśupatiṅga śrīguhyeśvarīpīṭha yasto puṇyabhumi āphanu muluka chadai chadai kalimā hiṃduko rāja yehī muluka mātrai cha.* (MA-ED2/1 §1).

57 He ascended the throne of Gorkha in 1743, conquered Kathmandu and Patan in 1768, and conquered Bhaktapur in 1769 (Slusser 1982 [vol. 1]): 402.

1.3.1 The Pre-mediaeval Period

Even though manifold and rich examples of the theory of Brahmanical jurisprudence in ancient India have been handed down to us, historical material on the actual legal practice has hardly been preserved.⁵⁸ Nepal is no different in this respect. Many authors who have written on legal aspects of Nepalese history claim that until Jaya Sthiti Malla the legal praxis in Nepal was largely based on Brahmanical scriptures of Hindu law (i.e., *dharmasūtras*, *-śāstras* and *nibandhas*).⁵⁹ However, without solid evidence this claim remains questionable. First, there has already been a long discussion about whether the Brahmanical law scriptures were meant to be enforced for specific geographical regions and social groups or were rather merely scholarly compositions, for all that they may have been applied to a certain extent in some regions.⁶⁰ Second, despite all the discussion, it is still not clear whether contemporary society was governed according to customary practices (*ācāra*) or according to legal practices grounded completely in the *dharmasāstra*, *-sūtra* and *-nibandha* texts. There is no doubt that one of the sources of the dharmashastric texts was customary practices,⁶¹ but it is hard to argue that the Brahmanical law scriptures could have entirely incorporated the practised customs of all the geographically and culturally diverse territories and societies of the ancient Indian subcontinent so as to have resulted in a universally acceptable law code. Thus, the question of legal praxis in ancient Nepal (before Jaya Sthiti Malla) still cannot be precisely resolved, even if there has been some speculation on the basis of limited sources.

The documented legal history of Nepal starts with around two hundred inscriptions from the Licchavi period.⁶² Since these are written in Sanskrit, it is plausible that Sanskrit was the main language of the Licchavi elite. These inscriptions indicate that the rulers were interested in their subjects enjoying a high standard of justice. For example, the Licchavis divided their kingdom into several subdivisions including

58 See Michaels 2010: 61.

59 See, for example, Dh. Vajracharya 1967, Vaidya & Manandhar 1985 and R.R. Khanal 1976.

60 See, for example, Rocher 1993, Lariviere 2004 and Davis 2005.

61 See Lariviere 2004: 616 and Davis 2005: 314.

62 See Dh. Vajracharya 1973.

grāma, *tala*⁶³ and *draṅga*⁶⁴ for better governance.⁶⁵ Similarly, the four state offices known as *kuthera*, *śullī*, *ligvala*, *māpcoka* were introduced for a quick and effective disposal of lawsuits. The *grāmapāncālī*, a local judicial body, was granted considerable jurisdiction to take decisions regarding theft, robbery, homicide, adultery and other offences. According to Dh. Vajracharya, the effective juridical procedures put in place by the Licchavis was one of the important characteristic features of their governance. According to R.R. Khanal, the chief judicial official used to be appointed from among the members of the royal family; he had responsibility for dispensing justice on the basis of *śrutis* and *smṛtis*.⁶⁶ Although there is not enough evidence to determine clearly the sources of justice during Licchavi rule, arguments have been made on the basis of some available inscriptions that the classical Brahmanical legal scriptures were the main sources of the Licchavi justice system.⁶⁷ The inscription of Aṃśuvarman (r. 605–621) in Handigaon is one of the notable examples of the king expressing great joy in preparing rules and regulations.⁶⁸ Further, the pillar inscription of Anuparama⁶⁹ at the Satyanārāyaṇa Temple of Handigaon shows that the *Manusmṛti*, *Yamasmṛti* and *Bṛhaspatismṛti* were consulted by the Licchavis.⁷⁰

63 According to Dh. Vajracharya, this term refers to a certain inhabited area that comprised many villages. It appears, for example, in the following inscription of Caukiṭāra, near Balambu: [...] *bhaṭṭāarakamahārājaśṛigaṇadevaḥ kuśālī śītātikātale teḡvalagrāme yathāpradhānabrāhmaṇa-purasarān sarvān eva kuṭumbinaḥ kuśalaṃ pṛṣṭvā mānayati*. “[...] the venerable Great King Gaṇadeva asked about the well-being of the respective Brahmins including all householders [who] live in Teḡvala village of Śītātikātala and gave [corresponding] orders.” Quoted in Dh. Vajracharya 1966: 11.

64 According to the inscriptions of Śivadeva and Aṃśuvarman in Bhīmasenasthāna, *draṅga* also refers to a certain division of land. This meaning can be extracted from the following line: *kuthervṛṭtyadhikṛtānāṃ samucitas trikaramātrasādhanā (yiva praveśo) smin draṅge [...] ligvalaśullī pañcāparādhādinimitan tv apra (veśa iti) prasādo vaḥ kṛtaḥ*. “Officials of the *kuthera* shall enter into this *draṅga* only to collect the three [types] of revenue. [...] you are [directed] not to enter [into it] to [crack down on] the five grievous crimes.” Quoted in Dh. Vajracharya 1966: 14.

65 Dh. Vajracharya 1966: 17.

66 See R.R. Khanal 1978: 29.

67 See Dh. Vajracharya 1967.

68 [...] *aniśīniśīcānekaśāstrārthavimarśavasādītāsaddarśanatayā dharmādhikāras-thūtikaraṇam evotsavam anatiśayam manyamānaḥ* [...] “[...] the bad opinion has gone while discussing, day and night, about the meanings of the *śāstras*. Thus, the big celebration is arrangements of justice [...]” Quoted in Dh. Vajracharya 1967: 349.

69 It is not yet known when Anuparama was born. However, he is identified as the father of Bhaumagupta, who ruled Nepal around 558. According to the inscription of Abhīrī Gominī, Anuparama died in 540; see D. Acharya 2007: 32–33.

70 *śamākhya-taṃ śāstre manuṣyama bṛhaspatyuśanasāṃ vidhānaṃ kṛtyānāṃ asugamaḥ padam loka(ya)makam* [...] “In the scriptures of Manu, Yama,

Although Dh. Vajracharya argues on the basis of the above-mentioned inscriptions that the Licchavis enforced Brahmanical law scriptures as part of their judicial practice,⁷¹ the extent to which they were used in law cases remains unknown.

1.3.2 Mediaeval Period

Jaya Sthiti Malla was the first ruler to take initial steps on the road to a written law code by having the NyāV (before 1379) produced in both Sanskrit and vernacular Newari.⁷² According to the *Nepālīk-abhūpavaṃśāvalī* (hereafter NBhV), Jaya Sthiti Malla had formed a group of five pundits, Kīrtinātha Upādhyāya, Raghunātha Jhā, Śrīnātha Bhaṭṭa, Mahīnātha Bhaṭṭa and Rāmanātha Jhā, in order to introduce legal reforms.⁷³ Since the Sanskrit version of the NyāV was for the most part a commentary on the fourth canto of the *Nāradaśmṛti* (henceforth NārSm),⁷⁴ little similarity to positive law can be observed in it.⁷⁵ Although the extensive NyāV can be considered more a rewriting of a Brahmanical law text than an independent work, it is an important initial foundation for the development of codified law in Nepalese legal history. The Newari version of it, shrouded in the complexity of the mediaeval vernacular Newari language, is still untranslated.⁷⁶ According to D. R. Panta, it is not a literal translation of the root text. In most verses, it differs from the Sanskrit version.⁷⁷

Bṛhaspati, and Uśanas, the way of performance of duties is 'stated'." Ed. and tr. in D. Acharya 2007: 41 and 47.

71 See Dh. Vajracharya 1967.

72 According to D. R. Panta (2008: 328) the exact date of the composition of the text is not known. However, the colophon of one manuscript which he used to prepare a diplomatic edition of the text mentions, "the text was copied on Thursday, the 3rd of the bright fortnight of Phālguna in the Nepal Era 500 for the minister Jayata Varmā." *Svasti śrīnepālikasamvatsare 500 phālgunaśuk-latrītyāyāṃ guruvāsare śrīśrījayasthītirājamalladevasya vijayarāje bhaktapure amātyajayatavarmaṇaḥ puṣṭakam(!) idam alekhi.* (NyāV, p. 328). This colophon provides us with a date *ante quem*, in this case AD 1379.

73 See NBhV (vol. 1), p. 73–75, R. R. Khanal 1976: 7–8 and 1979: 3–4.

74 See D. R. Panta 2008.

75 See Lariviere 2004: 612 for the discussion of the term 'positive law'.

76 Kashinath Tamot (a Newari scholar) assisted by Jīvanakumāra Maharjana has prepared a diplomatic edition of the *Nepālanyāyapālavidhi*, the Newari version of the *Nyāyavikāsinī* (see Tamotā 2006). In a personal communication (January 2013), he characterized its language as complex, but he hopes to undertake a translation of it in the future.

77 See D. R. Panta 2008: Editorial preface.

After Jaya Sthiti Malla, the regulations attributed to King Mahendra Malla (also written as Mahindra, r. 1560–1574)⁷⁸ are noteworthy in that they served as a model for subsequent rulers.⁷⁹ In one regulation, he addresses the village heads of his kingdom and directs them not to indulge in gambling but to work in the interests of the subjects. He further ordered them to speak the truth and resolve local disputes locally. He also advised his subjects to trade and to work with other provinces of other kings in order to bring new skills to their own kingdom.

Besides the Licchavi kings Mānadeva I (459–505) and Aṃśuvarman, as well as Jaya Sthiti Malla, many authors attribute to Rāma Śāha, the fourth king of Śāha dynasty, a decisive role for the introduction of written law.⁸⁰ Rāma Śāha promulgated a considerable number of royal edicts and decrees (hereafter RŚEdict) in order to reform the justice system. For example, he made a provision that family members of an adulterer who did not participate in the adultery were no longer to be held responsible.⁸¹ The principle of individual liability thus replaced earlier forms of collective liability.⁸² The RŚEdict introduced a scientific system of areal and weight measurement, fixed the maximum interest on debt, regulated disputes regarding land irrigation and oil pressing, controlled deforestation and addressed other subjects. However, T. Riccardi has questioned the historicity of the RŚEdict. According to him, the language used in it bears characteristic features of the late eighteenth and early nineteenth centuries, and consequently it cannot be a product of the fifteenth century.⁸³ Moreover, the RŚEdict carries late grammatical features of Nepali language in comparison to the Rānī Pokharī inscription of Pratāpa Malla (r. 1641–1674), whose date corresponds to 1670.⁸⁴ Therefore, I assume that the extant text represents an eighteenth or nineteenth century recording of the lost original that was adapted to the language and practice of that period.

78 See Slusser 1982 (vol. 1): 68, 89.

79 See B.R. Acharya & N. Yogi 2013, and translated in M.C. Regmi 1971: 123.

80 T. Riccardi (1977: 32 fn. 8) argues that Rāma Śāha's edicts were not organized written codes in the mould of Jaya Sthiti Malla's attempt at reforming a caste system in Nepal.

81 See RŚEdict 16 in MA-ED2/Appendix and Riccardi 1977: 54.

82 See B. Khanal 2000: 11.

83 See Riccardi 1977: 32.

84 For the Rānī Pokharī inscription, see Clark 1957: 167–187.

1.3.3 Pre-Rāṇā Period

From the late eighteenth century onward, there are more sources available, allowing for a more nuanced understanding of the legal praxis of the pre-Rāṇā period.⁸⁵ These sources emerged in consequence of the state-building project initiated by Pṛthvī Nārāyaṇa Śāha, who started the quest of unification by conquering the *bāisī-rājya* ('twenty-two principalities'), a group of petty kingdoms centred in the Karṇālī-Bherī river basin, and the *caubisī rājya* ('twenty-four principalities'), a group of sovereign and intermittently allied petty kingdoms in the Gaṇḍakī river basin. To be sure, even though in Nepalese nationalist historiography Pṛthvī Nārāyaṇa Śāha's wars of expansion often have been portrayed in terms of unification,⁸⁶ they were rather merely an attempt to enlarge the territory of the Gorkhā kingdom. This expansion reached a climax when he conquered the economically and culturally rich Malla kingdom of Kāntīpura (Kathmandu) in 1768,⁸⁷ which indeed provided a solid base for a unified Nepalese state. Pṛthvī Nārāyaṇa Śāha's reign represents both in institutional and ideological terms a 'critical juncture' in that it set the course for the formation of a Nepalese state, identity, and ideology. Even though several regulations included in the MA seem to have been laid down by this king,⁸⁸ there is no direct link leading from his legislative measures to the MA. Pṛthvī Nārāyaṇa Śāha in his political testament, the *Divyopadeśa* (c. 1774, henceforth DivU),⁸⁹ expressed a wish to lay down edicts of his own,⁹⁰ but the document has rather to be interpreted as an attempt to emulate legitimatory practices of preceding rulers than as formulating a systematic and comprehensive legislative statutory law.⁹¹ Therefore, legal initiatives during his and his successors' times before the establishment of the Rāṇā regime largely

85 The Śāha period produced not only paper documents but also a significant number of inscriptions; e.g., see Dh. Vajracharya & T.B. Shrestha 1980.

86 See for a detailed history of Gorkha, for example, D.R. Panta 1986, and also, concerning the question of unification and topics raised in the present section, H.N. Agrawal 1976.

87 Pṛthvī Nārāyaṇa Śāha conquered Kathmandu in September 1768, which was the day of the Kumārī Yātrā celebration (see D.R. Regmi 1961: 80, Slusser 1982 (vol. 1): 76).

88 See MA-ED1/2 §23 and MA-ED2/33 §§16–17.

89 This text is attributed to Pṛthvī Nārāyaṇa Śāha, but its authenticity is still questionable.

90 "I observed the arrangements of King Ram Shah. I saw the arrangements of Jaya Śhīti Malla, also. I saw, too, the arrangements of Mahindra Malla. If it is God's will, I would like to make this sort of arrangement for the 12,000" (translated in Stiller 1989: 43).

91 See Cubelic & Khatiwoda 2017.

consisted in orders given in reaction to particular judicial cases of limited scope and were embodied in such types of documents as *rukkās* (missive),⁹² *lālamoharas* (royal deed),⁹³ *sanadas*⁹⁴ or royal edicts issued in order to establish the ruler as the supreme authority in legal matters.

After Pṛthvī Nārāyaṇa Śāha, Bahādura Śāha (r. 1785–1794) introduced some regulations relating to land reform. For example, he issued a *rukkā* in 1791 in which he ordered that land located east of Sindhu Naldum, west of the Dudh Koshi, north of the Mahabharat range, and south of Listi and the border with Bhoṭa (i.e., Tibet) be surveyed. He also set tax rates according to the quality of land: Four rupees for twenty *murīs*⁹⁵ of first-grade land (*abbala*)⁹⁶, three for twenty *murīs* of second-grade land (*doyam*),⁹⁷ and two rupees for twenty *murīs* of third-grade land (*sima*).⁹⁸

King Raṇa Bahādura Śāha (r. 1777–1799) issued a *savāla*⁹⁹ in 1806, which contains forty sections.¹⁰⁰ It addresses the *subbās*¹⁰¹ who have been sent throughout the country, west of the Kanaka-Ṭiṣṭā river system and east of the Mahākālī. The *savāla* regulates such matters as bribery, disputes between landlords and tenants, revenue collection, land cultivation, misuse of ritual objects in temples and bodily impurity.

Another key figure of the pre-Rāṇā period for the introduction of clearly formulated written law was Ujira Siṃha Thāpā (1795–1824). A nephew of Prime Minister Bhīmasena Thāpā and son of Amara Siṃha Thāpā, the commander of the Nepalese army during the Anglo-Nepalese war of 1814–1816, he was appointed by Bhīmasena Thāpā as colonel of the Royal Army and stationed in Pālpā as a frontier governor.¹⁰² In 1822, he prepared a short but noteworthy legal statement

92 Missive of high-ranking officials, often the king and prime minister.

93 Royal order or decree bearing a red seal.

94 A grant, charter, appointment or endorsement, often signed by a ruling authority.

95 Unit of land measurement in the hill region, comprising $\frac{1}{4}$ *ropanī* with 100 *murīs* in 1 *kheta*.

96 The best of four land categories (cp. *doyama*, *cahāra*, *sima*), also used for the tenants on such land.

97 The second best of four land categories (cp. *abbala*, *sima* and *cahāra*), also used for the tenants on such land.

98 The second best of four land categories (cp. *abbala*, *sima* and *cahāra*), also used for the tenants on such land.

99 This refers to the rules and regulations enacted based on an existing law; “government rules and regulations” (Karmacharya 2001a: 328). *Savālas* refer to ordinances, which are a collection of directives issued primarily for administrative purposes.

100 See Lawyer’s Club 2006: 85–89.

101 Governor or chief administrative officer of a province or district.

102 See Dangol 1983 for a detailed account of Ujira Siṃha Thāpā.

(called *Ujira Siṃhako Ain*, henceforth UjAin)¹⁰³ mainly regarding military affairs, but also dealing with civil legal matters and judicial procedure. As indicated by J. Fezas, this *Ain* set forth recommendations for legal reform rather than being a proper piece of legislation in itself.¹⁰⁴ Indeed, many of these rules had a direct influence on the MA. For example, Ujira Siṃha Thāpā proposed strengthening evidential law applied during judicial proceedings and enhancing the independence of court decisions.¹⁰⁵ In the MA, we find very similar provisions regarding the interrogation of accused persons and the same procedures when imposing punishment.¹⁰⁶ When property is confiscated, for instance, Ujira Siṃha Thāpā recommends that only the property of the offender should be taken; and not that of his son, father or brother, though. In line with this provision, the MA also explicitly states that only the offender's share of property—what he is entitled alone to receive in accordance with the *Ain*—should be confiscated.¹⁰⁷ This undertaking by a member of the aristocratic elite of preparing legal recommendations in code-like form went a long way towards promoting the idea of a formal codification among the rulers. The explicit mention of the British court system as a model by Ujira Siṃha Thāpā indicates that his endeavour was influenced, to some extent, by his interaction with the colonial legal system.¹⁰⁸

In 1826, some years after Ujira Siṃha Thāpā finished his code, King Rājendra Śāha (r. 1816–1847) issued several regulations regarding the management of the judicial system.¹⁰⁹ In one of these regulations, equality under the law is specifically enjoined, while others illustrate it. For example, the first rule instructs Dalabhañjana Pāḍe to hear complaints filed against royal priests, ministers, local, central and high administrations by any subject irrespective of caste status, position or

103 See NGMPP B 280/23, also transcribed in Dangol 1983 and D.R. Panta 1991: 37–59.

104 See Fezas 2000: xii and xiii.

105 For example, the third, fourth and fifth sections of the first Article and sections one to four of the fourth Article direct government employees to get a proper understanding of the facts, investigate the case not to impose punishment before offenders confess their crime (UjAin/1 §§3–5 and UjAin/4 §§1–4).

106 See MA-ED2/37.

107 See MA-ED2/43.

108 “[As I saw] the Lord Judge Justice [and] Interpreter were sitting in the court of British, [therefore I made the following regulations,] which are needed for those who sit in a Nepalese court.” *Adālatamā basnyā jastai phiraṃgikā lāṭa jaj justis ināṭarapīṭara rahimchan tastai adālatamā basnyā mānīslāi cāhinyā kām.* (UjAin/4).

109 See Lawyer's Club 2006: 110–112.

financial status. Later, this concept of legal equality was included with the same phrasing in the preamble of the MA proclaimed by Rājendra Śāha,¹¹⁰ although the MA itself did not follow this principle.

In the Śāha period, we have more sources not only on legislation, but also on the judicial administration. Jurisdictional institutions were already well structured during the end of the Śāha period before the onset of the Rānā regime. B. H. Hodgson paints the following picture of legal institutions in mid-nineteenth-century Nepal (before the promulgation of the MA).¹¹¹ There were four major legal courts in Kathmandu: the Iṭācapalī,¹¹² Koṭīlīṅga, Ṭaksāra and Dhanasāra. These courts were responsible for adjudicating both civil and criminal cases. In addition, there were two minor courts: The (Sadara) Daphtar Khānā¹¹³ was responsible for disputes regarding land assigned to soldiers as *jāgira*,¹¹⁴ while the Chebhaḍela¹¹⁵ dealt with legal disputes pertaining to disputes between families. Any subject who lived in the kingdom was permitted to file a civil case at any of these four courts, while criminal cases had to be heard in the Iṭācapalī. The other courts were subordinated to the Koṭīlīṅga, where a *ḍiṭṭhā*¹¹⁶ was appointed as the chief judge for appellate cases. This *ḍiṭṭhā* served as chief judge for all the four courts, with two *bicārīs*,¹¹⁷ one *jamdāra/jamadāra*,¹¹⁸ twenty-five soldiers, twenty-five *mahāniyās/mahānes*,¹¹⁹ and five peons being appointed to each of the courts in the capital. The prime minister stood as a supreme authority, and the first (i.e., penultimate) authority of appeal. Petitions could be addressed to him if a person was not satisfied with the decision of the courts. If the prime minister failed to

110 See MA-ED2/preamble.

111 See Hodgson 1880 (vol. 2): 211–236.

112 One of the four central courts (*cāra adālata*) located in Kathmandu, others being Koṭīlīṅga, Ṭaksāra, and Dhanasāra.

113 Primarily, it served as a general registry office for land and revenue assignments in place of pay (*jāgira*).

114 Land assigned to government employees in lieu of salaries.

115 Primarily, it served as the building authority, with responsibilities for constructing and renovating state houses and properties.

116 A civil servant ranking above a *mukhiyā* and lower than a *subbā*. Originally, *ḍiṭṭhās* served as judges presiding over the courts in Kathmandu, but later they could also hold various other offices such as Kausī, Hāttīsāra, or Sadara Daphtara Khānā (Edwards 1975: 107). The MA distinguishes three categories of *ḍiṭṭhās*: Jaṅgī Kote *ḍiṭṭhā* (likely referring to combatant personnel), Lājimā *ḍiṭṭhā*, and *ḍiṭṭhā* in charge of the Elephant or horse stable or cowshed (MA-ED2/31 §11).

117 Magistrate, ranked under *ḍiṭṭhā*.

118 A commissioned officer of low rank in the army, who could also be assigned to civil offices.

119 A local revenue functionary in the Kathmandu Valley.

satisfy him, the appellant could still appeal to the king as a last resort. The king then decided the case after consulting with the Court Council (*bhāradārī sabhā*)¹²⁰ in a session witnessed by a *dharmādhikārin*.¹²¹ The *dharmādhikārin/dharmādhikāra* was present only on certain occasions, acting among other things as the main judge during impurity trials.¹²² He was responsible for enforcing traditional Brahmanical regulations and customary laws relating specially to penance and other religious practices, and for granting expiation (Nep. *patiyā*, Skt. *prāyaścitta*)¹²³ and issuing a short note (*patiyāpūrjī*) to reinstate into their caste persons who had been polluted through an impure act as defined in the customary practices. Apart from the mentioned courts in the capital, there were two provincial courts in the west, in Pālpā and Ḍoṭī, where *bicārīs* were sent by when necessary. The provincial courts were not allowed to hand down decisions upon the following five offences: killing a Brahmin (*brahmahatyā*), killing a woman (*strīhatyā*), killing a child (*bālahatyā*) and illicit sexual intercourse (*pātakī*). A lawsuit relating to these five offences had to be forwarded to the higher courts. Besides the central and provincial courts, a local legal body called a *pañcāyata/pañca*¹²⁴ exercised certain jurisdictional powers. The *pañcāyata* was neither a government body nor a permanent local body. A *ḍiṭṭhā* had the right to form a local legal body for the settling of minor lawsuits. No one could be a member of a *pañcāyata* without the consent of both parties, the complainant and defendant. Further, any decision of a *pañcāyata*—if the decision was satisfactory to the both parties—had to be referred to the upper courts for enforcement. Although the Śāha period witnessed both the establishment of a hierarchical court structure and initial attempts at legal codification, it was only after the ascendancy of the Rāṇā family that the idea of codification gained momentum, as will be explored in the following section.

120 During that period, four *kājīs*, four *saradāras*, four eminent men of high character, one *ḍiṭṭhā* and one *bicārī* were the members of the Court Council (Hodgson 1880 [vol. 2]: 213).

121 A judge in the religious jurisdiction whose primary responsibilities involve granting expiation and rehabilitation to individuals considered polluted. This term is exclusively used for Brahmins.

122 See Michaels 2005b: 11–12.

123 For discussions of these terms, see Höfer 2004: 161–162, Michaels 2005b: 35–39 and NGMPP K 175/18 (Part II: C, Document 4).

124 An assembly of elders forming a local judicial body.

1.4 The Emergence of the MA

1.4.1 Overview

The period from the second half of the eighteenth century to the beginning of the twentieth century has been widely characterized as an ‘age of codification’ in legal history, as discussed elsewhere.¹²⁵ This era witnessed the proliferation of legal codification across Europe, with Prussia (1794), France (1804), and the Habsburg monarchy (1812) serving as initial catalysts, followed by subsequent waves of codification throughout the continent.¹²⁶ According to the prevailing narrative, this phenomenon was primarily driven by an increasing number of legal experts, the rising bourgeoisie’s demand for a rational and predictable legal framework, and the integration of liberal principles within the emerging nation-states of Europe.¹²⁷ Consequently, this process of rationalizing and modernizing legal systems ultimately paved the way for the concept of constitutionalism, which fundamentally transformed the basis of state power legitimation in Europe.¹²⁸

It is noteworthy that legal codification was not limited to the Western world alone; it also exerted significant influence in non-colonial Asia. Among the instances in this region, the *Mulukī Ain* stands out as an exception to the aforementioned narrative of codification leading to constitutionalism. In the early nineteenth century Nepal, the conditions necessary for such a codification project—such as a well-established body of professional jurists, a politically aware bourgeoisie capable of fostering such initiatives, or the pressure from a colonial authority—were absent. Moreover, Nepal remained under the framework of divine kingship during the nineteenth and twentieth centuries, wherein the king, perceived as a manifestation of Viṣṇu, held the ultimate authority to mandate penalties through his appointed officials. As R. Burghart highlights, “at the turn of the nineteenth century, the king of Nepal saw himself as a divine actor in his realm, considering himself an embodiment of the universal god Vishnu, and his palace was revered as a temple.”¹²⁹ Additionally, A. Michaels notes that god and king were treated as identical in Nepal, indicating a lack of clear separation between

125 See Cubelic & Khatiwoda 2017. The first and second passages in this section (1.4.1) are taken from this paper.

126 See Kroppenberg & Linder 2014: 72.

127 See Kroppenberg & Linder 2014: 70–74.

128 See Cubelic & Khatiwoda 2017.

129 Burghart 1996: 193.

the realms of state and religion.¹³⁰ Therefore, the endeavour to introduce a legal code that would bind the king to specific regulations was a unique and formidable task specific to Nepal.¹³¹ This ambitious project of establishing a comprehensive national legal code became intertwined with the re(formation) of the Nepalese state in the latter half of the eighteenth century.

The foundation of modern Nepal goes back to Pṛthvī Nārāyaṇa Śāha, who expanded his territory by conquering many other petty royal provinces and established a strong, unified kingdom after he conquered Kathmandu in 1768. After unification, the king figured as the supreme authority in all matters, and was assisted by the royal priests (*rājagurus*) and members of the royal assembly (*bhāradārī sabhā*). Pṛthvī Nārāyaṇa Śāha ruled his kingdom as an absolute monarch who controlled all levels of power in administrative, legislative and judicial matters. This strong executive power and the centralized government of the Śāha kings lay a solid ground for the development of concrete administrative and judicial institutions staffed with loyal functionaries. For example, such officials as the *cautarīyā*,¹³² *kājī*,¹³³ *saradāra*,¹³⁴ *kaparadāra*,¹³⁵ *khajāncī*,¹³⁶ *ḍiṭhā*, *bicārī*, *subbā*, *dvāryā/dvāre*,¹³⁷ *caudharī*,¹³⁸ *nāike*¹³⁹ and *hajuriyā*¹⁴⁰ were deployed throughout the kingdom in order to keep a firm grip on the provinces.¹⁴¹ Thus, when the Rāṇā aristocracy seized

130 See Michaels 2005b: 5–6.

131 See below (Part I, 1.5.2) and Cubelic & Khatiwoda 2017 for a discussion of the regulations constraining kingship in the MA.

132 A prestigious title bestowed upon several male descendants of the Śāha kings, carrying high-ranking status but without specific assigned functions or duties.

133 An official of ministerial rank in the civil and military administration.

134 A top-ranking official next in hierarchy to a *kājī*.

135 *Kaparadāra* is a high-ranking official who held the position of chamberlain and is described as the chief of the royal household. The *kaparadāra* is responsible for overseeing various important aspects, including managing the king's wardrobe and being in charge of jewellery and other valuable items within the palace (M.R. Pant 2002).

136 Chief royal treasurer and head (*hākima*) of the Kausītoṣākhānā.

137 A *dvāre* held the role of a local revenue collection official, as mentioned by M.R. Pant (2002: 132). Furthermore, a *dvāre* also served as a gatekeeper at the royal palace, entrusted with the responsibility of collecting specific levies.

138 A headman or landlord vested with revenue-collection rights, especially in the Tarai.

139 *Nāike* primarily signifies a leader who holds authority over different kinds of groups, localities, or duties. Moreover, it can specifically indicate a headman, akin to a *pradhāna*, especially within the setting of a Newar village.

140 This refers to a personal attendant of a member of the royal family. These individuals were assigned various administrative or other duties based on the preferences and discretion of their masters. See T (s.v. *hajuriyā*).

141 See H.N. Agrawal 1976: 7–8.

executive powers from the king in 1846, a solid foundation for a unified legal code was already in place, and within a decade, the promulgation of the MA became a turning point in Nepalese administrative and legal history. The driving force behind the codification project was Jaṅga Bahādura Rāṇā, the country's de facto ruler, who oversaw a shift away from the country's diverse judicial practices towards a common set of laws. In the following section, I shall first briefly discuss the political scenario during Bhīmasena Thāpā's prime ministership, the turmoil after his fall and the rise of Jaṅga Bahādura Rāṇā, which events not only resulted in the disempowerment of the king for the first time in Nepalese monarchical history, but also represented a milestone in the process of establishing a nation-state, one of whose cornerstones was Jaṅga Bahādura Rāṇā's initiatives towards a homogeneous set of basic laws.

1.4.2 Political Turmoil after Bhīmasena Thāpā's Fall

Bhīmasena Thāpā emerged as a powerful minister at the end of Raṇa Bahādura Śāha's reign between 1777–1806. Under the regency of Lalita Tripura Sundarī, who herself had been born into the Thāpā clan, Bhīmasena Thāpā was given charge over all military and civil authorities.¹⁴² In 1811, he obtained the rank of general. After the death of King Gīrvāṇayuddha/Gīrvāṇuyuddha Śāha (r. 1799–1816), Bhīmasena Thāpā became an even more powerful national figure during the kingship of Rājendra Śāha (r. 1816–1847), who was two and a half years old when he was enthroned. During Bhīmasena Thāpā's prime ministership, relations between Nepal and the East India Company worsened, the seeds for which had already been sown by Lord Wellesley, who formally dissolved the peace treaty with Nepal in 1804. The British finally proclaimed war against Nepal in 1814.¹⁴³ As a consequence of that war, Nepal had to sign a treaty with the East India Company in 1816, resulting in the loss of two-thirds of its territory. In the aftermath of the war, Bhīmasena Thāpā became the most powerful person in the palace. He consolidated his preeminent position by assigning civil, military and judicial administration of the Western provinces completely to

142 See Kumar 1967: 24 and K. K. Adhikari 1984: 18.

143 For an overview of the Anglo-Nepalese war of 1814–1816, see Prinsep 1825: 81–131.

his brother Raṇavīra Siṃha.¹⁴⁴ B.H. Hodgson, corresponding with his superior C.E. Trevelyan, opines that Bhīmasena Thāpā has the “[...] ultimate design of permanently setting aside the rights of the Prince, and will apparently necessitate the increase of the existing strength of the army [...]”.¹⁴⁵ According to B.R. Acharya, Bhīmasena Thāpā, who had enjoyed ultimate power as a shadow of Rājendra Śāha, fell from power because of the autocratic nature of his brother Raṇavīra Siṃha and nephew Māthavara Siṃha Thāpā, and a conspiracy hatched by the British Resident B. H. Hodgson. Since Rājendra Śāha was not able to control the administration, his wives Sāmrajya Lakṣmī and Rājya Lakṣmī Devī had no trouble interfering with the king in all royal matters. In 1837, Bhīmasena Thāpā was accused by Sāmrajya Lakṣmī of poisoning Prince Devendra Śāha. Soon he along with his family members and the royal doctors (*rājavaidya*) who had treated the prince were arrested and put in prison, and their property seized.¹⁴⁶ As foreseen by B. H. Hodgson,¹⁴⁷ the heavy hand of politics applied by Bhīmasena Thāpā during his twenty-five-year-long rule resulted in a very unhealthy power struggle within the palace and among the (*bhāi*)*bhāradāras*.¹⁴⁸ After the dismissal of Bhīmasena Thāpā from office, the *mukhtiyāra*-ship (prime minister and commander-in-chief) was assigned to Raṇajaṅga Pāḍe, who was a grandson of Kālu Pāḍe, the commander of the Gorkhālī forces during the unification campaign of Nepal initiated by Pṛthvī Nārāyaṇa Śāha.¹⁴⁹ Unable to gain support from the majority of *bhāradāras*, however, he left office after just three months. After his resignation, the process of appointment and dismissal of *mukhtiyāras* continued until the return of Māthavara Siṃha Thāpā from exile and his appointment as *mukhtiyāra* in May 1843.¹⁵⁰ As Wright notes, the frequent rotation of *mukhtiyāras* and other *bhāradāras* in the administration, coupled with the faction-building among the royal family members and *bhāradāras*, created a complete political vacuum, which frequently led to rifts in the

144 See Kumar 1967: 27.

145 Quoted in Kumar 1967: 27.

146 See B. Acharya 1962: 9–16.

147 In 1834, B. H. Hodgson offered to C. E. Trevelyan the following analysis about ongoing developments in Nepalese politics: “If Bhim Sen continues to rule unchecked, his death or retirement would be followed by a civil war which would be detrimental to the peace and commerce between two countries” (quoted in Kumar 1967: 27).

148 A generic term for a member of the royal family or high-level state functionaries.

149 See B. Acharya 1962: 15–16.

150 See Wright 1877: 55.

Anglo-Nepalese friendship.¹⁵¹ As a consequence of the extreme political turmoil, the rise of another ruler like Bhīmasena Thāpā was all but a matter of time. Thus, Jaṅga Bahādura Rāṇā appeared on the political scene of mid-nineteenth-century Nepal as if according to script.

1.4.3 The Rise of Jaṅga Bahādura Rāṇā

Sundry stories about Jaṅga Bahādura Rāṇā's courage in facing difficulties, his physical abilities and miraculous events surrounding him have been handed down from generation to generation by Nepalese. A daring jump into the river Triśulī on a horse, his plunge into a deep well or his leap down from the top of the Dharaharā tower, the tallest structure in Kathmandu in the south-west corner of Tūḍikhela.¹⁵² However, it is not evident what is fabricated and what real in these stories. Contemporary sources stress Jaṅga Bahādura Rāṇā's intelligence and boldness. For example, the British Resident Major Lawrence describes Jaṅga Bahādura Rāṇā as follows: "Kazi Jung Bahadur is Mathbar Singh's nephew, but though clever and soldier-like, indeed more so than any man in Nepal, he is a time-server and warmly joined the Chautarias during the exile of his uncle and the disgrace of the Thapas."¹⁵³ A long discussion on the legendary aspects of Jaṅga Bahādura Rāṇā's career is beyond the scope of this thesis; I shall here briefly introduce Jaṅga Bahādura Rāṇā and his emergence in Nepalese politics.

Jaṅga Bahādura Rāṇā was born on the eighteenth of June 1817 to Gaṇeśakumārī Devī (also called Rakṣakumārī), niece of Bhīmasena Thāpā, and Bāla Narasiṃha Kūvara, who held high positions during Thāpā's time in government.¹⁵⁴ Jaṅga Bahādura joined in army operations in his mid-teens while visiting his father stationed in the eastern province of Dhanakuṭā, around 1828, and in the western provinces of Ḍaḍeladhurā and Jumlā, in around 1835.¹⁵⁵ In 1837, he, along with his family and a number of relatives lost their positions and property when Bhīmasena Thāpā was dismissed from his post.¹⁵⁶ Soon thereafter, he went to Benares for some time and came back to Nepal only in 1841.

151 See Wright 1877: 55.

152 See, for example, Whelpton 1983: 9 and M.R. Panta 2013a: 2–3.

153 This is from a diplomatic report sent to the governor general in June 1845. It is quoted in Stiller 1981: 317.

154 See M.R. Panta 2013a: 2 and Whelpton 1983: 75.

155 See M.R. Panta 2013a: 2.

156 See Whelpton 1983: 75.

Rājendra Śāha's first queen, Sāmrājya Lakṣmī, died in 1841, leading to more political chaos in the palace. The second queen, Rājya Lakṣmī Devī, quickly became more influential in the royal court. She wanted to enthrone her son, Raṇendra Śāha, who had not been on the roll of succession for the kingship. Jaṅga Bahādura was appointed as a personal attendant of Surendra Śāha in November 1841, and used his position to curry favour with the queen. After two months, he obtained the post of *kāji* and was stationed in Kumārī Coka, an office responsible for keeping government accounts.¹⁵⁷ Jaṅga Bahādura gained an even more influential position under Māthavara Siṃha Thāpā, a maternal uncle of his.¹⁵⁸ However, their relationship worsened due to disagreement over administrative matters.¹⁵⁹ This finally led to the murder of Māthavara Siṃha Thāpā in May 1845 at the hands of Jaṅga Bahādura after he was called by the king to the palace for a meeting.¹⁶⁰ Jaṅga Bahādura played a prominent role in the government newly formed soon after the death of Māthavara Siṃha Thāpā, being appointed as general with command over three regiments of the army, although he did not hold an official ministerial position.¹⁶¹ Phatya Jaṅga Śāha held the *mukhtiyāra*-ship in the government, but the leading figure was General Gagana Siṃha, who was strongly supported by Rājya Lakṣmī Devī. The general was shot on 14 September 1846. The queen reacted in an unhinged manner,¹⁶² ordering Jaṅga Bahādura to find the murderer. He called a court

157 See M.R. Panta 2013a: 3 and Whelpton 1983: 76.

158 Māthavara Siṃha was nephew of Bhīmasena Thāpā. He was exiled to India in 1838. As soon as Rājya Lakṣmī Devī became Rājendra Śāha's regent, Māthavara Siṃha was called back to Nepal by her and appointed as minister and commander-in-chief of the army (see Whelpton 1983: 78).

159 S. Kumar (1967: 36) and J. Whelpton (1983: 78) present the two following reasons for the disruption of relations between Māthavara Siṃha and Jaṅga Bahādura: one was the former's refusal to investigate a request made by some tenants for reduction of rent obligations; the other was his refusal to intervene against the death sentence imposed on Devī Bahādura, a cousin of Jaṅga Bahādura's. D. Wright also hints at Māthavara Siṃha having nursed some sort of suspicion against Jaṅga Bahādura. He writes: "By this time, however, he [Jaṅga Bahādura Rāṇā] had risen to the rank of Colonel, and in 1844 his uncle, Matabar Singh, expressed some alarm at the increase of his influence at Court and with the army" (Wright 1877: 55).

160 See Wright 1877: 55.

161 D. Wright, seemingly confused because of the rapid replacement of mukhtiyāras during this period, states that the new government was formed under Gagana Siṃha (Wright 1877: 56), when in fact, according to sources, the new government was formed under the *cautarīyā* Phatya Jaṅga Śāha; see, for example, Kumar 1967: 36 and M.R. Panta 2013a: 3.

162 There is no consensus among historians about the murder of Gagana Siṃha. D. Wright (1877: 57) records that Gagana Siṃha was shot by somebody called Alī Jah (he probably meant Alī Jhā). S. Kumar (1967: 32), referring to

assembly consisting of both civil and military officials to the Kot, a royal assembly hall at the Hanumān Dhokā palace, where he and his brothers were on hand, along with his three regiments. The queen let herself be convinced by Jaṅga Bahādura that Vīra Keśara Pāḍe, a relative of the minister Dalabhañjana Pāḍe, had murdered Gagana Siṃha. Jaṅga Bahādura proceeded to propose to Phatya Jaṅga that he sentences Vīra Keśara to death, but to no avail. As soon as the queen got wind of this, she herself went to have Vīra Keśara executed, but was stopped by Phatya Jaṅga, Abhimāna Siṃha and Dalabhañjana Pāḍe and told that they would properly investigate the murder. As the queen was heading back to the upper floor of the Kot building, the three of them were shot. Soon the son of Phatya Jaṅga, Khaḍga Vikrama, came to know that his father had been shot, he attacked Kṛṣṇa Bahādura and Bam Bahādura, the brothers of Jaṅga Bahādura, who in turn shot Khaḍga Vikrama. Meanwhile, Jaṅga Bahādura Rāṇā's three regiments were going on a shooting spree, targeting everyone their commander had directed them to. According to K. K. Adhikari,¹⁶³ Jaṅga Bahādura Rāṇā was given the command of sixteen regiments while the massacre was still taking place. The whole incident lasted until the morning of the fifteenth of September.¹⁶⁴ Although it is not clear from the historical records whether the Kot Massacre had been preplanned by Jaṅga Bahādura or was rather a spontaneous reaction on the part of Jaṅga Bahādura, who faced strong pressure from Rājya Lakṣmī Devī to find the murderer of Gagana Siṃha and put him to death. It is obvious in hindsight that Jaṅga Bahādura Rāṇā's being appointed as prime

Oldfield, notes that Rājendra was the main plotter of the murder of Gagana Siṃha, against whom he held his low birth and previous activities. However, he does not mention the name of the murderer. Further, J. Whelpton (1983: 57) and K. K. Adhikari (1984: 35) argue that Gagana Siṃha was shot by Lāla Jhā, a Brahmin with a long criminal record. Although S. Kumar's speculation is convincing that the murder was planned by Rājendra, the reason given by him for Rājendra's plot seems to be an overly speculative. Since Gagana Siṃha, who was strongly favoured by Rājya Lakṣmī Devī and suspected of being her paramour, held the real power in the palace and Phatya Jaṅga Śāha was merely a puppet *mukhtiyāra* (see K. K. Adhikari 1984: 28), Rājendra wanted to stop the rise of Gagana Siṃha.

163 See K. K. Adhikari 1984: 32.

164 The origins of the Kot massacre are highly controversial. The accounts presented by historians are largely similar, but nobody has presented a concrete case that the massacre was plotted by Jaṅga Bahādura (see, for example, Wright 1877, Kumar 1967, Whelpton 1983 and K. K. Adhikari 1984). The validity of a document issued by Rājendra Śāha in 1856 in which he claims that he himself had ordered the massacre in several letters addressed to Jaṅga Bahādura has been questioned. An edited version of the document appears in M. R. Panta 2013a: 41–42.

minister on the sixteenth of September 1846 put Nepalese politics on a steady course—a precondition for establishing the strong judicial and administrative foundations of a nation-state.

1.4.4 The Emergence of the MA

As pointed out by L.F. Stiller, since the history of Nepalese politics before Phatya Jaṅga was soaked in blood (the prime ministers Bhīmasena Thāpā, Raṅgaṅga Pāḍe and Māthavara Siṃha Thāpā all died violently), the Kot Massacre did not come as a total surprise.¹⁶⁵ The political chaos in the country after the Anglo-Nepalese War (1814–1816) had reached a climax, the loss of one third of Nepalese territory having resulted in a considerable reduction in revenue, so that the country was rife for political change, and it was Jaṅga Bahādura who offered it.¹⁶⁶ After the Kot Massacre, he was made commander-in-chief of the army and the country's prime minister.¹⁶⁷ His appointments set in place the tradition of both positions being reserved for members of the Rāṅgā family, with the Śāha kings now reduced to ceremonial rulers. Although the Rāṅgā rulers continued to follow in many respects the path of political isolationism and cultural conservatism, they also showed a certain openness to Western forms of conspicuous consumption, aesthetics and governmental operations.¹⁶⁸ This led to considerable legal and administrative reforms.¹⁶⁹ One major example of the greater willingness to engage with foreign ideas is Jaṅga Bahādura's state visit to London and Paris in 1850, the first trip of a South Asian prime minister to Europe.¹⁷⁰ As soon

165 See Stiller 1981: 279.

166 In 1847 (Sunday, the 12th of dark fortnight of Pausa in VS 1904), King Surendra issued a *lālamohara* to Jaṅga Bahādura in which the absolute authority to collect all forms of revenue throughout the country is explicitly granted to him. Furthermore, the latter was empowered to punish creditors of the state as he best saw fit (see NGMPP DNA 11/47 digital catalogue in <http://abhilekha.adw.uni-heidelberg.de/nepal/index.php/catitems/viewitem/1340/1>, last accessed on 10 June 2023). This merely underscored the need to re-establish control over the revenue collections systems, which had deteriorated after the death of Bhīmasena Thāpā because of the ongoing political turmoil.

167 After his appointment as prime minister, Jaṅga Bahādura managed to obtain for himself all the facilities once enjoyed by Bhīmasena Thāpā. Rājendra Śāha issued a *rukkā* on Sunday the 5th of dark fortnight of Mārga in VS 1903 (1847), about three months after the massacre, granting Jaṅga Bahādura all facilities and emoluments due to the head of several offices (see NGMPP DNA 15/91 below, Part II: C, Document 11).

168 See Toffin 2008: 163.

169 See Edwards 1977: 161–162, and M. C. Regmi 1988: 77–90 and 122–179.

170 See Cubelic & Khatiwoda 2017.

as he returned from his state visit, he formed a law Council (the *Ain Kausala*)¹⁷¹ to discuss the nature of a proposed law code and to set standardized forms for the previously existing legal documents.¹⁷² The MA was promulgated during the reign of Surendra Śāha (r. 1847–1881), on Thursday, the seventh of the bright fortnight of Pausa in Vikrama Era 1910 and witnessed by Rājendra Śāha and Trailokya Śāha.¹⁷³ Although, as pointed out by K. K. Adhikari, it is uncertain whether the drafting of the MA was a result of Jaṅga Bahādura's introduction to the British legal system during his state visit,¹⁷⁴ no direct quotation from the British legal tradition can be detected in the MA.¹⁷⁵ Nor, for that matter, does the MA refer to either any Brahmanical text of scriptural law or any other Western or Islamic code of law.¹⁷⁶ What is known is that Jaṅga Bahādura, the country's de-facto ruler, established a strong foundation for the unification of diverse judicial practices by promulgating the country's first systematic legal code—one which shares several characteristics with the legal codification that was taking place in colonial India. In both colonial India and Nepal, centralized systems of judicial administration replaced more fluid forms of legal pluralism; the dominance of religious laws giving way to a state-led reform that introduced positivistic notions of legitimacy into the legal norms. The projects to codify Hindu law as a (religious) system of personal law initiated by the British on the basis of orientalist representations of civilization, literate culture and religion and the codification of Hindu customary law by Jaṅga

171 The Council, known as *Kausala*, was comprised of 219 members whose names are recorded in the preamble. These members included Rāṇās (specifically, Jaṅga Bahādura Rāṇā's brothers, sons, and nephews), royal priests (*rājaguru*), a religious judge (*dharmādhikārin*), individuals from the nobility (*cautarīyā*), as well as civil and military officials such as *kājīs*, captains, lieutenants, *vakīlas* (Nepal's diplomatic envoys to British India, Tibet, and other Asian countries and cities like Calcutta, Patna, Lucknow, and Lhasa), *subbās*, *mīra munsī* (the executive head of the Foreign Office), *diṭhās* (judicial officers), *mukhiyās*, *subedāras*, and *vaidyas*.

172 See MA-ED2/Introduction, p. 2–7.

173 See MA-ED2/Introduction, p. 1–2.

174 See Whelpton 1991: 218 for a further discussion of this.

175 See K. K. Adhikari 1976: 107.

176 See Michaels 2005b: 7. The relevant source for Islamic code of law is the *Ain-I Akbari* (see in Jarrett 2010). It is worth noting that the MA incorporates a diverse array of legal terminology, such as *ain*, *muluk*, *rukkā*, *pūrjī*, *umarāva*, *mohara*, and *phalānā*. These terms can also be traced back to the 16th-century *Ain-I Akbari*, a detailed document that records the administration of the Mughal Empire under Emperor Akbar. Due to the limitations of the present study, I am unable to extensively explore the potential influence of *Ain-I Akbari* on the MA. A separate research on this topic is necessary in order to thoroughly investigate and explore the issue of the potential influence of *Ain-I Akbari* on the MA.

Bahādura shifted the boundary between private and public spheres and the formation of religious identity. Even as legal texts were being placed centre stage within the judicial process, thus giving translocal and trans-cultural norms of scholastic-judicial discourse precedence over local customs.¹⁷⁷

According to the preamble of the MA, the major aim of the code was to unify the penal system by prescribing clear guidelines for meting out punishment. Since the legal system had not been uniform earlier, two offenders from two different territories or ethnic groups could easily have received different punishments for the same crime.¹⁷⁸ Other aims were to “establish a national caste hierarchy for the multiplicity of Nepal’s ethno-cultural units, to bring about a homogeneous legislative as well as a uniform system of administration and, through such legal code control over remote areas and separate ethnic groups [...].”¹⁷⁹ Especially in comparison with texts of the *dharmasāstra* tradition, the MA is unique, inasmuch as it “has the great advantage of offering the representation of an entire traditional society—not as a utopia of the moralists and not as reflections of the learned, but as law for immediate application.”¹⁸⁰

1.4.5 The Contents of the MA

The MA comprises 167 Articles that address a range of judicial, administrative, and legislative matters. As noted by M.C. Regmi and A. Michaels, the MA possesses constitutional qualities, granting

177 See Khatiwoda 2013.

178 This can be extracted from the preamble: [...] *maramāmilā gardā ekai bihorāmā kasailāi kami kasailāi baḍhatā saḷāya huna jānyā hudā tāsārtha aba uprānta choḍā baḍā prajā prāṇi sabailāi ṣata jāta māphika ekai saḷāya havas ghaṭī baḍhī naparos bhannā nimitta tapaslīla bamojīmakā bhārādārasameta rāṣi kausala gari kausalamā ṭhāharyā bamojīmkā ain tayāra garnu bhani śrī 3 mahārāja jaṅga bahādura rāṅā ji. si. bi. prāim miniṣṭara yāṅḍa kamyāṅḍar ina cīphalāi hokum baksī banyākā aina [...]* “[...] since there have been dissimilarities [lit. less than enough for some and more than enough for others: ‘kasailāi kami kasailāi baḍhatā’] in punishment [imposed] in the same [kinds of] lawsuit (*ekai bihorā*) until today, therefore, in order to achieve uniformity of punishment according to the crime committed, this *Ain* has been prepared in response to the following order to the thrice venerable Mahārāja Jaṅga Bahādura Rāṅā G.C.B. Prime Minister and Commander-in-Chief [...].” (MA-ED2/preamble).

179 See Michaels 2005b: 8.

180 Höfer 2004: xxxvi.

a certain level of autonomy to the civil and judicial administration.¹⁸¹ It also classifies the hierarchy within the caste system by bringing the various castes and ethnic groups under five main categories:¹⁸² Sacred Thread-wearers (*tāgādhārī*), Non-enslavable Alcohol-drinkers (*namāsinyā matuvālī*), Enslavable Alcohol-drinkers (*māsinyā matvālī*), Impure but Touchable castes (*pāni nacalnyā choi chiṭo hālnunaparnyā*) and Untouchable castes (*pāni nacalnyā choi chiṭo hālnuparnyā*).¹⁸³ The MA codifies a wide range of social, customary and religious practices, such as civil and penal regulations under the caste system, rules of purity and impurity, landownership, debt, inheritance, deposits, marriage regulations, commensality, homicide, witchcraft, slavery, adultery, arson, street cleaning and deforestation. Besides civil and criminal law, it also covers aspects of public law and such constitutional provisions as the appointment and prolongation of civil servants, revenue arrangements and foreign policy. Broadly speaking the 167 Articles of the MA cover the following main legal topics:¹⁸⁴

- a) Legislative regulations (Articles 1 and 2)¹⁸⁵
- b) Administrative and revenue regulations (Articles 1–14)
- c) Procedural law (Articles 6–10 and 15–30)
- d) Punishments (Articles 42–47 and 49–53)
- e) Personal and civil laws (Articles 22–32 and 95–163)
- f) Criminal laws (Articles 41, 56–61, 63–68 and, 82–97)
- g) Varia (Articles 61–62, 71, 74–75 and 78–79): witchcraft, gambling, deforestation, farting, spitting and so forth

As noted by D. W. Edwards, the above contents of the MA remind the law of the *Mānavadharmasāstra* (hereafter MDh).¹⁸⁶ Just like Manu assembles a wide range of social, individual and moral law, so too the MA covers a similar spectrum of topics, with again the Brahmanical caste system as the underlying foundation. The latter, however, is far more differentiated than the MDh in terms of punishments imposed on offenders. For example, the MA, unlike Manu, does not teach how a king, minister or an individual should behave morally and socially, but merely defines the exact punishment for all the offences mentioned in the code. The MA, no longer heterogeneous in nature in the

181 See M. C. Regmi 2002: 2 and Michaels 2005b: 8.

182 See Höfer 2004: 9–10.

183 This will be discussed below (see Part I, 1.7.2).

184 The MA-ED2 contains only 163 Articles.

185 These Articles are given only in the MA-ED1.

186 See Edwards 1977: 124.

manner of the judicial system it replaced, made for a quick disposal of court cases. After the codification of the MA, as pointed out by K.K. Adhikari, no shastric texts had to be consulted regarding certain cases.¹⁸⁷ According to B.H. Hodgson's account, before the MA was introduced, legal cases involving questions of caste, inheritance, adoption or wills were strictly followed in accordance with the *śāstras*.¹⁸⁸ The remaining cases were adjudicated on the basis of customary practice. The present study will demonstrate that regulations for dealing with homicide do not strictly follow shastric legal categories or prescriptions rather, brings together three different components: shastric and customary practices along with contemporary political thought serving to establish the 'rule of law'.

Since the MA does not provide specific constitutional safeguards guaranteeing its implementation,¹⁸⁹ it cannot be said that the MA restricted the absolute authority of the Rāṇā regime. However, it can be argued that the MA became a common basis for the rules of administration and those governing subjects in mid-nineteenth-century Nepal, in spite of some exceptions where the Rāṇā autocracy was above any kind of legislative and jurisdictional constraints.¹⁹⁰

1.4.6 The Historical Context

As it has been evident that Jaṅga Bahādura Rāṇā's codification project did not emerge all of a sudden, preliminary steps in its direction having been taken from the time of Jaya Sthiti Malla to the onset of the Rāṇā regime. Thus, the MA was to a great extent a manifestation of previously existing regulations—some available in written form and others in customary practices—that were recast into a unified homogeneous legal code. However, it is worth discussing the possible driving forces underlying the emergence of the MA. In the following sections, I present some of the more essential factors.

187 See K.K. Adhikari 1976: 106.

188 It is known from the B.H. Hodgson's account that the *Mitākṣarā* and *Dāy-abhāga* were often consulted during such cases (Hodgson 1880 [vol. 2]: 231–232).

189 See M.C. Regmi 2002: 3.

190 Aspects of the implementation of the MA will be discussed below (see Part I, 3).

The Economic factor

Due to the intermittent wars against the English or the Chinese-Tibetan forces from 1767 onwards, Nepal's economy was under heavy strain by the time Jaṅga Bahādura Rāṅṅā took power. Nepal had lost not only two-thirds of its territory under the peace treaty of Sugaulī (1816) between Nepal and the East India Company, but also a considerable amount of revenue that could no longer be collected from the areas lost. The economic crisis kept plummeting in the political turmoil after the fall of Bhīmasena Thāpā. The destabilizing power struggle within the royal place and among the *bhāradāras* kept the land tenure, *ijārā*¹⁹¹ and *lokabhāra*¹⁹² systems from functioning properly. This lack of a centralized command resulted in a considerable loss for the state treasury,¹⁹³ which would soon be exacerbated by the Sino-Nepalese war of 1855. By the time of Jaṅga Bahādura arrived on the scene, therefore a reform of Nepal's economy was long overdue, and this required establishing a unified form of land and revenue management which was possible only under a systemic written law enforceable throughout the country. Towards this end, Jaṅga Bahādura was forced to introduce universal regulations, which allowed him to administer state taxation and revenue flows under his direct command. Consequently, the first twenty Articles of the MA deal with land tenure, with a special focus on tenant–landlord relations. Similarly, the MA contains several Articles on the law of succession and adoption which guarantee that the property of deceased heirless persons comes into the possession of the state. Finally, the unified system of imposing heavy fines on offenders in court cases is further evidence that Jaṅga Bahādura wanted to re-establish a strong economic basis for his regime.

Preserving autonomy from British India

As stated before, Nepal was among a few kingdoms in the South Asian region which protected its sovereignty from the British territorial

191 System under which the government granted to an individual the exclusive right to collect revenue from a specified source, subject to the payment of a sum stipulated in advance.

192 It refers to a system in which the local community assumes the responsibility of paying the designated revenue through a representative assigned for that specific purpose.

193 See M. C. Regmi 1988 for an overview of the economic history of this period.

expansion. All such efforts before Jaṅga Bahādura were dependent on individual actors. The idea of collective nationhood had not yet developed among the subjects, which were divided along lines of ethnicity, culture, language and caste, and between authorities as well. Jaṅga Bahādura's seizure of power only made the political constellation that much more unstable, which split the central and local political leaders and networks even further (most prominently, into the Thāpā, Pāḍe, Royal and Jaṅga Bahādura Rāṅā -factions). This prompted some people to seek out contact with the colonial power, thus putting Jaṅga Bahādura at the risk of being removed from his post, by violent means or otherwise. In order to tackle this challenge, Jaṅga Bahādura resorted to pushing the notion both of a strong collective patriotism and a religious identity as means of establishing a strong moral and legal bond between the country's leaders and its subjects. The creation of the MA, which set the tone for this politically- and religiously-based patriotism—in which king, prime minister and subjects were bound to one another within a legal framework—posed a symbolic threat to British colonialism. For one, the MA restricts unauthorized contact with the colonial power. Actions which resulted in creating enmity with China and British India were regarded as a serious offence for both government officials and subjects. This is manifested in the following citation:

If somebody lies in connection with [some matter] which brings an unexpected calamity [in relations] with China or the English, or which creates hindrances for the realm, he shall be dismissed from his post (*jāgīra*) and put in prison for 12 years. If he agrees to pay a fine [commensurate with the prison sentence], the fine shall be taken in accordance with the *Ain* and he shall be taken outside from the city and set free.¹⁹⁴

Moreover, as one strategy for creating a solid religious patriotism, the words 'Nepal as the only remaining Hindu kingdom in the Kali era' was introduced into the MA, along with the Brahmanical notion of 'Christians as Water-unacceptable caste fellows', which clearly distinguished Nepal from British India and the British people.¹⁹⁵ Against the background that Jaṅga Bahādura himself neither accepted the idea of 'divine kingship', one of the basic norms of Hindu orthodox thought, nor was particularly

194 MA-ED1/2 § 10.

195 See MA-ED2/87 § 2.

invested in other basic Hindu norms,¹⁹⁶ his efforts toward constitutionally formalizing Nepal's status as a Hindu kingdom can be interpreted as a patent political strategy to hold the line against British imperialism.

Monarchical fear

Unlike Bhīmasena Thāpā, Jaṅga Bahādura Rāṇā's emergence and his positions as prime minister of the country and commander-in-chief of the army neither could be ascribed to any favouritism nor enjoyed the blessing of royal assent. Therefore, in order to protect his autocratic supremacy, which he had won with much bloodshed, it was not enough to form an alliance with a certain group or to enjoy the support of the monarch. Since king, kingdom and subjects were still regarded as consubstantial, the king was strongly supported by a majority of subjects and political figures, while the opposition to Jaṅga Bahādura represented an enormous threat. Several attempts were made by the king and his followers to regain power by plotting to assassinate Jaṅga Bahādura, but they all came to naught.¹⁹⁷ Therefore, in order to keep the king under control, Jaṅga Bahādura was forced to institutionalize the monarchy as a ceremonial and cultural authority subject to certain legal restrictions, which subsequently were laid down in the MA. In this way, he deftly kept the king from exercising executive powers.¹⁹⁸ However, he did not touch the religious prerogatives of the king. By refraining from doing so, he not only tied the king to the legal-frame but also, very importantly, avoided a possible backlash from subjects who still regarded the king as an embodiment of Viṣṇu.

196 For example, his state visit to Europe in 1850s (Dīkṣita 2011) and his direct support of British efforts to suppress the Indian Mutiny of 1857 (Wright 1877: 63) were not in concordance with the norms of a Hindu state.

197 See Wright 1877: 58.

198 For example, the following section reads: "A king who acts against existing arrangements with foreign powers without prior permission from the prime minister is to be removed from the throne: If an enthroned king, without the advice of the chief minister [i.e., the prime minister], gives an order which [is likely to] spoil friendly relations with the emperors of the south and north, engages in domestic conspiracy and gives orders which corrupt [his] own *umarāvas*, *bhāradāras*, army and subjects, he shall be removed from the throne, and it shall be granted to the [next] one on the roll [of succession,] and he shall reign." (*gaddinasida rājāle mokhya bajirakā bisallāha uttara dakṣiṇakā bādasāhasitako salatanata bigranyā ra ghara jālasāja gari āphnā umarāva bhāradāra phauja raiyata bigranyā kuro hukuma diyā bhane gaddibāta khāraja gari gaddi rolale pāune jo hun unailāi di hukuma calāumu.* (MA-ED1/1 §17).

Nepal's encounter with the western world

Unlike A. Höfer and D.W. Edwards,¹⁹⁹ K.K. Adhikari strongly argues that the MA was not at all influenced by the British legal system, which Jaṅga Bahādura had encountered during his state visit in the 1850s. According to him, “[...] the Ain as a whole was partially customary, yet partially written with the times when it was laid out.”²⁰⁰ K.K. Adhikari is right that no direct evidence of the British legal system has been detected in the *Ain*. However, he does not answer the question of how the idea of drafting such a code emerged in an isolated place like Nepal. The conclusions he does come to seem to be based on only certain Articles, those having to do with criminal cases and caste hierarchy. He leaves unconsidered, for example, the Articles ‘On the Throne’ (*gaddīko*)²⁰¹ and ‘On Legislative Affairs’ (*rājakājako*).²⁰² The legislative checks and balances between the monarch, prime minister and the Council are clearly demarcated in the MA. On the one hand, any form of executive power is denied to the monarch; on the other hand, the prime minister still can be checked by the king in case of any deviation from the *Ain*, and the *bhāradāras* by the prime minister. For example, in one of the provisions on legislative affairs it is stated:

After the *Ain* is promulgated, whoever deviates from the provisions of the *Ain* so introduced either by giving a wrong explanation of it, or by overstating it or by understating it, shall be punished by the king, if he is a prime minister (*mukhtiyāra*). If a high or low ranking [*bhāradāra*] official files petitions or gives signatures violating the *Ain*, he shall be punished by the prime minister.²⁰³

Going back to K. K. Adhikari's conclusion, the mentioned idea of checks and balances was neither a customary practice nor a political necessity of the time. K. K. Adhikari fails to explain why Jaṅga Bahādura—if it was simply his aim to codify customary laws and contemporary social

199 See Edwards 1977: 120, and Höfer 2004: 3.

200 See K. K. Adhikari 1976: 107.

201 MA-ED1/1.

202 MA-ED1/2.

203 *aina bhayāpachi aina bamojim toki chinyākā kurā ulṭāi thorai kurāko dherai dherai kurāko thorai gari phareba garmyā jo cha testālāi mukhtiyārale bhayā rājābāṭa sajāya garnu aru choṭā baḍā gairhale aina mici biṃṭi garmyā daskata garmyā mukhtiyārabāṭa sajāya garnu.* (MA-ED1/2 § 21).

practices—did not elevate the role of prime minister above any power block, be it the king or the Council. For example, the following provision in the MA explicitly mentions that nobody stands above the sovereignty of the kingdom:

A king who has ascended the throne shall not sell his own land to neighbouring emperors or kings irrespective of whatever large amount he receives [for it]. Even if a king who has ascended the throne orders [it] to be sold, ministers or the Council shall not sell it. If the ministers or the Council—with or without orders [from the king], or for reasons of their own, [such as] receiving a large sum for a small [piece] of land—sell land within their own boundary to neighbouring emperors or kings, they shall be considered as rebels (*apsara*) and untrue to the [king's] salt (*nimaka harāma*).²⁰⁴ All shall know them as being untrue to the [king's] salt. One can sell land to those who have come with their family and reside as [our] own subjects inside [our] own boundary.²⁰⁵

Therefore, I argue that one of the reasons for the emergence of the MA was the inspiration Jaṅga Bahādura drew from the British parliamentary system as witnessed close up on his state visit to Europe.²⁰⁶ If Ujira Siṃha Thāpā, who was a minor aristocrat, could base weighty legal recommendations on the British court system even in 1822, it seems plausible that Jaṅga Bahādura Rāṇā, who had directly encountered the British political and legal system in London, could have returned with a vision to reform the Nepalese administrative and judicial system.²⁰⁷

204 'Namaka harām/halāl' expresses the conduct of a traitor. For someone to have somebody else's salt means to pay total loyalty to that person (*namaka/nūnko sojho*). Conversely, not to be loyal to one's master is to deceive him; such a disloyal person is said to be untrue to the [other's] salt (see Banerjee-Dube 2014: 330).

205 *sarahadakā vādasāhā rājāharūsaṃga āphanu jamīna katti dherai rūpaiyā pāyā paṇī gaddīnasenale navecanu. gaddīnasenale veca bhaṃṇiyā hukuma diyā paṇī vajīra kausalale navecanu. hukuma pāi havasa hukuma napāi āphanā tajaviṃjale havasa thorai jamīnako dherai rūpaiyā pāi havasa āphanā sivānā bhīrako jamīna sarahakā vādasāhā rājāsaṃga vecanyā vajīra kausala apsara nimaka harāma ṭhaharchan. nīmaka harāma hū bhani sansārale jānu. jahāna pariṃyāra smait bhāi āphanā sarahadamā āi raiyat bhāi vasyākālāi vecana huncha.* (MA-ED2/2 §61).

206 In the account on Jaṅga Bahādura's journey to Europe (see Whelpton 1983: 177–188), it is recorded how the Nepalese delegation understood the contemporary British political institutions, and this resembles the provisions in the Article 'On Legislative Affairs' in the MA. (See MA-ED1/1–2).

207 Jaṅga Bahādura Rāṇā's enthusiasm for a printing press which he observed during his state visit to Europe and brought back to Nepal, can be taken as

However, the British legal influence on the MA does not take the form of imitating actual English judicial codes. Jaṅga Bahādura did not, that is, directly borrow provisions from the British legal system for the MA. Still, he was visibly inspired by the British concept of a universal rule of law when it came to preparing the general framework of the MA.

1.5 The Characteristics of the MA

In this section, I shall discuss some of the characteristics of the MA which distinguish it from the *dharmaśāstra* literature, which may be considered to have been still partially dominant in forming the legal practices of nineteenth-century Nepal.²⁰⁸ The MA will be shown to be a much more modern and secular creation, one more in line with positive law than both nineteenth-century Sanskrit law texts in British India and pre-MA legal practices in Nepal. I will focus on the following points peculiar to the MA: The MA as the first proper codification of law in Nepalese legal history; as a law code constitutional in character and in its establishment of a rule of law; and as deviating from both Brahmanical law scriptures and customary practices.

1.5.1 Codification

In contradistinction to the general opinion,²⁰⁹ the process of legal codification in the MA neither involved merely recording customs and edicts, nor did it come about because of a sudden direct foreign stimulus. Rather, it arose through processes of collecting previously existing legal practice, introducing new legal norms inspired by the colonial and British legal traditions mixed in with homogenizing, if contradictory, regulations meant to guarantee the universal applicability of the former.²¹⁰ During the nineteenth century, such codification took place within “analogous

a small but telling example. A. Michaels writes: “[...] Jaṅga Bahādura during his trip to London and Paris (15th January 1850 till 29th January 1851) came to esteem of printed books with an almost magical sense as the expression of Western superiority” (Michaels 2005b: 8).

208 See Hodgson 1880 (vol. 2): 211–236.

209 See, for example, K. K. Adhikari 1976: 107 and Kumar 1967: 114.

210 See Caroni 2016.

practical political contexts”²¹¹ in different parts of the globe. According to J.E. Wilson, wherever the codification of law took place,

it occurred because political actors doubted their ability to construct viable forms of rule on the basis of existing intellectual and institutional traditions alone. As the networks that sustained ‘old regime’ politics fragmented in the late eighteenth century and the early nineteenth, political actors in many different places adopted new textual techniques and developed new concepts of sovereignty to define and govern social conduct in a more anxious world. Codification occurred where political actors felt a sense of rupture with the past.²¹²

For example, as argued by J.E. Wilson,²¹³ British legal culture harboured deep suspicions against the codification of law in the late-eighteenth and early-nineteenth centuries. Initially, British officials in colonial India tried to regulate inheritance practices of the native population in historically faithful continuity with their legal traditions.²¹⁴ However, due to the complexity of the indigenous law, the colonial regime was torn between administering existing and introducing new law.²¹⁵ Further, the British administration was not able to understand, identify and act accordingly within the new political, juridical and administrative systems in Bengal. It was thus that the concept of codification gained traction in colonial India. Similarly, after seizing power from the royal dynasty in the mid-nineteenth century, Jaṅga Bahādura felt at variance with the current legal practices, fearing for the stability of his regime if it continued to be based on the previously existing monarchical administration, according to which the king was the final authority in any matter. Therefore, he took the necessary steps towards codification in order to create a uniform legislative space in which the divinity of kingship would be *de facto* questioned by keeping the king within strong legal bounds, the administration and penal system reformed and standardized, the idea of collective nationhood strongly emphasized, the concept of the rule of law made tangible and various ethnic and caste groups brought under a scheme of five major categories.

211 J.E. Wilson 2007: 23.

212 *ibid.* 23.

213 *ibid.* 22.

214 *ibid.* 22.

215 *ibid.* 22.

Even though the principles of legal relativism (i.e., different legal norms according to different status groups) and legal pluralism (i.e., different systems of civil law in different areas), both of which, in shaping the MA, limit the scope of its uniformity, one can still argue that they were still placed within a single state-dominated legal framework. Thus, the MA, rather than being a utopia dreamt up by shastric pundits, represented the whole of traditional society operating according to laws that were actually applied.²¹⁶ A. Höfer's observation is right that the MA was neither an idealized legal composition emerging completely from long-practised orthodox thought nor merely a rewriting of some Brahmanical legal scripture such as the fourteenth-century NyāV. However, the MA was not an entirely secular codification either. For example, the MA itself states that it “was prepared [after observing] *śāstras*, [being based on] wise political thought (*nīti*) [and] practised customs (*lokakā anubhava*).”²¹⁷ Therefore, the MA can be understood as a unique combination of customary practices, positive law²¹⁸ and some scripturally based orthodox Brahmanical thought. As discussed in the previous section,²¹⁹ one of the chief aims of the MA was the universal application of punishments according to the crime committed and the caste status of offenders.²²⁰ M. C. Regmi calls this stated aim contradictory, inasmuch as making the caste status of offenders a consideration defeats the whole purpose of a unified system.²²¹ Although M. C. Regmi is right that—if the degree of punishment varies according to caste—the code does not offer equal justice under law. Some care is required in order to understand what the following phrase in the MA meant: [...] *aba uprānta choṭā baḍā prajā prāṇi sabailāi khata jāta māphika ekai sajāya havas* [...]. “[...] From now on all subjects, [irrespective of whether they are] higher or lower in rank, shall receive the same punishment according to the crime [committed] and caste status [...].”²²² The relevant Articles of the MA reveal that the caste status of offenders is a matter of import when imposing punishments only in instances regarding bodily impurity and a few other very exceptional cases. For example, Brahmins and women are not to be sentenced to

216 See Höfer 2004: xxxvi.

217 [...] *śāstrale nītile lokakā anubhavale banāyāko aina ho*. (MA-ED2/1 §1).

218 See Lariviere 2004: 612 for a discussion of the term.

219 See Part I, 1.3.3.

220 See MA-ED2/preamble.

221 See M. C. Regmi 2002: 3.

222 MA-ED2/preamble.

death for homicide.²²³ Barring such issues, it is impossible to find areas where caste status affects the degree of punishment, be it, for example, in the Articles on legislation, administration, murder or theft.²²⁴

1.5.2 A Code with Constitutional Character and the Establishment of Rule of Law

Jaṅga Bahādura Rāṇā is portrayed in historiography very often as an aristocratic *de facto* ruler empowered with all three governmental powers, executive, legislative and judicial. For example, H. N. Agrawal, quoting P. J. B. Rāṇā, characterizes Jaṅga Bahādura Rāṇā as follows:

[...] he [Jaṅga Bahādura Rāṇā] was invested powers and privileges of a sovereign character. They were: “(1) the right of life and death; (2) the power of appointing and dismissing all servants of Government; (3) the power of declaring war, concluding peace, and signing treaties with any foreign power, including British, the Tibetans, and the Chinese; (4) the power of inflicting punishments on offenders; (5) the power of making new laws and repealing old laws, civil, criminal and military.” The maharajaship and the absolute powers were made hereditary in his family. And thus, Janga Bahadur made the Rana prime minister, a Maharaja with absolute powers, “as much the sovereign as was Peter the Great of Russia.”²²⁵

However, Jaṅga Bahādura’s regime needs to be reanalysed within a larger frame, with due consideration given to the provisions of the MA. The legislative, administrative and judicial autonomy provided by the MA laid the foundation for a constitutional system of government, making the document a unique piece of codified law in South Asian legal history.²²⁶ The following observations concern what it is that endows the MA with its constitutional character:

223 See MA-ED2/64 §1 and §6.

224 See, for example, the sections §§1–14 in MA-ED1 and §64 and §68 in MA-ED2.

225 H. N. Agrawal 1976: 10.

226 See Regmi 2002: 3.

The changed notion of divine kingship: the king's religious identity and the conceptual separation between king and state

It is likely that in Nepal the concept of the divine king as an 'incarnation of Viṣṇu' has its roots in the image of King Viṣṇugupta (r. around 6th century) made in the guise of Viṣṇu.²²⁷ Given the fact that no follow-up documented evidence has so far been found for its validation, as pointed out by M. Slusser, Jaya Sthiti Malla is the first Nepalese king to include the name of Nārāyaṇa among the titles of his *praśasti* (eulogy).²²⁸ The successors of Jaya Sthiti Malla held firmly to the conception of the king as an embodiment of Viṣṇu, and therefore the Nepalese kingship in the nineteenth and twentieth centuries was understood in terms of 'divine kingship', according to which the monarch is treated as a partial reincarnation (*āṃśikāvatāra*) of Viṣṇu, and as the focus of the kingdom's divine ritual. This elevated the king to a position above all positive law.²²⁹ The king as divine entity, an idea central to orthodox Brahmanical thought, is grounded in Brahmanical scriptures.²³⁰ The NyāV, which represents a rewriting of Brahmanical scriptures rather than the codification of new legal norms, remained true to the concept. In this context, R. Burghart argues that at the turn of the nineteenth century, the king of Nepal still saw himself as a divine actor in his realm, and still as an embodiment of the universal god Viṣṇu, his palace being known as a temple.²³¹ Similarly, A. Michaels states that in the early part of that century the king was still indistinguishable from the state; no separation between king and kingdom existed.²³² It is likely that Burghart's and Michaels's perception of Nepalese kingship is the result of their explicit focus on the king's ritual roles. These assumptions need to be reassessed *vis-à-vis* the MA, in order to understand nineteenth-century notions of kingship. The Nepalese political elite occupied a heterogeneous, multidimensional ideological space, which provided them great scope for articulating and legitimizing power so

227 See A. Agrawal 1989: 238–239. J.C. Regmi (1989: 123) further argues that Vaishnavism became strong in the Kathmandu Valley after Jiṣṇugupta and Bhaumagupta installed the sculpture of Buḍhānīlakaṇṭha.

228 See Slusser 1982: 67.

229 Once a king is conceived as the embodiment of Viṣṇu, his absolute divine power can take five forms: those of Agni, Indra, Soma, Yama and Kubera (for example, see NārSm 18.24–31).

230 For example, see NārSm. 18.13, 20–21.

231 See Burghart 1996: 193.

232 See Michaels 2005b: 5–6.

as to cast a different shade of meaning on the nature of the king as a partial incarnation of Viṣṇu.²³³

The MA incorporates notable provisions that establish a connection between traditional notions of kingship and modern conceptions of state structure, marking a significant shift from perceiving the state as a mere extension of the king's household to recognizing it as an autonomous entity. Consequently, the MA introduces a distinct separation between the monarchy and the state, imposing stringent regulations that redefine the monarchy primarily as a cultural and religious institution. The laws outlined in the MA establish that the country's sovereignty is contingent upon its treatment by other nations, transcending internal affairs. While Nepal can be characterized as an oligarchy, if not *de facto* monarchy, during the premiership of JBR and his esteemed status as the thrice venerable great king (*śrī 3 mahārāja*), it is crucial to acknowledge that the king himself was subject to strict legal constraints. Violation of specific offenses carried severe consequences, including dethronement, imprisonment, and even loss of caste. These offenses encompass: i) killing his successor by either administering poison himself or having someone else do so,²³⁴ ii) committing unlawful homicide,²³⁵ iii) giving, without the prime minister's advice, an order likely to damage the relationship with the two bordering emperors (southern and northern) or engaging in a conspiracy to harm his own *umarāvas*,²³⁶ *bhāradāras*, army and subjects,²³⁷ iv) coming down with a serious disease and recovering through treatment within three years, but rather becoming insane or fallings from his caste,²³⁸ or v) selling

233 See Cubelic & Khatiwoda 2017.

234 *gaddinasida rājāle āphnā sekhapachi gaddi pāune bhāt chorālāi āphule jahara bikha khuwāi bhayo aru mānisa lagāi bhayo jyāna mare bhane testā rājālāi gaddibāta khāreja gari jātapatita gari darjāmāphika khāna lāuna di darbāradekhi bāhira najarabandī gari rākhanu. yastālāi gaddi hudaina rolale gaddi pāune jo hun gaddi mā unilāi rākhanu.* (MA-ED1/1 §9, also see §29).

235 *gaddinasida rājāle bekasura benisāphamā āphnā bāhulile kasaiko jyāna mare bhane gaddibāta khāreja gari darbāradekhi bāhira najarabandī gari khāna lāuna ijjata di rākhanu. gaddimā gaddi pāune hakawālālāi rākhanu.* (MA-ED1/1 §11).

236 In the early post-unification period, *umarāvas* denoted commanders of a military post, as mentioned by M.R. Panta (2002: 136), who was responsible for raising and maintaining their own troops. However, over time, the term came to be occasionally used to refer to senior military commanders in general.

237 *gaddinasida rājāle mokhya bajirakā bisallāha utara dakṣiṇakā bādāsāhasitako salatanata bigranyā ra ghara jālasāja gari āphnā umarāwa bhāradāra phauja raiyataharu bigranyā kuro hukuma diyā bhane gaddibāta khāreja gari gaddi rolale pāune jo hun unilāi di hukuma calāunu.* (MA-ED1/1 §17).

238 In this case, he is dethroned but is not put in prison. Further, he should be taken out of the palace and respectfully provided with food and accommodation. (MA-ED2/1 §24).

land in his kingdom to foreign emperors in violation of a prohibition to do so by the Council and prime minister.²³⁹

Especially interesting in this context is that the MA allows the degradation of the king's caste status. Such a provision explicitly questions the divinity of the king. Moreover, it is not only the enthroned king but also other members of the royal family who are put under legal restrictions meant to prevent unhealthy power struggles in the palace. For example, if the next in line to the throne (i.e., the crown prince) kills the enthroned king, he is to be removed from the roll of succession, put into prison outside of the palace and respectfully provided with food and accommodation.²⁴⁰ A later son or a brother who is on the roll is to be sentenced to death for doing so, as are other royal princes who are not in line to the throne.²⁴¹ Not only male members of the royal family but also the queen is covered under the law. For example, a queen who kills an enthroned king and plans to have someone else crowned loses her caste, and is fettered and put into prison outside of the palace. In the case where a murder plot is conceived but remains unexecuted, she shall be put into prison outside of the place but not fettered.²⁴²

Within the framework of the MA, the relationship between the king, subjects, and state is not solely defined in legal-bureaucratic terms. The government's sphere of activity is also delineated in a manner that emphasizes its role in fostering collective prosperity and safeguarding a shared religious identity. In Nepal, incipient notions of religiously inspired patriotism can be observed in *Prthvī Nārāyaṇa Śāha's DivU*, particularly in the renowned phrase that refers to Nepal as the 'true Hindustan' (*asal Hindustān*).²⁴³ However, in the *DivU*, religious patriotism remains centered around the ruler and can be interpreted as an extension of the ruler's duty to uphold the purity of his realm, rather than a fully developed patriotism grounded in a collective 'we' identity and imbued with a broader socio-economic vision. A more comprehensive conception of religious patriotism finds notable expression

239 See MA-ED1/1 §34.

240 See MA-ED1/1 §10.

241 See MA-ED1/1 §§12–13.

242 See MA-ED1/1 §14.

243 "Give a man only honor, and that according to his worth. Why? I will tell you. If a rich man enters into battle, he cannot die; nor can he kill. In a poor man there is a spark. If my brother soldiers and the courtiers are not given to pleasure, my sword can strike in all directions. But if they are pleasure seekers, this will not be my little painfully acquired kingdom but a garden of every sort of people. But if everyone is alert, this will be a true Hindustan of four jatas, greater and lesser, with the thirty-six classes." (Stiller 1989: 44).

in a section of the MA that pertains to religious endowments.²⁴⁴ This section begins by presenting three cautionary tales that illustrate the futility of spending money for religious purposes or making cash investments in British India. Building upon these illustrative instances, the MA prohibits both charitable transactions and cash investments in foreign countries,²⁴⁵ providing the following justifications:

There is a Hindu kingdom whose *Ain* is such that it bans the killing of cows, women and Brahmins; an independent land of such merit, with a palace, [situated] in the Himalayas (*hima-vatkhaṇḍa*), the land of the [*nāga*] Vāsukī (*vāsukīkṣetra*), a pilgrimage place of Āryas (*āryātirtha*)²⁴⁶, [the one] that contains Paśupati's Jyotirlinga and the venerable Guhyeśvarīpīṭha. [This] is the only Hindu kingdom in the Kali era. Henceforth whoever wishes to construct a Śiva temple [or] *dharmasālā* (pilgrim shelter) [or] establish a *sadāvarta-gūṭhī* (*guthi*)²⁴⁷ shall find a pilgrimage place in [his] own realm and construct the Śiva temple [or] *dharmasālā* [or] establish the *sadāvarta-gūṭhī*. No one—from king to subjects—shall construct a Śiva temple or *dharmasālā* in a foreign realm. Because if [one] has been constructed in [one's] own realm, [one's] own offspring can repair it at the slightest damage, [one's] own realm will be adorned, and whatever realm has a multitude of *dharmasālā*, no disease, illness or epidemic will come upon it [and] no starvation will occur in it. When one obtains fame for [one's] own realm, [the result] will be splendour: The architects of [one's] own realm will become skilful. The poor will be protected since they will

244 See MA-ED1/4 §1 and MA-ED2/1 §1.

245 The first one tells of a Śiva temple and rest-house (*dharmasālā*) built by Guru Raṅganātha Paṇḍita in Kāśī having been sold by somebody else without authorization; the colonial administration did not punish this defrauder. The second one deals with a royal endowment (*sadāvarta-gūṭhī*) at Kedāranātha Temple on British territory that was confiscated by the colonial administration. The third one involves the Nepalese royal priest Vijayarāja Paṇḍita, who lent 10,000 rupees to an Englishman under a mutual understanding of repayment plus four percent interest per year; he received only three percent. Moreover, the suspicion is raised in the *Ain* that when a person has no male heirs, his daughters will not be able to recover outstanding debts under the inheritance law in British-India (see in MA-ED2/1 §1).

246 For *āryātirtha*.

247 A charitable foundation for the provision of food to the poor, mendicants and pilgrims.

receive a salary, and the wealth of [one's] own realm will not go to foreign wealth or to a foreign realm.²⁴⁸

These passages show that the monarch within this framework plays an important role as 'Hindu king,' symbolizing the purity and uniqueness of the polity. On the other hand, the king is here only one among several markers of this 'Hindu identity,' others being the protection of cows, women and Brahmins.

In summary, the monarchical policy outlined in the MA signifies a shift in perception, wherein the king is no longer viewed as the entirety of the polity, but rather as a component within it. While the rhetorical source of sovereignty still attributes a divine essence, often represented as a partial embodiment of Viṣṇu, the king's authority in the MA is constrained by multiple factors. His executive power, ability to dispose of his property, and capacity to establish relations with foreign powers are all subject to limitations imposed by a legal framework that establishes a conceptual separation between the king and the kingdom. This signifies a fundamental change in the understanding of the king's role, highlighting the importance of governance within a defined legal framework rather than absolute authority.

The conceptual establishment of rule of law

The concept of the 'rule of law' has deep roots in western political and legal discourse, particularly within British political and constitutional history. It encompasses a period spanning from the Norman Conquest to the modern era. According to D. Zolo, the leading principles of the English rule of law were

248 *hiṃdūhrāja gohatyā nahunyā strihatyā nahunyā brahmahatyā nahaunyā yasto aina bhayāko darbāra himavatkhamaṃdā vāsukikṣetra ārjyātirtha yotirmaya śrīpaśupatiṃga śrīgūhyeśvarī pīṭha yasto puṅgabhumī āphanu muluka chadā chadai kalimā hiṃduko rāja yehī muluka mātraī cha. aba uprānta jaskā sivālaya dharmasālā banāunakāko irādā cha guṭhī sadāvarta rākhana irādā cha āphanā rājyamā tirtha pāi śivālaya dharmasālā banāunu. guṭhī sadāvarta rākhana. virānā mulukmā rājādekhi raiyatsaṃma kasaile śivālaya dharmasālā nabanāunu. dharmasālā banāyāko āja u jamūna kaccā thaharinyā śivālaya 23 guṭhī sadāvarta narākhana kina bhanyā āphanā rājyamā banāyā thorai bhatkyā pañī āphanā saṃtānale tālhaṭola gari banāuna pāunyā aphnu deśa rāmro gulajāra hunyā jauna mulukmā dharmā jyādā bhayo tesa mulukmā roga vyādhi desāna na āunyā anikāla naparnyā huṃcha. āphnu desamā kirti bamdā sobhā hunyā āphanā deśakā kārigaḍha sipālu hunyā jyālā majuri pāunāle gariba kamgālako pālanā huṃcha. āphanā mulukako dhana virānā mulukamā jādaina. (MA-ED2/1 §1).*

individuals' legal equality, irrespective of their status and economic conditions. Notwithstanding individuals' deep social inequality—which is deemed to be obvious—all citizens are subject, with no exceptions, to the general rules of ordinary law, in particular to the ones regarding criminal punishment and patrimonial integrity. [...] normative synergy between Parliament and judiciary, through which the settlement of single cases is in England the result of decisions stemming from two sources that are in fact, if not certainly in law, equally sovereign. On the one hand, there is legislative sovereignty of Parliament, i.e., the Crown, the House of Lords, and the House of Commons, according to the famous 'King in Parliament' formula. On the other hand, there is the common law, in the hands of ordinary courts.²⁴⁹

However, the British encountered significant challenges in establishing such a rule of law system in colonial India. The Mughal and Hindu legal systems they encountered were considerably complex and varied greatly across communities and regions. Consequently, the British struggled to comprehend the existing legal practices, resulting in the coexistence of two legal systems: Company law and indigenous law. That is, "the original lack of interest in the life of the non-European communities turned into a deliberate legal dualism."²⁵⁰ According to L. Benton, the legal dualism resulted in hybrid forms during the Company's legal history.²⁵¹ For instance, the 'Choultry' judges became Company servants in 1654, and in 1661, the governor's authority was established over criminal and civil matters. In 1773, the Supreme Court of Judicature at Fort William was established to administer British law to British subjects, Company employees, and Indians who wished to file court cases there.²⁵² However, the complexity of the colonial legal system, shaped by its hybrid nature, necessitated the creation of the role of '*vakilas*' in 1793 to assist complainants and defendants with formal procedures.²⁵³ The involvement of untrained Hindu and Muslim legal experts, such as *maulavis* for Muslim law and *pundits* for Hindu law, posed additional challenges for the English understanding of law. Consequently, in the late eighteenth century, the British felt compelled

249 Zolo 2007: 7.

250 Quoted in Benton 2002: 132.

251 *ibid.* 132.

252 *ibid.* 136.

253 *ibid.* 138.

to commission translations of Hindu legal texts, resulting in distorted variations of both Hindu and Muslim law. As noted by Benton,²⁵⁴ this provided a justification for the dominance of English law and the relegation of Indian law to a secondary position. Finally, the enactment of the Code of 1860 significantly curtailed the enforcement of Hindu and Muslim law in British India, effectively replacing the indigenous legal systems with the English concept of the ‘rule of law.’

Even though the MA was fostered in such an isolated and conservative non-nation-state as Nepal, it developed a concrete concept of ‘rule of law.’ In the mid-nineteenth century, the Nepalese political actors were not familiar with that European concept on any intimate basis, nor was there any colonial force to directly push for the establishment of such a system. Therefore, it is worth looking at the concept of ‘rule of law’ as conceived in the MA, which was made possible by Jaṅga Bahādura’s encounter with the English rule of law in 1850s. It is striking, for example, that the notion of legality in the MA was extended to apply to the monarch himself.²⁵⁵ The text states that all—from the king to his subjects—are bound by the law and that deviating from it will result in punishment irrespective of deviator’s status. This can be extracted through the preamble:

[...] whoever does not render verdicts and oversteps his bounds when rendering verdicts or [performing] other [such] acts shall be punished as written in the *Ain* concerning that subject. [...] Having said this, we three generations have ordered that all shall obey this *Ain*, starting with us and on down to our subjects. All officials (*kāriṅdās*) including the prime minister shall act in accordance to the *Ain*.²⁵⁶

Similarly, the sovereignty of the Council²⁵⁷ defined in the MA in a way which resembles the legislative sovereignty of the English parliament, is another noteworthy element ensuring the rule of law. The Council,

254 *ibid.* 139.

255 See Cubelic & Khatiwoda 2017.

256 *yaśa kitābamā lekhiyā bamojīmko nisāpha niḡari ghaṭi baḍi pāri kājakāma nisāpha garṇyālāi usai kurāko ainmā lekhiyā bamojīm daṃḍa sajāya garṇu* [...] *bhani hāmi tina pustā basi hāmidekhi raiyata takale yaśa aina bamojīmamā rahanu bhanyā hokum baksyau. śrī prāim ministara lagāyata kājakāma garṇyā kāriṅdā yaśai aina bamojīma kājakāma garṇu.* (MA-ED2/preamble).

257 According to K. K. Adhikari (1984: 70), the Kausala (also known as *bhāradārī sabhā*) was called ‘Council’. The term *kausala* is probably a corrupt form (*apabhraṃśa*) of the English term ‘council’. B.H. Hodgson’s (1880 [vol. 2]:

representing the military, civil service, judicial domains along with local officials and village notables, is constituted as both the supreme legislative and executive body, as well as source of law.²⁵⁸ For example, the MA stipulates that the Council had final authority to enact new laws, change previously existing laws and add the necessary laws. It is also extracted through the preamble:

[...] this is the volume of law written in response to the following order to the thrice venerable Mahārāja Jaṅga Bahādura Rāṇā G.C.B. Prime Minister and Commander-in-Chief: “Call the Council, which includes the *bhāradāras* listed below, and prepare an *ain* as deemed proper in the Council.” It was instituted on Thursday, the 7th of the bright fortnight of the month Pauṣa in the [Vikrama] era year 1910 with the approval of us members of three generations, [that is, the king’s father Rājendra, King Surendra and Crown Prince Trailokya]. When it is necessary [for a portion] to be corrected or rejected by order of the Council and as witnessed by us, it should be [so] corrected or rejected and added as a new law.²⁵⁹

Moreover, the MA has clearly provided constitutional provisions to safeguard the autonomy of the kingdom. Not only the king, prime minister and subjects but also the autonomous Council was subordinated to higher state interests. The realm is no longer conceived solely as anybody’s possession, but is itself regarded as the fundamental principle, as embodied in the territorial integrity of the state. For example, Section 34 ‘On the Throne’ and Section 61 ‘On Land’ contain regulations which prohibit the king, prime minister, Council and subjects from selling land to foreign governments or foreign subjects. This fits in with Burghart’s observation that around 1860 the notion of a boundary

212) and D. Wright’s (1877: 55) account verify that the Kausala/Kausī was the supreme legislative body even in the period preceding Jaṅga Bahādura.

258 Below, I shall present a diagram (see Part I, 1.7.3) listing the members of the Council according to their positions and castes.

259 *tapasila bamojīmakā bhāradāra sameta rākhi kausala gari kausalamā thaharyā bamojīmakā aina tayāra garnu bhani śrī 3 mahārāja jaṅga bahādura rāṇā jī si bi prāim miniṣṭara yāṇḍa kamyāṇḍara ina ciphalāi hokum baksī banyākā aina hāmi tina pustābāta pani maṅjura gari samvat 1910 sāla mīti pauṣa sudi 7 roja 5 kā dina lekhiyākā kitābamā hāmra rohabaramā kausalakā tajabijamā sacyāunā khāraja garnyā thaharyākā sacyāi khāreja gari nañā bhayāko aina thapi [...]* (MA-ED2/preamble).

meant to delineate sovereign spaces gained acceptance as something to be established and preserved.²⁶⁰

If an enthroned king himself sells to neighbouring emperors or kings land forbidden to be sold by the prime minister and the Kausala, his subjects shall be permitted to replace such a king irrespective of however large the amount he has received [for it]. If the prime minister or the Kausala—[either] on orders [from the king] or on their own, without orders [from the king], and whether [or not] they receive a large sum for a tiny [piece] of land—sells land within [the country's] own borders to neighbouring emperors or kings, and if it is ascertained that such a prime minister, Kausala or official is untrue to [the king's] salt, know that such persons are [indeed] untrue to [the king's] salt. One may sell land to those who are [fellow] subjects who live in a house on land in one's own country.²⁶¹

An enthroned king shall not sell his own land to neighbouring emperors or kings irrespective of however large an amount he might receive [for it]. Even if an enthroned king orders [such land] to be sold, neither ministers nor the Kausala shall sell it. If ministers or the Kausala—with or without orders [from the king], or for reasons of their own, [such as] receiving a large sum for a small [piece] of land—sells land within their own borders to a neighbouring emperor or king, they shall be considered rebels (*apsara*) that are untrue to their salt. All shall know them to be untrue to their salt. One may sell land to those who have come with their family and reside as subjects inside [our] own borders.²⁶²

260 See Burghart 1984: 101–125.

261 *sarahadakā bādasāha rājāharūsaṃga āphnu jamina katti dherai rūpaiṇā pāye pani bajira kauśalale bebarjita gari gaddinasidale becyo bhanyā testā rājālāi duniñāle badalana huncha. hukuma pāi havas napāi āphnā tajabijale havas thorai jamīnako dherai rūpaiṇā pāi havas āphnā sibānābhitrako jamina sarahadakā bādasāha rājāsaṃga becanyā bajira kauśala aphisara pani nimaka harāma thaharchan. yastā nimaka harām hun bhani jānnu.* (MA-ED1/1 §34).

262 *sarahadakā bādasāha rājāharūsaṃga āphanu jamina katti dherau rūpaiṇā pāyā pani gaddinasenale nabecanu. gaddinasenale beca bhamnyā hukuma diyā panī bajira kausalale nabecanu. hukuma pāi havasa hukuma napāi āphanā tajabijale havas thorai jamīnako dherai rūpaiyā pāi havasa āphnā sivānā bhitrako jamīna sarahadakā bādasāha rājāsaṃga becanyā bajira kausala aphisara nimaka harāma thaharchan. nimaka harāma hun bhani sansārale jānnu. jahāna pariyāra smait bhai āphnā sarahadamā āi raiyat bhai basyākālāi becana huncha.* (MA-ED1/5 §61).

The mentioned sections of the MA reveal that the state has emerged as an autonomous entity to which one pays loyalty. Especially interesting in these passages is the expression of collective identity, which binds everyone belonging to the country under a single rule of law and puts the interests of national sovereignty above any other kind, be it personal or institutional.

Jurisdictional autonomy and normative synergy between the Council and the judiciary

As pointed out by D. Zolo,²⁶³ the sovereignty of parliament and independence of ordinary courts in making and administering statutory law have made British constitutional practices a lodestone in the political and legal history of the world. Such domestic practices led British colonial governments to introduce similar systems in their colonized territories. The British attempt to introduce positive law in colonial India can be taken as one such example. The social, political and legal systems of pre-colonial India and pre-MA Nepal were pretty similar. Given the large number of indigenous groups and their individual legal, administrative and judicial practices, the emergence of homogeneous legislation which could be widely implemented was not readily possible. Still, the MA appears to have been just such a unique piece of legislation. Including as it does power-sharing provisions among the king, Council and prime minister and allowing for the independence of the courts, it bears one of the most essential prerequisites of a constitutional form of government. The MA devotes several chapters to dealing with judicial procedure.²⁶⁴ As pointed out by K. K. Adhikari,²⁶⁵ the MA displays three important judicial features: it ensured for a quick disposal of lawsuits through a host of provisions that covered all important aspects of indigenous society; it replaced multi-faced scriptural Brahmanical law, which had been used for conducting lawsuits in the pre-codification period; and finally, to a great extent it provided unified and independent jurisdictional practices. More importantly, the courts were bestowed with a considerable degree of autonomy. To safeguard this autonomy, the MA explicitly protects judges from being influenced by

263 See Zolo 2007: 7.

264 For example, Articles 34–37, 40–48 and 53 of MA-ED2 figure prominently in this regard.

265 See K. K. Adhikari 1984: 274.

any authoritative actors when handing down court decisions. This is exemplified in the following section:²⁶⁶

Court judges, *ḍiṭṭhās* and *bicārīs*, [and] the heads of *ṭhānās*,²⁶⁷ shall decide matters on the order of lawsuits in accordance with the *Ain*. Even if an [oral] order or an order [in the form of] a *lālamohara* from the king or a signed directive (*daskhat*) from the prime minister to decide a lawsuit [in a way which] deviates from the *Ain*, [the above persons] shall not obey them. Lawsuits shall be decided in accordance with the *Ain*. They (i.e., judges etc.) shall not be fined or convicted of committing a crime for having disobeyed such a [*lāla*]mohara, *daskhat*, *hukuma*,²⁶⁸ *marjī*,²⁶⁹ oral order or *pramāṅgī*.²⁷⁰

Further, section 21 on ‘Court Affairs’ makes the relation clear between courts and the Council, the supreme legislative body. The MA directs courts not to forward to higher authorities any lawsuit which can be conducted under the legal code. To be sure, lawsuits which cannot so be dealt with are to be brought to the Council.

When deciding disputes or court cases, the heads of courts or *ṭhānās*, the heads of the east and west frontier courts or *dvāryās* of *amālas*²⁷¹ need not refer [them] to the Council as long as a matter written about in the book of the *Ain* is before them. They shall decide [such cases] on their own. If they do not decide [such] lawsuits on their own but refer [them] to the Council, he who refers [them] to the higher authority shall be fined (if he is the head of a court) 20 rupees, (if a *ḍiṭṭhā*) 10 rupees,

266 *adālatakā hākima ḍiṭṭhā bicāri ṭhānākā mālikale aina bamojima nisāpha miḷyākā kurā chinnu. ainadekhi bāhekako nisāpha gari chini deu bhani sarkākako hukuma bajirko marjī ājñā pramāṅgī ra sarkārako lālamohara barjiko daskhat bhai āyā pani namānnu. aina bamojimako nisāpha gari chinidinu. mohora daskhat hukuma marjī ājñā pramāṅgī mānen bhani inlā jarivāna taksira kehi lāgdaina.* (MA-ED2/45 §2).

267 A police or military office with judicial functions.

268 (Written) order, especially from the king or members of the Rānā family.

269 (Prime ministerial) order.

270 Order or authorisation letter from the king, prime minister or a high-ranking government official.

271 A village level revenue collection office with judicial functions. In the MA, *adālatas*, *ṭhānās* and *amālas* were the central institutions for judicial administration.

(if a *bicārī*) 5 rupees, and (if a *bahidāra*²⁷² or the *dvāryā* of an *amāla*) 5 rupees. If lawsuits come up which either have not been written about in the *Ain* or conflict with details in it, they shall be referred to the Council. The Council shall act the matter and shall on due consideration have [new provisions] written into the *Ain* if needed to be written into law. If the details of it conflict [with the *Ain*, the Council] shall straighten out the details and define how to decide [such matters in the future].²⁷³

Furthermore, the MA not only provides that the judiciary will remain loyal to the nation but also explicitly provides safeguards that it will adjudicate properly, as the following section demonstrates:

From now onwards, when punishing or fining any [type of] offender or carrying out according to the *Ain* [such] other court-related matters [as] tax [audits], [annual] revenue due or account clearings, [the *adḍā*,²⁷⁴ *adālata*,²⁷⁵ *ṭhānā* or *amāla*] shall bring the *Ain* to bear and write down their pronouncement, stating: ‘Perform such and such an action in accordance with such and such a section of such and such an Article.’²⁷⁶

- 272 *Bahidāra* literally translates to ‘record-keeper’. It refers to an accountant, clerk, or scribe who serves as a civil functionary entrusted with the task of writing official documents. The *bahidāra* holds a higher rank than the *nausindā*, as mentioned in K. K. Adhikari (1984: 345).
- 273 *adālata ṭhānākā hākima ra pūrva paścima aḍā gauḍākā hākima amālakā dvāryāharūle jhaijagarā gairha māmīlā chinḍā ainakā kitābamā lekhiyākāsammakā kāma kurā pari āyāmā kausalmā sādhanu pardaina. aina bamojima āphaile āṭi chinidinu. ainamā lekhiyāsammakā kurāmā āphaile nachini kausalmā sādhanu āyā bhanyā adālatakā hākimalāi 20 ḍiṭṭhālāi 10 bicārīlāi 5 bahi[dāra] ra amālkā dvāryālāi 5 rūpaiyākā darale jasale sādhana āucha uslāi jarivānā garilīnu. ainamā bihorā namilanyā kurā pari āyā bhanyā kausalamā sādhanu ra kausaliyāle tajabija gari ainamā lekḥāunu parnyā kuro rahecha bhanyā aina tajabīja gari lekḥāi dinu. bihorā namilnyā kuro rahecha bhanyā bihorā milāi estā tarahale china bhani toki dinu. (MA-ED2/35 §12).*
- 274 Firstly, *adḍā* refers to a law court that holds authority over *adālatas* (lower courts), *ṭhānās* (police stations), and *amālas* (revenue offices). Secondly, it denotes an office, post, or station where state functionaries perform their duties.
- 275 *Adālata* refers to a law court located at the district level or in frontier areas. It holds authority over *ṭhānās* (police stations) and *amālas* (revenue offices), serving as a higher-level court in the judicial hierarchy.
- 276 *aba uprānta aḍā adālata ṭhānā amālabāta bābati baihrālāi daṃḍa saḍāyā gardā ra arū māmīlā hisāba kitāba bāsila bāki pharaphāraka gairha aina bamojīmkā kāmakurā gardā aina milāi phalānā mahalkā eti lambarakā ainale yo kuro garnu bhaṃṃnyā janāi leṣanu. (MA-ED2/35 §19).*

Especially interesting in this context is the normative synergy between the Council and judiciary. On the one hand, the courts owe loyalty to the Council as the supreme legislative body, while on the other hand the autonomy of the courts is explicitly mandated, the court officials being directed not to consult the Council as long as court decisions can be made on the basis of the written provisions of the *Ain*. The mentioned separation of powers between the Council and judiciary implies that the state was designed to be a polity of autonomous, mutually complementing forces to which state employees including all high-ranking and local actors owed collective loyalty. The implementation of the MA's jurisdictional provisions, as shown in the excerpt above, is bolstered by its directing judges to cite the Articles and sections of the MA pertinent to their court decisions. Although the provisions given in the MA bear witness to a solid conceptual development of the autonomy of civil and judicial administrative functions, the extent to which such autonomy had a long-term impact on the Nepalese political cultural needs to be analysed within a larger frame.

1.5.3 The Legitimation of Foreign Diplomacy

Prthvī Nārāyaṇa Śāha in his DivU expressed the geographically sensitive location of the Nepalese kingdom famously as 'a gourd between two rocks.' Consequently (he added), "Maintain a treaty of friendship with the emperor of China. Keep also a treaty of friendship with the emperor of the southern sea (the Company)."²⁷⁷ In mid-nineteenth-century Nepal, foreign diplomacy continued to be crucial because of a possible threat to the country's political and economic autonomy, especially from the colonial government in British India. Jaṅga Bahādura, too, needed to carefully craft his foreign diplomacy towards both neighbouring imperial powers, British India and China. Before the emergence of the MA, Nepal had been stationing envoys at strategic places.²⁷⁸ Jaṅga Bahādura felt the absence of a unified foreign policy as a potential enormous threat from alliances against him. It was possible that anybody who was against him could at any time plan a domestic conspiracy, especially involving an alliance with the southern colonial power. Therefore, through the vehicle of the MA, he paved

277 Stiller 1989: 42.

278 See M. Bajracharya, Cubelic & Khatiwoda 2016 and 2017 for a further discussion about the envoys stationed in colonial India by Nepal.

the way for a clear foreign policy by introducing a centralized foreign diplomacy apparatus under strict supervision within the state's legal framework. This helped to prevent unauthorized encounters between domestic actors with non-domestic powers, as the following section spells out:

Somebody who lies about [a matter,] thereby bringing about unexpected calamity [in relations] with China or the English or creating [other] hindrances for the realm, shall be dismissed from his post (*jāgīra*) and put in prison for 12 years. If he agrees to pay a fine [commensurate with the prison sentence], the fine shall be taken in accordance with the *Ain* and he shall be taken outside the city (i.e., sent into exile). Whoever practises fraud or deceit regarding matters relating to China or the English shall, after [due] consideration by the Council, be put in prison for 6 years. If he agrees to pay a fine of 5 rupees per month, he shall be freed.²⁷⁹

This section of the MA shows that actions creating rancour with China and British India were a serious offence, whether committed by government officials or ordinary subjects. Moreover, the MA not only prohibits subjects from creating enmity with the neighbouring powers but also explicitly forbids the king and prime minister to do so. This is stated in the following sections:

If a king who has ascended the throne gives, without the advice of the chief minister (i.e., the prime minister), an order which [is likely to] spoil friendly relations with the emperors of the south or north, engages in domestic conspiracy or gives orders which corrupt [his] own *umarāvas*, *bhāradāras*, army and subjects, he shall be removed from the throne and it shall be granted to the [next] person on the roll of succession; that one shall reign.²⁸⁰

279 *cīna aṅgarejasita batyāsa panyā muluk sanbadhī khalala hunyā kuro dhātanyālāi jāgirabāta khārāja gari 12 varṣa kaida garnu. rūpaiyā tīrcha bhanyā aina bamojīma rūpaiyā lī sahara bāhira gari choḍīdīnu. cīna aṅgreja sanbaṁdhi kurāmā phareba jālasājakā kurā garnyālāi kausalabāta tajabṭja gari 6 varṣa kaida garnu. rūpaiyā tīrcha bhanyā mahinākā 5 rūpaiyākā darale li chāḍīdīnu.* (MA-ED1/2 §10).

280 *gaddīnasīda rājāle mokhya bajīrakā bisallāha uttara dakṣiṇakā bādāsāhasī-tako salatanata bigranyā ra ghara jālasāja gari āphnā umarāva bhāradāra phauja raiyataharū bigranyā kuro hukuma diyā bhane gaddibāta khārāje gari gaddī rolale pāune jo hun unilāi di hukuma calāunu.* (MA-ED1/1 §17).

If a minister joins forces with other kings, northern or southern, and is set to hand over [to them] the king's realm (*rājāko muluka*), such a minister shall be executed.²⁸¹

Jaṅga Bahādura was aware that only peaceful and friendly relations with British India could secure the autonomy of the country, and by extension his own regime. This is why the MA adopted such norms of interstate foreign diplomacy as diplomatic immunity:

If an envoy or resident from China or England commits homicide or any [other] crime after coming to our realm, the courts of [our] own government shall not investigate the case. Their [own] government shall be written to.²⁸²

The MA, then, not only concerns itself with civil and criminal justice, administration and the regulation of social order, but also sets up norms for the conduct of international diplomacy.

1.5.4 The Reform of Brutal Corporal Punishment

A penal reform that established more lenient forms of punishment is another key feature of the MA, particularly in the case of punishments imposed for committing certain heinous offences. A document issued in 1805, which was copied for the Regmi Research Collection,²⁸³ can be taken as an example of the brutality of punishment during pre-MA times. It contains the decision handed down, probably by the king, on a lawsuit forwarded by an anonymous local judicial official and involving adultery committed by a slave with an unmarried girl belonging to the Alcohol-drinking Magar caste. Addressed to an *amālī*,²⁸⁴ it directs him to punish the slave by taking out his eyes and cutting off his nose,

281 *bajirale rājāko muluka aru utara dakṣiṇakā rājāsita mili dina lāgyo bhane testā bajiralāi kāṭi māridinu.* (MA-ED1/1 §33).

282 *cīna amgrejakā ukīla bakīla rajītantale hāmṛā mulukmā āi kehi khuna taksīra garyā bhanyā tīnako nīsāpha āphnā sarkārakā adālatabāṭa herna hudaina. unaikā sarkāramā lekhī paṭhāunu.* (MA-ED1/2 §17).

283 See NGMPP E 2426/187.

284 An *amālī* is the chief of an *amāla* office, which is a revenue functionary responsible for a regional administrative unit. The *amālīs* hold judicial powers within their role.

ears and genitals.²⁸⁵ B. H. Hodgson also records similar forms of punishment being carried out in 1826.²⁸⁶ These practices were based on the *dharmasāstras*. The NyāV prescribes barbarian forms of punishment even for minor offenses.²⁸⁷ For example, if somebody out of spite spits at or urinates on a person belonging to a higher caste, the king is to have respectively his lips or penis cut off.²⁸⁸ Such cruel forms of punishments are notably absent in the MA. Thus, the MA sentences a slave to death only in the case of having intercourse with the wife, daughter or sister-in-law of his master, or having intercourse with unmarried girls below the age of eleven who belong to a Sacred Thread-wearing and Alcohol-drinking caste.²⁸⁹ In similar cases involving persons other than the ones just mentioned, the punishments are branding, imprisonment, a fine or enslavement depending on the conditions.²⁹⁰ Similarly, the ban on interrogation by ordeal or divine means (*dīvyaparīkṣā* or *niñā* in the MA) is another big step forward for penal reform in the MA.

The first occurrence of the concept of ordeal in Indian classical literature, according to R. W. Lariviere²⁹¹ in the *Āpastambadharmasūtra* (hereafter *ĀpDhS*),²⁹² shows the long history of practising such interrogation methods. The NyāV follows along in the same tradition, providing a detailed description of the five following forms of divine interrogation to be undergone by suspects accused of having committed heinous crimes such as theft, murder and adultery: balance (*ghaṭa*),

285 21 *naṃ āge dhādīṅgakā amālī pratī. tāhā vāphala chāpamā kamārāle kaṃnyā maḡaranīsita bīrāma bhayacha ra tāhākā bhalā mānīsa basī kerdā kamāro kāyala bhayecha ra hāmṛā hajūra binti garī pathāyāchāu. testā karma gar-nyālāi ākhā jhīknu. nāka kāṭānu. kāna kāṭānu. nalaphala kāṭānu. yeti sāsnā garī chādīdīnu. itī samvat 1862 sāla mīti jeṣṭha sudī 6 roja 2 su[bham].* “21 number. To the *amālī* of Dhāding. You sent me a request [asking for my judgement in a lawsuit in which] a slave committed adultery with a Magara/Magar unmarried girl there, at the place [called] Vāphalachāpa, and he confessed [his crime] when interrogated by a [village] notable there. [Therefore] take out the eyes of the slave who did such a thing, cut off [his] nose, cut off [his] ears [and] cut off his genitals. Inflict such punishment and set [him] free. Monday, the 6th of the bright fortnight of Jyeṣṭha in the [Vikram] era year 1862. May there be auspiciousness.” (NGMPP E 2426/187).

286 See in Adam 1950: 164–168.

287 See NyāV, p. 244–247, parallel in NārSm 15/16.23–26 and 28–30.

288 *avanīṣvīvato(!) darpād vā vāṣṭau(!) chedayen nṛpaḥ. avamūtrayataḥ śiṣṇum(!) apaśabayato(!) guda(!).* (NyāV, p. 245, parallel in NārSm 15/16.27).

289 See MA-ED2/161 §1 and §10–11. However, a slave belonging to a Sacred Thread-wearer caste is not sentenced to death for having intercourse with a virgin girl from an Alcohol-drinking caste (MA-ED2/161 §11).

290 See MA-ED2/161 for a more detailed overview of this issue.

291 See Lariviere 1981: 1.

292 P. Olivelle (2000: 10) dates this text to the beginning of the third to the middle of the second century BCE.

fire (*agni*), water (*udaka*), poison (*viṣa*) and holy water (*koṣa*).²⁹³ B.H. Hodgson's account verifies that such techniques were practised during Nepal's pre-MA period.²⁹⁴ However, the procedures for the water ordeal presented in his account differ from the NyāV.²⁹⁵ In this context, K.K. Adhikari²⁹⁶ argues that trial by ordeal was a common practice in disputes over debts before the beginning of Rāñā rule. Nevertheless, available evidence does not suggest that trial by ordeal was a very common practice. For example, according to Hodgson,²⁹⁷ interrogation by ordeal could only be carried out upon approval of the king, and only when both parties, the complainant and defendant, agreed. F.B. Hamilton²⁹⁸ does note, though, that after the Gorkhālī conquest the practice of trial by ordeal became more frequent. B.H. Hodgson for his part states that trial by ordeal was conducted in not only civil but also criminal cases.²⁹⁹ In any event, the MA completely abolishes trial by ordeal. Under it, a judge who interrogates an offender by having him held under water would be similarly treated if the suspect dies.³⁰⁰ Furthermore, judges who base their decisions on ordeals are fined twenty rupees. Such decisions are rendered invalid and the case is brought before the court again. The MA explicitly provides for conducting trials on the basis of formalized procedures of interrogation.³⁰¹ Similarly, it abolishes some previously existing cruel practices, such as the *sīthi jujha*—a vigorous stone-throwing festival, which was started by Guṇakāmadeva at the Kañkeśvarī Kālī temple in Kathmandu and continued to be held annually.³⁰² Now, though, anyone who played such a game was liable to a fine of two rupees. If the fine was not paid, the culprit was put into prison.³⁰³ This and similar regulations were applied throughout the country,³⁰⁴ the strict ban on widow burning being especially noteworthy.³⁰⁵

293 *ghaṭo ḡnir udakaṃ viṣaṃ koṣaś ca paścamaḥ* (corr. *pañcamah*) (NyāV, p. 301, with a parallel in NārSm 20.6).

294 See Hodgson 1880 (vol. 2): 220–223.

295 NyāV, p. 311–313, with a parallel in NārSm 20.25–31.

296 See K.K. Adhikari 1984: 291 fn. 188.

297 See Hodgson 1880 (vol. 2): 220.

298 See Hamilton 1819: 103.

299 See Hodgson 1880 (vol. 2): 221.

300 See MA-ED2/49 §1.

301 See MA-ED2/49 §2.

302 See Wright 1877: 156 and also M. Bajracharya & Michaels 2016 (vol. 1): 59.

303 See MA-ED2/55 §1.

304 See MA-ED2/55 §2.

305 See Michaels 1993: 21–24 and 1994: 1213–1240.

Summing up, the MA was Nepal's first proper codification of law in which the concept of positive law was introduced as the guiding principle meant to place the country's sovereignty above any individual or certain powerful institutional interest. The concept of the rule of law was established, being grounded in the autonomy of the courts and in the Council as both the supreme legislative body and the final interpreter of the *Ain* whenever legal norms collided. While it is on the whole a homogeneous code of law, the MA, interestingly, still accepted a certain amount of legal relativism and legal pluralism within its unified legal framework. The specific ways in which it attempted to balance such dichotomies as patrimonialism and independent statehood, royal sovereignty and legal strictures on the king, divine kingship and patriotism is a reminder that global concepts require careful historical contextualization if some semblance of rationality to national trajectories is to be reconstructed.

1.6 The Various *Ains*: An Overview

The MA of 1854 was gradually refined, amended and expanded, often incorporating *ad hoc* ideas, and hence the different versions each stand out for a range of diverse notions, formulations and editorial characteristics. K. K. Adhikari notes major amendments of the MA in 1862, 1872, 1888, 1904, 1910, 1918, 1923, 1927–1928, 1930, 1933, 1942, 1947–1948 and 1955.³⁰⁶ The last version of the MA dates from 1962, and is vastly different from the first. In this section, I shall present the major amended versions of the MA.

1.6.1 The Major Amended Versions of the MA

The 1865–1867 version

K. K. Adhikari opines that one of the first major revisions of the MA of 1854 was executed in 1862.³⁰⁷ However, his assumption is neither referenced, nor has the edition in question ever surfaced. In his defence, A. Höfer notes an amended version prepared between 1865 and 1867

³⁰⁶ See K. K. Adhikari 1976: 107; compare Fezas 1990: 301–310.

³⁰⁷ See K. K. Adhikari 1976: 107.

(VS 1922–1924) that was neither completed nor published.³⁰⁸ As discussed above,³⁰⁹ scholars who have immersed themselves in the study of the MA often consider MA-ED2 to be the same as the first version, MA-1854. Nevertheless, the preface of the printed edition clearly states that it is based not on the *Ain* prepared in 1854,³¹⁰ but on a copy of the amended version of it prepared between 1865 and 1867 (VS 1922–1924).³¹¹ For example, section five of the Article ‘On Adultery’ was deleted in MA-ED2, which is but one event in the continuous transformation of the MA.³¹²

The first amended version added some new Articles and provisions, and deleted and corrected a number of sections. Although this version does not feature any fundamental change to the first edition of the MA, it nevertheless testifies to an ever-increasing wish to improve the original code.³¹³

The amended version of 1870

The MA was amended for the second time in 1870 (VS 1927).³¹⁴ Although the 1870 version again exhibits only a few changes to its predecessors of 1854 and 1865–1867, some of them turn out to be, in fact, quite crucial. In order to safeguard parity before the law, for example, the MA of 1854 had explicitly strengthened the power of the judges to the extent of allowing them to put the prime minister himself into prison were he to issue unlawful orders or indulge in nefarious activities:

308 See Höfer 2004: 1.

309 See Part I, 1.3.

310 [...] *1910 mā lekhiēko mūla prati sāthai tyo bhandā pachi laḡabhaga 1922–24 tira lekhiēko arko prati pani yo sāthai yasa mantrālayalāi prāpta bhaeko thiyo. tara yasa pratimā so avadhibhītra thapiēkā ra khāreja bhaekā sameta milāi lekhiēko dekhincha. [...] yasa prakāśanako lāgi pachillo pratilāi lieko cha.* “[...] The ministry received an original copy [of the MA] written in 1854 and another copy [of the MA] written around 1865–1867. It seems that the latter copy was written with portions being added to and deleted from [the former] during that time. [...] The later copy [is what] has been taken for publication.” (MA-ED2/preface).

311 The title of the Article seven of the *Ain* proves that this edition contains text that is later than this span of dates: *22 sāla aghidekhī rakam bujhāunyā ain* (the Regulations on the Fulfilment of Revenue Contracts before the Year [VS] 1922). See also Fezas 1990: 130.

312 See MA-ED2/134 §5.

313 For example, the Article 7 is added in the first emendation (see MA-ED2/7).

314 K.K. Adhikari (1976: 107) mentions that a major amendment of the MA was made in 1872. However, no such version has so far been recognized by the scholarly community. It is not impossible, then, that this was a simple slip of the pen, Adhikari having intended to write 1870.

If a *pramāṅgī* (written order) is issued by the thrice venerable great king, prime minister, general, colonel or any other person to the *hākima*/head of a court directing him to set free a person who has been put in prison for having confessed to a crime but who has not yet signed a letter of confession or is still under interrogation, the *hākima*/head of the court shall once write [pertinent] details [to the issuer of the *pramāṅgī*]. If the [*pramāṅgī*] is again issued even after declaration of [pertinent] details, [the *hākima*/head of the court] shall put [the issuer of the *pramāṅgī*] into prison. If the *hākima*/head [of the court] fails to put [the issuer of the *pramāṅgī*] into prison, he (i.e., the *hākima*/head of the court) shall be fined 5 rupees.³¹⁵

In something of a backlash, however, the MA of 1870 retracted much of the judiciary's authority and immunity by adding a new section, which elevates high-ranking government officials above the *Ain*, as demonstrated clearly in the following:

If the king, minister, general, *cautarīyā*, royal priest, colonel, *kājī*, *saradāra*, *bhāradāra* [and] so forth gives an order to the *hākima*/head, *ḍiṭṭhā*, *bicārī*, *amālī* or *dvāryā* [and] so forth of an *adḍā*, *gauḍā*,³¹⁶ *adālata* or *ṭhānā* to reverse a court decision (lit. to have the winner lose and the loser win) [in a manner] that is not in keeping with the *Ain*, they shall request [the giver of the order,] saying: 'We have taken an oath to uphold the *dharma*, so we cannot do something that, by committing injustice, will lead us to hell.' If an order is given even after such a request is made, in spite of the fact that an injustice would be done according to

315 *adālatmā adālatakā hākimalē anyāya garnyālāi kāyelanāmā lekhāi sahi hālena bhani thunyākā belāmā athavā pūrpakṣa garnālāi thunyākā belāmā choḍī deu bhani pramāṅgāi śrī 3 mahārājako prāimminīstara janarala karṇela arūko āyo bhanyā eka paṭaka esto behorā ho bhani janāi paṭhāunu. janāyāpachi paṇi pheri choḍīdeu bhannyā pramāṅgī āyo bhanyā pramāṅgī bhai āunyālāi thunidinu. pramāṅgī bhai āunyālāi thūnna sakena bhanyā adālatakā hākimalāi 5 rūpaiyā jarivānā garnu.* (MA-ED2/45 §3).

316 *Gauḍā* (*Gauḍā*) has multiple meanings and functions. Firstly, it refers to a fortification or fortress. Secondly, certain districts were known as *gauḍā*, specifically Doti, Salyan, and Palpa in the West and Dhankuta in the east, as described by Adhikari (Adhikari 1979: 16). Thirdly, *gauḍā* also signifies a district office responsible for maintaining law and order in the districts referred to as *gauḍā*. According to Adhikari, these judicial offices were initially placed under the supervision of military officials, such as *kājīs* or *sardāras*, and later under generals and colonels. In the MA, the chief officer of a *gauḍā* is referred to as *hākima* or *mālīka*.

the *Ain*, [the *hākima*/head etc.] shall request [the following]: ‘Issue the order [in the form] of a [*lāla*]mohara or *daskhata* [to that effect], and I shall act accordingly.’ If a *lālamohara* or *daskhata* is issued, he shall do as written in the order. [...] ³¹⁷

In a marked departure from earlier versions, the MA of 1870 introduces the practice of tying the execution of justice to a solemn vow, a written oath in the name of divinity and the *dharmā* being required of judges set to be appointed to the courts.

During the annual re-allotment of posts (*pajani*) [including] assigning the government positions of head/*hākima* of a court, *ḍiṭṭhā*, *bicārī* and so on down to chief clerks, the *mukhtiyāra* shall assign (*dimu*) [the posts] to those who are capable of working and deemed able [to do so] in accordance with the *Ain*. He [the *mukhtiyāra*] shall not assign these posts to persons who are not worthy of them or who have been convicted of committing a crime. When assigning [these posts], [the *mukhtiyāra*] shall have [the qualified candidates] write a statement to the effect: ‘I shall hand down judgements in accordance with the *Ain* regarding matters dealt with in the *Ain*, bearing ethics and the *dharmā* in mind to the extent that my intellect and insight can. If something turns up which is not [dealt with in the *Ain*], I shall refer the matter to the *sarkāra* and shall act on his [written] orders, being true to his salt. If I do any injustice—take a bribe or show favouritism—[authorities] shall deal [with me] in accordance with the *Ain*.’ If the re-allotment is not done accordingly, [the assignment of positions] shall be refused. ³¹⁸

- 317 *aḍḍā gauḍā adālata ṭhānākā hākima ḍiṭṭhā bicārī amālī dvāryā gāihra lāi sarkāra laḡāeta miniṣṭara janarala cautarīyā guruprohita karṇaila kājī sardāra bhārādāra gāihrale kasaikā jhaḡaḍāmā māmilāmā hāmyālāi jītāi jītanyālāi harāideu bhani ainamā namilanyā kurāko hukuma marjī ājñā diyā bhanyā hāmīle dharmā bhākyāko cha anyāya gari āphu naraka pamyā kuro hāmī garna saktauna bhani binti garnu. so binti gardā ainamā nisāpha napamyā bhayā pani esai garideu bhanyā huñcha bhanyā mohora daskhatako sanada garibaksyosa ra sohi bamojima garuṃlā bhani binti garnu ra mohora daskhata garidiyā so sanadamā lekhyā bamojima garidinu. [...] (MA 1870 p. 77 §2).*
- 318 *mukhtiyārale adālatakā hākima ra ḍiṭṭhā bicārī mukhyakārindā sammako tainātha pāunyāko pajani gardā kāma garna sakanyā aina bamojima ṭhaharyākā mānisalāi dinu. belāyakkālāi ra kasurabandakālāi dina hudaina. didā merā buddhi akkalale bujhyā jānyā samma imāna dharmā samajhi aina bhayākā kurāmā aina bamojima insāpha garulā nabhayākā kurā pariāyā sarkāra sādhi hukuma marjī baksyā bamojima nimaka samajhi garulā. gho rosavata khāi maramolāhijāmā lāgi amnyāye garyā bhanyā aina bamojima*

Similarly, section 3 ‘On Court Arrangement’ no longer explicitly prescribes punishment for the prime minister if he deviates from the legal norms set out in the *Ain*. It is all the more interesting that religious sentiment here asserts itself over standards of jurisprudence established by the MA of 1854:

If it is known that, the king or the brothers or sons of the minister have interfered in a lawsuit by reversing the [court] decision (lit. by having the loser win and the winner lose), the minister shall undo such [a decision] and justice shall prevail in accordance with the *Ain*. If the minister does not do so, or if he himself, as the minister, reverses [a court decision] (lit. has the loser win and the winner lose), having taken a bribe, he shall be declared a bastard’s son (lit. born of two fathers) and untrue to [the king’s] salt. [Such] a minister shall be punished; by order of His Majesty, and if not by him, then the Lord will punish [him].³¹⁹

The interesting phenomenon here is that the MA of 1870 steps back from the secular jurisdictional practices put in place in the MA of 1854 to empower the courts with absolute autonomy. The MA of 1870 started limiting the autonomy of the judiciary with the aim of strengthening Rāṇā authority. In addition, editorial and linguistic changes apparent in the MA of 1870 markedly simplify the complex language structure of the 1854 MA, with many small sections supplanting what previously were long paragraphs ceremonial in tone.³²⁰ Unnecessary provisions have been deleted, and long sections have been rephrased. Illustrative of this stylistic reboot is a point to the fact that both the MA of 1854 and the first amended version narrate three lengthy stories to highlight reasons why one should not invest one’s fiscal resources in foreign lands,³²¹ whereas the MA of 1870 dispenses with such didactic elements and merely formulates restrictive bans on investment in foreign

garnu bhaṃnyā muculkā lekhāi dinu. so bamojima nagari diyā badara huncha. (MA 1870/1/1 §1).

319 *rājāle ra bajirakā bhāi chorā kaisaile kasaikā jhaijhaḡadā gaihra māmilā parnyāmā hārnyālāi jītāunyā jītanyālāi harāunyā garī chināyāko rahecha bhanyā testā māmilā bajirale ulṭāi aina bamojima nisāpha garidinu. eti kurā nagaryā ra arkāko ghusapesa khāi āphu bajira bhai jītanyālāi harāunyā hārnyālāi jītāunyā dui bābule janmāyāko nimaka harāma bajira ṭhaharcha. inalāi jarivānā garnu. śrī 5 mahārājadhīrājako hukuma vāhābāṭa nabhaḡā iśvarale sajāe garnan.* (MA 1870 p. 77 §3).

320 See MA 1870 p. 1–2 §§1–5.

321 See MA-ED2/1 §1.

countries: no one—from king to subjects—is to construct a temple, *dharmaśālā*, rest house, bridge, water spout, pond, resting place (*cau-tārā*), cremation site, well, garden or the like in a foreign realm.³²²

The amended version of 1885/1888

Another major alteration of the MA was carried out under the prime ministership of Vīra Samsera.³²³ Although completed, the final version only saw publication two years later, in 1888 (VS 1945). As stated in the preface to the *Ain*, the reason for this alteration was the belief that the previous 1870 MA was characterized by convoluted and obscure language, making it difficult to comprehend. Equally important, it was ambivalent in multiple instances. Many provisions of the earlier *Ain*, it averred, had not been stated clearly, and not only once, but repeatedly³²⁴ throughout the work, upending any claim to easy usability. It is these supposed drawbacks, which the MA of 1885 sought to correct, stating boldly on its very title page:

When the earlier *Ain* was being formed it became rather prolix, [many] of its provisions having been unnecessarily iterated twice [or even] three times, resulting in disparities in the applicability of penal measures—two to three [incompatible] provisions could be applicable to the same case. [Therefore,] Prime Minister Deva Samsera had [this] *Ain* produced which, being to the point, covers all the matters [as in the previous *Ain*] but so that one provision does not contradict another.³²⁵

The amended version was divided into five simplified chapters, with briefer Articles and a more compelling underlying structure. Material departures from the 1854 version remain minimal, at least with regard to the section on homicide. In other instances, emendations testify to

322 See MA 1870 p. 1 §1.

323 He attended his office from 5 March 1901 to 27 June 1901.

324 For example, the section 34 of the Article ‘Regarding the Throne’ is also placed as the section 61 of the Article ‘On Land’ (see MA-ED1/1 §34 and 5 §61).

325 *aḡhi āna bandā sāhrai lambāyamāna bhai ra doḡharā teḡharā smeta parī saḡāya smeta namīlyāko yakai muddā saḡā<..>nāmā 2|3 mahala lāḡnyā hunāle śrī 3 mahārāja bīrasamsera jaḡga rāḡā bāḡādūra [...] bāḡa choḡakarī tav- arasaga sabaikurā puḡnyā yekā mahalkā māmālā doḡrā mahalko āna nalāḡ- nyā garī banāibaksyāko āin.* (MA 1888/Cover page, in NGMPP E 1214/3).

the growing experience acquired in legal practice within the contemporary political culture. The notion of divine kingship is a case in point. As we have seen above, the MA of 1854 rhetorically provides the king an important role as a Hindu king within the given legal framework by defining the county as the only remaining Hindu kingdom in the Kali era, thereby signalling the purity and uniqueness of its polity. By contrast, the MA of 1885/1888 redefines the country as the “meritorious land which has Paśupati’s [Jyotir]liṅga and the venerable Guhyeśvarīpīṭha.”³²⁶ Poignantly, the king no longer enjoys any religiously or culturally derived legal privileges. At the same time, the prime minister’s position as delineated in the 1870 MA was significantly strengthened, since he was granted the authority to overturn court decisions, even if the principles on which they are founded are in clear accordance with the *Ain*. The following section demonstrates this well:

Do not set [a person] free if ordered by anyone other than the prime minister. If the commander-in-chief orders [somebody] to be set free, [the concerned authority] should provide him with information of [what led to] the imprisonment. If the commander-in-chief does not agree [to withdraw the request,] even after being so informed, the prime minister shall be informed. Even in the case where a *pramāṅgī* of the prime minister has been received, [the concerned authority] should take the [ordered] action only after informing [the prime minister of the said details].³²⁷

A further significant change is the restriction placed on widow burning (*satī polnu*), part of the amended provisions of the 1885/1888 MA. Although a theoretical restriction was introduced in the MA of 1854³²⁸—itself an initial step towards the full abolition of widow burning—the amended MA of 1885/1888 places stronger (i.e., more proactive) restrictions on widow burning by instructing local officials to actively dissuade widows from committing self-immolation. If their exhortations fall upon deaf ears, these officials are now bound to inform

326 [...] *śrī pasupati liṅga guhyeśvarīpīṭha bhayāko yasto puṇyabhūmī* [...]. (MA 1888/3/22 §1, in NGMPP E 1214/3).

327 *prāim mīnīṣṭara bāheka arule choḍideu bhanyā na choḍanu. kamyāṅḍara īna cīphale choḍideu bhanyā yo vyahorāmāsaga thuniyāko ho bhani jāhera garnu. jāhera gardā pani namānyā prāim mīnīṣṭarasaṅga jāhera garnu. prāim mīnīṣṭarako pramāṅgī āyā pani jāhera gari mātra garnu.* (MA 1888 p. 5 §13, in NGMPP E 1214/3).

328 See Michaels 1993 and 1994.

the local court or, where there was no major court in the area, any estate office. A widow is allowed to be burnt only if a decision to that effect is made by the court or office.³²⁹

The amended version of 1935

In 1935, a new version of the MA was prepared during the prime ministership of Juddha Samsera Rāṇā.³³⁰ This edition was in effect until the end of the Rāṇā regime (1950). One of the major changes of this edition was the abolition of slavery.³³¹ Compared to the latter two preceding editions of the MA, this edition contained more practical court procedures to shield the court from undue influence by outside authorities and to otherwise reinforce the autonomy of the judiciary.³³² The role of the king was further restricted by empowering the prime minister to take on the role of a court of appeals.³³³ The Bintūpatraniksārī Aḍḍā, a department directly under the prime minister, was given authority to evaluate petitions submitted to the prime minister.³³⁴ On the other hand, the prime minister was not given any power to overturn court decisions:

If a *pramāṅgī* is issued [directing judges] to [settle] a case by taking a view that accords with an order from the prime minister or a *marjī* from the commander-in-chief, then if one can, on the basis of the *Ain* and *savālas*, act in accordance with the *pramāṅgī*, [the judges] shall accept [it] and so act on the basis of the *Ain* and *savālas*. If one cannot so act in accordance with the *pramāṅgī*, [the judges] shall not accept such a *pramāṅgī*. [It] shall be sent back [to the issuer]. If such a [*pramāṅgī*] is returned, the Bintūpatraniksārī Aḍḍā shall inform [the prime minister or

329 See MA 1888/4/17 §1, in NGMPP E 1214/3.

330 Juddha Samsera held office from 1 September 1932 to 29 November 1945.

331 See Höfer 2004: 1. For a detailed discussion on the topic, see Bajracharya (2022).

332 See MA 1935 p. 1–129, in NGMPP E 1415/3.

333 See MA 1935 p. 139–145, in NGMPP E 1415/3.

334 For example, the following section explicitly forbids anyone other than the prime minister to issue *pramāṅgīs*: *prāim miniṣṭara bāheka aru kasaile pani enamā virodha parna nyāyako anyāya hune pramāṅgī dina ra addāle panī so bamojima garna humdāina. gareko bhae panī badara huncha*. “No one other than the prime minister shall issue a *pramāṅgī* which goes against [provisions] in the *Ain* or which turns justice into injustice. Nor shall the Aḍḍā take any action in accordance with such a *pramāṅgī*. If any action is taken, it is invalid.” (MA 1935 p. 142, in NGMPP E 1415/3).

commander-in-chief] and send it [back] to the [judges] [only] after the criteria of the *Ain* and *savālas* are met.³³⁵

The prime minister, then, was entitled to order the courts to reinvestigate and re-evaluate cases in instances where petitions yielded substantial evidence of error.

The MA of 1963, a proud project of King Mahendra's, 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. As pointed out by S. Kumar,³³⁶ the pre-Mahendra MAs did not constitute the entirety of the law. Therefore, after the promulgation of the MAs, various other legal documents such as *khadganisānas*,³³⁷ *sanadas*, *savālas* and *rukkās* were issued by the king, prime minister and other officials. Given the enormous number of supplementary laws, it was difficult for court officials to master the intricacies of particular aspects of the law. Therefore, fifteen years after the downfall of the Rāṇā regime, Mahendra formed a law commission to draft a new MA, which he then decreed. It was again divided into five parts and contained procedural, and civil and criminal laws. The major revolutionary concept of this MA was the abolition of the caste system, resulting in a new age of social development. Further, it regulated child marriage, provided property rights for women to an extent and also abolished polygamy. However, regardless of the abolition of caste system, the new MA held firm to the concept of a confessional Hindu state, as envisioned from the first MA of 1854 on.³³⁸

To sum up, the basic norms of the legal system as introduced by Jaṅga Bahādura Rāṇā in the MA of 1854 remained in place until the end of Rāṇā regime. The legitimacy in the 1854 MA, based on a shared collective identity grounded in strong moral-affective ties between the state domain and subjects, subsequently became the reference point for all further development of the succeeding *Ains*. Therefore, as A. Höfer

335 *prāim miniṣṭarakā hukuma mutābika ra mukhatyārakā marjī mutābika herneko pramāṅgi bhāi āemā aina savālale so pramāṅgi bamojīma garna hune rahecha bhane bujhī lī aina savālako rīta puryāi so bamojīma garnū. aina savālale so pramāṅgi bamojīma garna nahune rahecha bhane testo pramāṅgi bujhīlinu pardaina; phirtā garī paṭhāi dinū; testo phirtā āemā bintipatra niksārī adḍābāta doharyāi jāhera garī aina savālako rīta puryāi paṭhāi dinū.* (MA 1935 p. 146–147, in NGMPP E 1415/3)

336 See Kumar 1964: 62–63.

337 *Khadganisānas* were executive orders issued by the Rāṇā prime minister, typically bearing a seal with the image of a sword (*khadga nisānā*).

338 See MA-1963.

Table 1: A list of the major amendments to the MA after 1963

Amendment and Supplement	Date
First	1964 (VS 2021)
Contract Law (<i>karāra ain</i>)	1966 (VS 2023)
Second	1967 (VS 2024)
Third	1968 (VS 2025)
Fourth	1970 (VS 2027)
Fifth	1974 (VS 2031)
Evidentiary Law (<i>pramāṇa ain</i>)	1974 (VS 2031)
Sixth	1976 (VS 2033)
Seventh	1978 (VS 2034)
Eighth	1985 (VS 2042)
Ninth	1986 (VS 2043)
Law Repealing Some Nepalese Statutes (<i>kehī nepāla kānūna khāreja garne ain</i>)	1990 (VS 2047)
Law Amending Some Procedural Nepalese Laws (<i>kārabāhīsambandhī kehī nepāla ain saṃśodhana ain</i>)	1990 (VS 2047)
Law Amending Some Nepalese Laws (<i>kehī nepāla ain saṃśodhana garne ain</i>)	1992 (VS 2049)
Law Relating to Children (<i>bālabālikāsambandhī ain</i>)	1992 (VS 2049)
Tenth	1993 (VS 2050)
Law Amending Some Nepalese Laws (<i>kehī nepāla ain saṃśodhana garne ain</i>)	1999 (VS 2055)
Law Amending Slaughterhouse and Meat Inspection [Regulations] (<i>paśuvadhaśālā tathā māsu parīkṣaṇa saṃśodhana garne ain</i>)	1999 (VS 2055)
Law Amending Some Nepalese Laws Relating to Punishment (<i>daṇḍa sajāyasambandhī kehī nepāla ain saṃśodhana garne ain</i>)	1999 (VS 2056)
Contract Law (<i>karāra ain</i>)	2000 (VS 2057)
Some Nepalese Laws Relating to Court Procedures and the Administering of Justice (<i>adālata vyavasthāpana tathā nyāya praśāsanāsambandhī kehī nepāla ain</i>)	2002 (VS 2059)

Table 1 (continued)

Amendment and Supplement	Date
Eleventh	2002 (VS 2059)
Law Amending Some Nepalese Laws (<i>kehī nepāla kāmūna saṃśodhana garne ain</i>)	2006 (VS 2063)
Law Amending Some Nepalese Laws in order to Establish Gender Equality (<i>samānatā kāyama garna kehī nepāla ain saṃśodhana garne ain</i>)	2006 (VS 2063)
Twelfth	2007 (VS 2064)
Law to Strengthen the Republic and to Amend Some Nepal Statutes (<i>gaṇatantra sudhṛḍhikaraṇa tathā kehī nepāla kāmūna saṃśodhana garne ain</i>)	2010 (VS 2066)
Law to Amend Some Nepalese Laws in order to Establish Gender Equality and End Gender Violence (<i>laiṅgika samānatā kāyama garna tathā laiṅgika hiṃsā antya garna kehī nepāla ainlāi saṃśodhana garne ain</i>)	2015 (VS 2072)
Law Amending Some Nepalese Laws (<i>kehī nepāla ain saṃśodhana garne ain</i>)	2016 (VS 2072)

rightly understood,³³⁹ the MA of 1854 cannot be taken as having strengthened the dictatorial power of the Rāṇā regime. On the contrary, it institutionalized a new political culture under Jaṅga Bahādura Rāṇā, who was provided with well-defined executive powers to the detriment of other domestic institutions, first and foremost the monarchy.

The major amendments of the MA after 1963 are listed in Table 1.³⁴⁰

1.7 The Caste System in the MA

The concepts of purity (*śuddha*) and pollution (*aśuddha*) are key structural elements of everyday life in pre-modern Nepalese society. Religious values and moral conduct are defined in terms of them. Impurity comes about either because of impure acts as defined by custom, or because of birth—by being born into a lower caste. For example,

³³⁹ See Höfer 2004: 2.

³⁴⁰ The table is based on the seventh (MA-ED-7A), ninth (MA-ED-9A) and tenth (MA-ED-10A) editions of the MA. Compare the table given in the translation of the MA-1963 prepared by the Nepal Law Commission.

drinking liquor is considered as an impure act for Sacred Thread-wearing caste groups in the MA.³⁴¹ The following section demonstrates this:

If anyone belonging to a Sacred Thread-wearing caste group drinks liquor which he has either made at home, brought from somewhere else or gone somewhere else [to consume,] and if he also contaminates fellow caste members [by eating] cooked rice [together with them], his share of property shall be confiscated in accordance with the *Ain*, his Sacred Thread shall be removed and his caste status shall be degraded to the pure caste of Non-enslavable Alcohol-drinker. If he has not contaminated fellow caste members [by eating] cooked rice [together with them], his share of property shall not be confiscated; only his Sacred Thread shall be removed and his caste status shall be degraded into [that of a] Non-enslavable Alcohol-drinker.³⁴²

Similarly, the MA categorizes Kāmīs, Sārkiīs, Cunāras, Hurkyās, Poḍhyās etc. as impure caste groups because of their low birth.³⁴³

There has already been much discussion of the caste system (*jāti/jāta*).³⁴⁴ According to D. Quigley,³⁴⁵ the terms *varṇa* and *jāti* are indiscriminately translated as caste in various European sources. Since the terms *varṇa* and *jāti* are two different indigenous concepts in Hindu culture, the term ‘caste’ cannot stand for both. Quigley interprets *jāti* and *varṇa* as follows:

It is very clear, then, that *varṇa* and *jāti* are two different concepts, yet both have been translated as ‘caste.’ What exactly is the correspondence between them? Perhaps the most widespread

341 The MA strictly bases its regulation of drinking liquor on the shastric practice. The *sāstras* explicitly forbid the twice-born from drinking liquor. For example, the ApDhS (1.25.3) states *surāpo gnisparśiṃ surāṃ pibet*. “A man who has drunk liquor should [be made to] drink burning hot liquor.” Similarly, the GDhS (23.1.2) and VDhS (20.19.22) explicitly state that no penance can purify a twice-born who has drunk liquor; death is the only mean of his purification.

342 *tāgādhāri jāta gairha kasaile āphule gharamā banāi havas aṃtavāta lyāi havas aṃta gai havas jāni jāni jāda raksī śāi āphnā bhatāhālāi smet bhātamā borecha bhanyā ain bamojimko aṃsa sarvasva gari janai jhiki namāsinyā matavāli śuddha jātamā milāidinu. bhatāhālāi bhātamā boryāko rahenacha bhanyā sarvasva hudaina. janai mātra jhiki namāsinyā matavāli jātamā milāi choḍidinu.* (MA-ED2/87 §12).

343 See MA-ED2/160 §17.

344 See, for example, Dumont 1980, Quigley 1993, Bayly 1999; and Michaels 2005a and 2005b.

345 See Quigley 1993: 4.

opinion is that *varṇa* is simply a theoretical category never actually encountered on the ground while *jāti* is the ‘real’ operation unit, the real caste. [As] ... many Hindus themselves profess, the world is actually made up of units called *jāti* any one of which can, in theory, be slotted into one of the more embracing *varṇa* categories, or into the residual category of Untouchables.³⁴⁶

However, the MA—in contradiction to the common understanding³⁴⁷—uses the term *jāta* to refer to both, caste class (*varṇa*) and caste group (*jāti*).³⁴⁸ For example, Upādhyāya Brahmins, Jaisī Brahmins, and Rājapūtas are referred to as *brāhmaṇa jāta*,³⁴⁹ *jaisī jāta*³⁵⁰ and *rājapūta jāta*³⁵¹ respectively. Such uses of the term *jāta* seem to follow the Hindu *varṇa*-system. However, the MA also terms the Meciās, a Terai indigenous ethnic group, the Meciā *jāta*, and Muslims the *musalmān jāta*, thus applying the term *jāta* to tribes and religious groups respectively. The following passage demonstrates this:

[The following decision was made on] Saturday, the first day of the bright fortnight of Pauṣa in the year [VS] 1917: It became apparent that the people of Mugalāna do not accept water [touched by] the Meciā caste, who live at Morang district in Madhesa of the Gorkhā realm, owing to the fact that they consume buffalo, pig and chicken meat. [The subjects of] our realm, too, do not accept water from the Meciā caste. While [discussing the question] in the Kausala of the *bhāradāras* whether water can be accepted from the members of Meciā caste or not from now [on], the Kausala of the *bhāradāras* decided the following: Water shall be accepted from Meciā for the [following] reasons: [a] water from Newar, Magara, Guruṅg, Bhoṭe and Lāpacyā is also accepted in our realm, although they, too, consume buffalo, pig, chicken, cow and elephant meat; [b] earlier, water had been accepted from the Meciā caste and sons and daughters of theirs are in the palace as slaves; [c] they do not accept water from Water-unacceptable and Untouchables and Muslims; [d] they respect Śiva as their God, and therefore

346 Quigley 1993: 5.

347 See, for example, Marriot & Inden 1985: 349.

348 See Höfer 2004: 85–87 for a detailed description regarding the interpretation of the term *jāta* in the context of the MA.

349 See MA-ED2/113 §1.

350 See MA-ED2/115 §3.

351 See MA-ED2/114 §1.

they are the caste whose path is Shaivism. From today onwards, whoever [belonging] to the Parvatīya Thāru caste does not accept water from Mecyā caste shall be fined 5 rupees. If the fine is not paid, he shall, in accordance with the *Ain*, be imprisoned.³⁵²

The socio-cultural and caste classifications of the people of Nepal in the 1854 MA are highly complex, reflecting the multitude of inter-mixed ethno-caste groups and diverse individual cultures.³⁵³ Since the caste system of Śāha and Rāṇā Nepal does not seem to follow the Brahmanical *varṇa*-system of dharmashastric practices, it is hard to reach a conclusion regarding the conceptual roots behind the caste system of nineteenth-century Nepal. In distinction to the Brahmanical orthodox *varṇa*-system laid down in dharmashastric texts, the features of the MA's caste system are based in part on dharmashastric ideas but more so on customary practices. For example, as mentioned above, the Mecyā caste was considered as Water-unacceptable (but probably Touchable) caste group in the MA of 1854. However, their caste status was upgraded as Water-acceptable in 1860.³⁵⁴ This indicates that Nepal's caste system was not always bound to Brahmanical orthodox thought. The above example shows that impurity was not a question of personal likes or dislikes but depended on social status, which was deeply rooted in customary practice. Neither any particular *śāstra* nor the state could interfere in the matter. The state was forced by circumstances to decide upon the purity status of the Mecyā community on the basis of established customary norms. This indicates that while the state played the role of lawgiver, it had no inclination to break with existing social practice irrespective of what the *śāstras* teach. The caste history of Nepal shows, rather, some flexibility when it comes to redefining the caste

352 *samvat 1917 sālā pauṣa sudi 1 rojā 7 mā bhayāko gorṣā bharamuluka madhye-ṣa jillā morañmā rahanyā mechyā jātale bhaisi sugura kuṣurā ṣānyā hunālē mogalāniyāharūle pāni ṣādā rahyānāchan ra hāmṛā mulukmā pāni mecyā jātako pāni ṣādām rahyānāchan aba i mecyā jātako pāni calana sakcha ki sakdāina bhani bhāradāri kausala hudā hāmṛā mulukmā bhaisi sugura kuṣurā gāi hātiko māsu ṣānyā nevāra maḡara gurū bhoṭyā lāpacyākā hātako pāni hāmṛā mulukmā calyāko cha i mecyā jātako tā aghi pāni calyāko rahecha inako chorāchori kamārā bhāi darbārasamma pāni aghi pugyākā rahayāchan inaharūle pāni nacalanyā achuti jātakā hātako ra musalamān jātakā hātako pāni pāni ṣādā rahayānāchan deutā siva māndā rahyāchan inaharū siva mārgi rahayāchan bhanyā inkā hātako pāni calcha bhāṇnyā bhāradāri kausalale ṭhaharāudā āja deṣi jo mecyā jātako pāni ṣādāina teslāt 5 rūpaiyā daṃḍa garnu. rūpaiyā natiryā aina bamojima kaida garnu. (MA-ED2/89 §49).*

353 See Höfer 2004: 6.

354 See MA-ED2/89 §49.

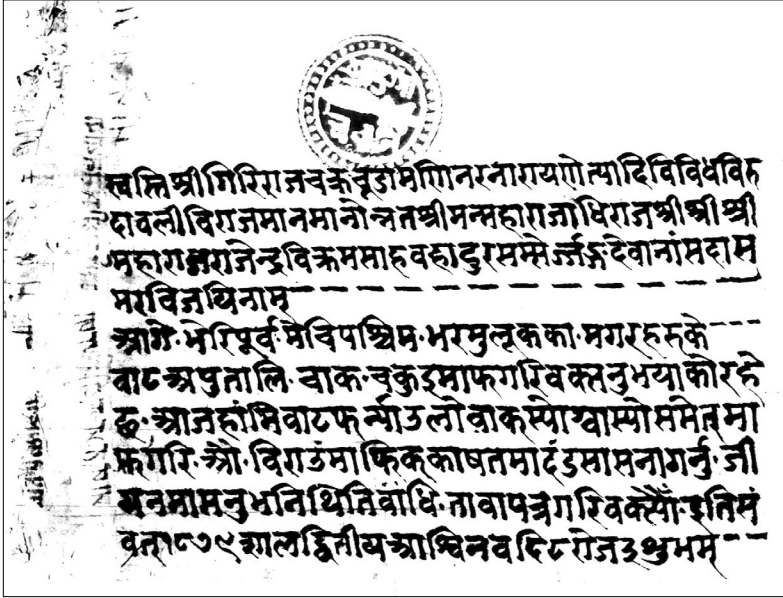


Figure 1: A *lālamohara* (DNA 14/28) issued by King Rājendra in 1822 (VS 1879)

status of certain categories of people. For example, the Magara caste group was upgraded to Non-enslavable Alcohol-drinkers in a *lālamohara* issued in 1822. It reads as follows (see Figure 1):

Hail! [A decree] of him who is shining with manifold rows of eulogy [such as], ‘the venerable crest-jewel of the multitude of mountain kings’ and Naranārāyaṇa (an epithet of Kṛṣṇa) etc., high in honour, the venerable supreme king of great kings, the thrice venerable great king, Rājendra Vikrama Bahādura Samsera Jaṅgadeva, the brave swordsman, the divine king always triumphant in war.

[Regarding the following]: To the Magaras throughout the Kingdom, east of the [river] Bherī and west of the [river] Mecī. It has come to our attention that ---1--- (i.e., venerable father of Rājendra) exempted you (i.e., Magaras) from the *aputālī*³⁵⁵ and

355 *Aputālī* is an adjective that denotes being ‘childless’, particularly in the context of a deceased man who has not left behind any male offspring. It refers to property that lacks a son as the rightful heir, thus becoming escheatable property or property that reverts to the state in the absence of a legitimate heir.

*cākacakui*³⁵⁶ [taxes]. Today we have exempted you also from the *pharnyāulo*³⁵⁷, *bāksyo* and *gvāsyo* [taxes]. Additionally, we have made [the following] regulation and [let it be written in] a copperplate: Regarding the crime of committing adultery, [Magaras] shall be punished with a fine but shall not be enslaved [anymore]. Tuesday, the 8th of Āśvina, in [Vikrama era] year 1879. May there be auspiciousness.³⁵⁸

The following subsection presents a brief overview of the caste system as laid out in the MA and prior to it.

1.7.1 History of the Caste System

An initial attempt to standardise and homogenise the caste hierarchy in Nepal was undertaken after the conquest of Kathmandu Valley by Pṛthvī Nārāyaṇa Śāha in 1769. According to B. Acharya, the king did not try to completely infuse Gorkhālī social and cultural practices into the Newar culture, nor did he entirely accept the previously existing Newar social and cultural practices of the Malla kingdoms.³⁵⁹ He aimed at a fusion of the pre-existing social and religious culture of Kathmandu Valley and the newly introduced Gorkhālī culture, in an effort to create a culturally more coherent kingdom. For example, a certain Machindra and his family of Dhalāche Ṭola in the city of Patan were punished with enslavement after Kathmandu was conquered by Pṛthvī Nārāyaṇa Śāha, and this resulted in their caste degradation. However, Gīrvāṇayuddha Śāha issued a *lālamohara* and emancipated Machindra and his family

356 *Cāka-cakui* is often translated as ‘adultery’ or ‘fine for adultery’. At times, it is also associated with the term ‘incest.’ Additionally, *cākacakui* refers to forms of marriage between different ethnic groups that do not align with the Hindu ideal of marriage, as described by Stiller (1976: 174). The term *cāka* pertains to a low-caste man who is punished by enslavement for a sexual offense, while *cakui* represents a low-caste woman who is similarly punished for a sexual offense (MA-ED2.86).

357 Incestuous sexual relations.

358 *swasti śrīgīrirājacakracūdāmaṇīnaranārāyaṇetyādivividhvirūdāvalī-virā-jamānamānonnataśrīmanmahārājādhirājaśrīśrīmahārāja-rājendravikramasāhahādhurasamserjjaṅgadevānāṃ sadā samaravijayinām --- āge bheri pūrva meci paścima bharamulūkakā magaraharūke. ---[I]---vāta aputālī cāka cakui māpha garivaksanu bhayāko rahecha. āja hāmivāta pharnyāulo vākasyo gvāsyo samet māpha gari au virāumāphik khatamā daṃḍa sāsanā garnu jīya namāsanu bhani thiti vādhi tāvāpatra garivaksyaū iti samvat 1879 śāla dviitīya āśvina vadi 8 roja 3 śubham ---.* (NGMPP DNA 14/28).

359 See B. Acharya 1963.

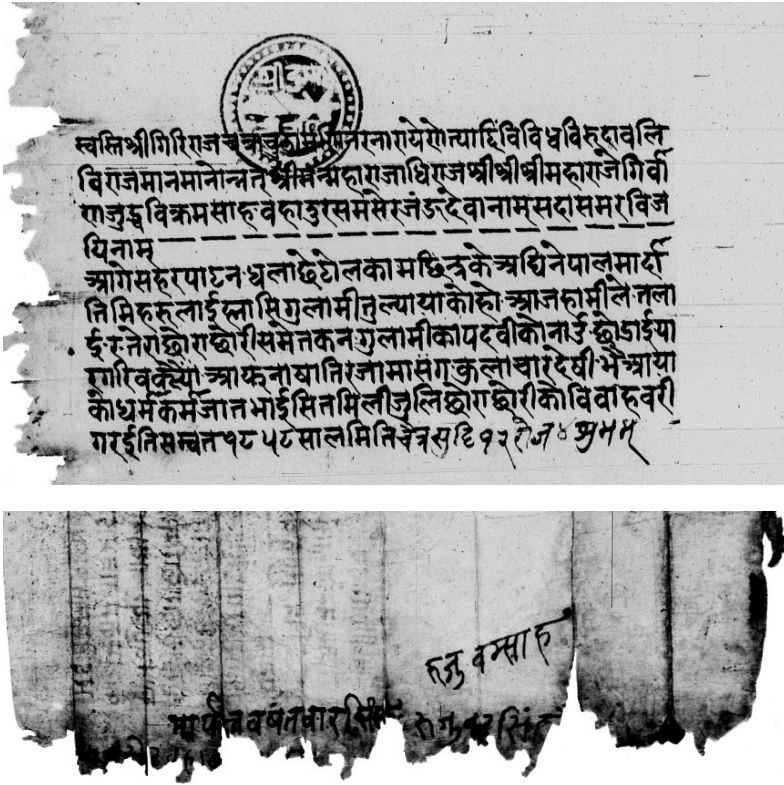


Figure 2: A *lālamohara* (DNA 12/65) issued by King Gīrvāṇayuddha in 1802 (VS 1858)

from slavery in 1801, thereby reversing the prior order and readmitting them into their former caste. The *lālamohara* reads (see Figure 2):

[Fol. 1r] Hail! [A decree] of him who is shining with manifold rows of eulogy [such as], ‘the venerable crest-jewel of the multitude of mountain kings’ and Naranārāyaṇa (an epithet of Kṛṣṇa) etc., high in honour, the venerable supreme king of great kings, the thrice venerable great king, Gīrvāṇayuddha Vikrama Śāha, the brave swordsman, the divine king always triumphant in war.

[Regarding] the following: To Machindra of Dhalāche Ṭola in the city of Patan. Earlier, when Nepāla (the Kathmandu Valley) was conquered, your community was uprooted and made slaves. Today, I have freed you and your sons and daughters by removing

the title of your status as slaves. Mindful of proper conduct (*khāti-rajāmā*), perform together with your fellow caste brothers the acts of *dharma* that have been passed down within the tradition of your clan and arrange marriages for your sons and daughters.

Wednesday, the 12th of the dark fortnight of Caitra in the [Vikrama era] year 1858. [May there be] auspiciousness.

[Fol. 1v] Attested by Bam Śāha, witnessed by Bakhatavāra Siṃha, attested by Sera Bahādura [and] attested by Narasiṃha.

There is no extensive historical evidence for an elaborate caste system in the Kathmandu Valley before the time of Jaya Sthiti Malla. However, there has been some speculation about its existence on the basis of a few Licchavi inscriptions. For example, N. R. Panta, quoting the Mānadeva and Vasantadeva inscriptions at Cāṅgu and the inscription in Thānakoṭa among others, argues that the caste system had been already established in the Valley by the sixth century.³⁶⁰ Since the quoted inscriptions merely refer to Brahmins, rituals, ritual gifts given to Brahmins and similar topics,³⁶¹ the evidence is not sufficient in order to be able to sketch out a complete picture of Brahmanical caste system in the Licchavi period. Still, with their references to Brahmins, such inscriptions provide some minor indications that aspects of the Brahmanical *varṇa*-system were influencing socio-political practices of that time.

A more comprehensive expression of the *varṇa*-system can be found in the NyāV sponsored by Jaya Sthiti Malla. For example, in defining the relation between Brahmins and the king, the NyāV puts the former at the top of the caste hierarchy: ‘[A seat] for Brahmins is mandatory [to be installed] in front of the seat of king. [The King] shall see all the Brahmins early in the morning and greet [them].’³⁶² Similarly, the following quote from NyāV draws a clear picture of the caste hierarchy imagined along the lines of the Brahmanical *varṇa*-system in the Malla kingdom:

360 See N. R. Panta 1964: 1–7.

361 For example, N. R. Panta (1964: 4) quotes: *viprebhṃ ’pi ca sarvvadā pradadaṭī tatpūṇyavṛdhṃyai dhanam* [...]. “[Queen Rājyavatī remained like Arundhatī] in that she always gave wealth to Brahmins in order to increase his (i.e., King Dharmadeva’s) merit [...].”

362 *bra(!)hmaṇasyāparihāro rājanyāsanam agrataḥ. prathamam darśanam prātaḥ sarvvēbhyaś cāpivādanam(!)*. (NyāV, p. 263, see parallel in NārSm 18.33). “A [sign of] the respect (lit. ‘lack of disrespect’ *aparihāra*) for Brahmins within a king is their seat in front [of him].”

A Kṣatriya who assails a Brahmin with harsh language shall incur a fine of one hundred [*paṇas*]. If [such an offence is committed by a Vaiśya], he shall be fined one hundred fifty [to] two hundred [*paṇas*], while [if it is committed by] a Śūdra, he shall undergo corporal punishment.³⁶³

The chronicles, for example the *Bhāṣāvamśāvalī* (BhV) and *Nepālīk-abhūpavaṃśāvalī* (NBhV), are other major sources with detailed accounts of the caste reformation and other regulations introduced by Jaya Sthiti Malla. References to Jaya Sthiti Malla's legal reforms can be seen also in the DivU of Pṛthvī Nārāyaṇa Śāha³⁶⁴ and in the MA.³⁶⁵ Thus, the NBhV narrates:

He (i.e., Jaya Sthiti Malla) made various laws in Nepāla, such as the following: one should not take the occupation specified for the caste other than those which have been assigned to one's own caste; people of low caste should live using specified kinds of dresses, ornaments, and houses; Kasāi should wear sleeveless *labedā*; Poḍhyā should not wear caps, *labedā*, shoes, and golden ornaments; Kasāi, Poḍhyā and Kulu should not tile their roofs; and everybody should obey people of higher caste than their own.³⁶⁶

Similarly, the BhV gives a detailed narration of Jaya Sthiti Malla's caste reformation. According to this text, a total of 725 castes were defined,³⁶⁷ with certain professions being assigned to them in accordance with their caste status.³⁶⁸ Similarly, the text *Jātimālā* (JM), attributed to Jaya

363 *śataṃ brahmaṇam(!) ākrūṣya kṣatriyo daṇḍam arhati. vaiśyo dvyardha(!) śata(!) dve vā śūdras tu vadham arhati.* (NyāV, p. 240; see for a parallel, NārSm 15/16.16–18). According to the ĀpDhS (2.27.14), the tongue of a Śūdra is to be chopped off if he hurls abusive words at a Brahmin with virtue.

364 See B.R. Acharya & N. Yogi 2013: 47 and Stiller 1989: 43.

365 The MA quotes Jaya Sthiti Malla's regulations 'on land and house measurements' twice. The following two sections demonstrate this: (i) "when demarcating the boundaries of city houses, measure [...] in accordance with the [following regulations] previously made by King Jyasthti Malla" (*saharkā gharako sādhasivānā gardā aghi rājā Jaya Sthiti mallale baṃdeja gari gayā bamojima [...] nāpī garnu.* MA-ED2/5 §38), (ii) "when measuring of land, *khetas* and *pākhās* in the hill regions, [do so] in accordance with [the following regulations] made by Jaya Sthiti Malla [...]." *pāhādakā jagā jamīna khetā pākhāko nāpī gardā aghi rājā Jaya Sthiti mallale baṃdeja garī gayābamojima [...].* (MA-ED2/5 §40).

366 NBhV (vol. 2), p. 85–86.

367 See BhV, p. 9.

368 See BhV, p. 45–51.

Sthiti Malla himself, identifies 82 caste groups.³⁶⁹ Table 2 shows the caste division presented in the NBhV and BhV.

The above table shows that Jaya Sthiti Malla started the process of implementing a strong Brahmanical *varṇa*-system in the Kathmandu Valley, one in which all subjects are assigned places within a strict hierarchical caste order. Brahmins are assigned the task of calculating astrologically auspicious days for Brahmins and Kṣatriyas to perform birth rites and sacrifices. Soldiers are supposed to bow down to the feet of Brahmins. Poḍhyās and Kasās, who are categorized as Untouchable caste groups in the MA, are not allowed even to wear caps, *labedās*, shoes or golden ornaments, or to tile their roofs, and are enjoined to pay open respect to members of the upper castes. Such examples indicate that the Brahmanical *varṇa*-system was systematically adopted during Jaya Sthiti Malla's regime. The following passage from the BhV illustrates just how strict it was:

If a Kṣatriya commits adultery with a Brahmin woman who still has a husband, he shall be taken across the river and killed with one stroke by the hand of a *cāṇḍāla*. If a Kṣatriya commits adultery with a Brahmin widow, he shall be punished by chopping off his genitals and fined 30 rupees. If he wants readmission into his caste, [he shall undertake] *prājāpatya*³⁷⁰ and *cāndrāyaṇa*³⁷¹ vows. If a Vaiśya commits adultery with a Brahmin woman who still has a husband, his genitals shall be chopped off and fined 120 rupees. No *cāndrāyaṇa* vow shall be undertaken by either

369 The colophon of the text reads: *jayasthitimallabhūpālena dharmasāstreḥya uddhṛtāḥ. iti śrī nepālīyajātīyamālā samāptā bhūyāt śubham*. “The glorious [text] Nepālīyajātīyamālā, which was extracted from the *dharmasāstras* by Jaya Sthiti Malla, protector of the earth, ends [here].” (See JM, p. 7–8 and Frese 2000: 258–260).

370 As per the MDh (11.212), an individual (twice-born ‘*dvija*’) who observes the *prājāpatya* penance should follow a specific eating regimen. This involves eating in the morning for three days and in the evening for three days, consuming only what is received without asking for three days, and finally abstaining from food entirely during the last three days of the penance (*try ahaṃ prātas try ahaṃ sāyaṃ try ahaṃ adyād ayācitam, try ahaṃ paraṃ ca nāśnīyāt prājāpatyaṃ caran dvijah*).

371 The *cāndrāyaṇa* penance, as described in the MDh (11.217), entails a specific practice related to food consumption and bathing. During the dark fortnight, one rice-ball is to be deducted from the daily food intake each day, gradually decreasing the quantity. Conversely, during the bright fortnight, one rice-ball is to be added to the daily food intake each day, gradually increasing the quantity. Additionally, the individual performing the penance is required to take three baths each day (*ekaikaṃ hrāsayet piṇḍaṃ kṛṣṇe śukle ca vardhayet, upa-śṛṣaṃstriṣavaṇam etac cāndrāyaṇaṃ smṛtam*).

Table 2: A list of caste groups mentioned in the different sections of the NBhV and BhV

Caste group	Profession according to the NBhV and BhV
Kasāī	should wear <i>bāhākaṭyā</i> dress, should play music instruments during others' funerary rites and slaughter buffaloes. Priest: <i>nāigubhāla</i> .
Nari	should make wall paintings. Priest: <i>gubhāla</i> .
Sabala	should cultivate their landlord's land. Priest: <i>gubhāla</i> .
Poḍhyā	should not wear a cap, <i>labedā</i> , shoes or golden ornaments.
Kasāī, Poḍhyā and Carmakāra	should not tile their roofs and should respect upper castes.
Daivajña and Joṣī	should investigate astrological matters and provide astrological counsel for Vaiśyas and Śūdras.
Brāhmaṇa	should calculate astrologically auspicious days for Brahmins and Kṣatriyas to perform birth rites and sacrifices.
Takṣakāra/Pichu	should take measurements relating to houses.
Citrakāra	should paint pictures.
Mahābrāhmaṇa Bhāṭa	should dye blankets (<i>pākhī</i>) and loincloths (<i>paṭukā</i>) etc. Priest: <i>gubhāla</i> .
Sālmī	should press oil. Priest: <i>gubhāla</i> .
Chipā	should dye fabrics. Priest: <i>gubhāla</i> .
Gaṭha and Mālī	should engage in the flower trade. Priest: <i>gubhāla</i> .
Khupala	should carry litters.
Jogī (ascetic)	should beg for alms.
Lohakarmi	should work iron. Priest: <i>gubhāla</i> .
Kumāla	should produce pots. Priest: <i>gubhāla</i> .
Nau	should shave the heads of all caste groups. Priest: <i>gubhāla</i> .
Bhaḍela	should do cooking.
Kasaṭa	should work bronze.
Ṭamoṭa/Tamoṭa	should work copper. Brahmins, Jaisīs or Ācāryas are their priests if they are Hindus; <i>gubhālas</i> , if Buddhists.

Table 2 (continued)

Caste group	Profession according to the NBhV and BhV
Mulmī/Śreṣṭha	should do trading. Brahmins, Jaisīs or Ācāryas are their priests if they are Hindus; <i>gubhālas</i> , if Buddhists.
Kisāni	should carry ritual materials and dispose of the offered oblations. Priest: <i>gubhāla</i> .
Bāḍā/Lukarmi	should work gold and silver. Priest: <i>gubhāla</i> .
Vajrācārya/Gubhāju	should worship the deities and perform sacrifices for the following caste groups: Citrakāra, Sālmī, Chipā, Bhāṭa, Gaṭha, Lohakarmi, Kumāla and Nāi; and should give <i>mantra</i> to Śreṣṭha, Jyāpu, Halavāi, Vārāhi, Sikarmi, Lohakarmi and Citrakāra, and to <i>gubhālas</i> . Priest: <i>gubhāla</i> .
Soldiers	should bow down to the feet of Brahmins to receive a blessing.
Samghaṭa	should wash clothes. Priest: <i>gubhāla</i> .
Ḍoma	should play musical instruments and have their wives dance.
Kusle	should play musical instruments during marriage ceremonies. Priest: someone from their own caste group.
Pulupulu	should play instruments during cremations. Priest: <i>gubhāla</i> .
Nakarmi	should work iron. Priest: <i>gubhāla</i> .
Pichīnīko	should provide initial maternity care if a child is born on an auspicious day. Priest: <i>gubhāla</i> .
Sudhyāni	should provide maternity care.
Mosaṭa	should pack meat at Kasāi shops. Priest: <i>gubhāla</i> .
Ṭepoca	should plant vegetables for sale. Priest: <i>gubhāla</i> .
Khusala	should play instruments during processions and provide help to Sālamis constructing procession chariots. Priest: <i>gubhāla</i> .
Gvāla	should raise cows and sell dairy products. Priest: Brahmin.
Udāsa	should trade in Lhasa. Priest: <i>gubhāla</i> .
Ṭaṭi	should make Sacred Threads (<i>janai</i>). Priest: Brahmin.

Table 2 (continued)

Caste group	Profession according to the NBhV and BhV
Vaidya	should offer medical treatment. Priest: Brahmin.
Badhai	should make incense etc. Priest: Brahmin (if they are Śaivas); <i>gubhāla</i> (if they are Buddhists).
Halavāi	should make sweets. Priest: <i>gubhāla</i> .

[offender or victim]. If a Vaiśya commits adultery with a Brahmin widow, he shall be punished by chopping off his genital and fined 60 rupees. The Brahmin woman shall not [undertake] a *cāndrāyaṇa* vow, [but] if the Vaiśya wants readmission into his caste, he shall undertake *prājāpatya* and *cāndrāyaṇa* vows ten times. If a Śūdra commits adultery with a Brahmin woman who still has a husband, his genitals shall be chopped off and be fed [them,] and he shall be executed by the hand of a *cāṇḍāla*. No *cāndrāyaṇa* [shall be undertaken] by the Brahmin woman. If a Śūdra commits adultery with a Brahmin widow, his genitals shall be chopped off and he shall be executed by a *cāṇḍāla*. No *cāndrāyaṇa* [shall be undertaken] by the Brahmin woman.³⁷²

Brahmins and Kṣatriyas from Gorkhā played a major role in creating the foundation of modern Nepal by supporting the territorial expansion of Prthvī Nārāyaṇa's kingdom, and from then on never loosened their close political ties with the Śāha and Rāṇā dynasties. According to M. S. Slusser,³⁷³ people from present northern India migrated to Nepal at the end of twelfth century, after the Moghul invasion of northern India.³⁷⁴ Brahmins from Mithila came to the south of Kathmandu,

372 *poi hunyā brahmaṇīmā chetrī gayo bhanyā kholāpāra laiṅā cāṇḍālakā hātale ekacoṭamā marnyāgarikana hānī mārnu. vidhavā brahmaṇīsaṅga kṣatrī gayo bhanyā liṅgaśāsanā garī sunasiṁhī rupaiṅyā 30 daṁḍa [garnu]. jātamā jānaparyo bhanyā prājāpatya cāndrāyaṇa. aijaṁ poi hunyā brahmaṇīmā vaiśya gayo bhanyā liṅga kātīdinu. sunasiṁhī ru 120 daṁḍa dūlāi cāndrāyaṇa nāsti. vidhavā brahmaṇīsaṅga vaiśyagayo bhanyā liṅga śāsana garī sunasiṁhī rupaiṅyā 60 daṁḍa [garnu]. brahmaṇīlāi cāndrāyaṇa nāsti. vaiśyalāi āphnā jātamā jānaparyo bhanyā 10 prājāpatya cāndrāyaṇa. poi hunyā brahmaṇīsaṅga śūdra gayo bhanyā liṅga kātī khuvāi cāṇḍālakā hātale kaṭānu [brā]hmaṇīlāi cāndrāyaṇa nāsti. vidhavā brahmaṇīmā śūdra gayo bhanyā liṅga kātī cāndālalale mārnu. brahmaṇīlāi cāndrāyaṇa nāsti. (BhV, p. 45).*

373 See Slusser 1982: 8.

374 B. R. Acharya states that Indian migrated to Nepal only in the fourteenth century (as cited in M. C. Regmi 1972: 93).

while other groups including Brahmins migrated to the Western hill regions. Since these latter did not come in big numbers, they adopted the local pastoral culture of the Khasas, a group who were contemporaries of the Licchavis. B.R. Acharya³⁷⁵ argues that the Khasa culture was slowly influenced by the newcomers, which resulted in the spread of a mixed culture throughout the Gaṇḍakī and Kirāta regions. For example, a child born to a Khasa hill woman by a Brahmin is referred to as a Khatri,³⁷⁶ which could doubtless be assigned to the shastric category of *varṇaśaṅkara*. By the sixteenth century, the so-called Rājapūtas, a mixed military aristocracy, formed many petty kingdoms in the Western hill regions.³⁷⁷ Gorkhā, founded by Dravya Śāha in 1559, was one of these kingdoms. Although the Khasas adopted basic Hindu norms, they probably did not follow the strict rules required under the Brahmanical caste hierarchy of the Āryans of Indian plains.³⁷⁸ For all their deviations from Brahmanical orthodoxy, they were provided with a loose Hindu identity. A famous series of edicts issued by King Rāma Śāha provides evidence that the Brahmanical social structure was already caste-hierarchical and it was perceived as a model system at that time. For example, the fifteenth edict states: ‘If one kills a Brahmin, one is guilty of murdering a Brahmin (*brahmahatā*); if [the offender] is not executed, the king incurs guilt.’³⁷⁹ This is in line with the *dharmashastric* practice of exempting Brahmins from the death penalty.³⁸⁰

1.7.2 The Caste Hierarchy in the MA

The caste system of Nepal is very complex, encompassing as it does the country’s vastly distinctive peoples and their individual cultures, religions and customary practices. The following account of it by Hodgson suffices to form a picture of this complexity during the pre-MA period:

[...] though both the *Gúrungs* and *Magars* still maintain their own vernacular tongues, Tartar faces, and careless manners, yet, what with military service for several generations under

375 Translated in M. C. Regmi 1972: 93.

376 See Bista 1972: 3.

377 See Slusser 1982: 8.

378 See S. M. Adhikari 1988: 23–24.

379 RŚEdict 15, tr. in Riccardi 1977: 53.

380 See GDhS 21.1–3 and MDh 11.55–59.

the predominant *Khas*, and what with the commerce of *Khas* males with their females, they have acquired the *Khas* language, though not to the oblivion of their own, and the *Khas* habits and sentiments, but with sundry reservations in favour with pristine liberty. As they have, however, with such grace as they could muster, submitted themselves to the ceremonial law of purity and to Brahman supremacy, they have been adopted as *Hindús*. But partly owing to the licenses above glanced at, and partly by reason of the necessity of distinctions of caste to Hinduism, they have been denied the thread, and constituted a doubtful order below it, and yet not *Vaisya* nor *Sudra*, but a something superior to both the latter—what I fancy it might puzzle the *Shastrís* to explain on *Hindú* principles.³⁸¹

The aim of the MA, as stated in the preamble, was to bring uniformity to the regime of punishments as based on the severity of the crime and the offender's caste status (*khata jāta māphika*), irrespective of his official rank.³⁸² However, the notion of *jāta māphika sajāya* 'punishment according to caste status' might seem to be at odds with the aim of bringing uniformity to penal law. As mentioned earlier, the caste status of an offender affects the degree of punishment to be imposed on him only if it relates to matters that concern impurity and pollution. Indeed, there are only a handful of exceptions in which an offender's caste status affects the type of punishment in crimes which are not related to matters of impurity. For example, Brahmins, women and certain groups of ascetics are not allowed to be sentenced to death in any lawsuit.³⁸³ The text of the MA shows no sign that the caste status of any individual plays any role in non-religious affairs. In seventy-five Articles in the MA—out of one hundred sixty-seven in total—dealing with non-religious state affairs, caste is at most of tangential relevance. The key principles of the caste system laid down in the MA concern the religious hierarchy but do not, that is, exert any notable influence on political and economic regulations. Thus, barring few exceptions, the MA does not concern itself with the caste status of an individual unless it has some connection with religious matters.

Broadly speaking, the MA introduces, as listed in the table below, the following four caste classes, which were meant to place major

381 See Hodgson 1874 (vol. 2): 39.

382 See MA-ED2/preamble.

383 See MA-ED2/1 § 1, and also MA-ED2/64 §§1, 3–4 and 6.

social groups in Nepal and beyond within a comprehensive framework. For example, various Brahmins from the Indian sub-continent, Europeans, and Muslims all have their place in the caste structure of the MA. Table 3 shows the caste hierarchy as conceived in the MA. Except for Upādhyāya and Jaisī Brahmins within the first category, the internal hierarchy within Sacred Thread-wearers, Non-enslavable Alcohol-drinkers and Enslavable Alcohol-drinkers are not clearly distinguished in the MA. However, the MA goes into detail about the internal caste hierarchy of Touchable Water-unacceptable and Untouchable Water-unacceptable castes. The caste groups in the table are arranged according to hierarchical order in cases where their status is clearly defined.³⁸⁴

Except for a few cases, the *Ain* does not provide explicit information regarding the association between specific caste groups (*jāta*) and caste classes (*varṇa*). This omission leads to various challenges. One such problem arises in the instance of the alcohol-drinking Kṣatriyas residing in the Western Himalayas. According to the *Ain*, these individuals do not fit into any prescribed caste category. Since they consume alcohol, they are unable to maintain their caste status as Kṣatriyas who wear the Sacred Thread. However, in customary practice, they are still considered Kṣatriyas by birth, although the *Ain* remains silent on this matter.

The MA often paraphrases the totality of the caste system as *cāra varṇa chattisa jāta* (lit. Four Varṇas and Thirty-six Jātas). As stated by P.R. Sharma and A. Höfer, this expression was meant to symbolically address the totality of individual caste groups in the country.³⁸⁵ The frequent occurrence of the terms *varṇa*, Brāhmaṇa, Kṣatriya, Vaiśya and Śūdra in the MA gives the wrong impression that the Brahmanical *varṇa*-system has been adopted in the MA. For example, neither the Water-unacceptable nor the Untouchable caste group is a feature of the Brahmanical *varṇa*-system. Similarly, the MA treats ascetics as one caste group, whereas in the Brahmanical *varṇa*-system they are conceived of as outside of the caste structure. Most ascetic sects refuse Vedic sacrifices.³⁸⁶ In ancient India, asceticism represented renouncement of the early stages of Brahmanical orthodox life.³⁸⁷ Since abandoning Vedic ritual activities and customary practices are key defining elements of asceticism, ascetics cannot fall under the Brahmanical caste structure, even though their monastic practices often mirror caste categories.

384 See Sharma 1977b: 282 and Höfer 2004: 9.

385 See Sharma 1977b: 281 and Höfer 2004: 88.

386 See Olivelle 1995 and 2006 for a further discussion of asceticism.

387 See Olivelle 2006: 70.

*Table 3: Symbolic order of the caste system. The table is sourced from Khatiwoda, Cubelic & Michaels (2021) on pages 31–33. On the basis of such categorical differentiations, the caste hierarchy of the *Ain* looks roughly as follows even though the position of some ethnic groups (* = Ethnic group) is not always clear.*

1. Caste group of the ‘Sacred Thread-wearers’ (*tāgādhārī*)

- Upādhyāya Brahmin
- Devabhāju (Newar Brahmins)
- Brahmins of foreign kingdoms: Terhaūte Brahmin, Bhaṭṭa Brahmin, Mar(a)haṭṭā-Brahmin, Nāgara Brahmin, Gujarātī Brahmin, Mahārāṣṭrīya Brahmin, Tailaṅgī Brahmin, Dravidian Brahmin, Brahmin of Madhesa
- Asala Rājapūta, Rājapūta, Chetrī/Kṣatriya (‘warrior’)
- Asala Jaisī Brahmin, Jaisī Brahmin, Dotyāla Jaisī, Jumlī Jaisī, Duī-Liṅga-Jaisī, Tīna-Liṅga Jaisī, Cāra-Liṅga Jaisī
- High Newar castes such as Tharaghara, Asala Śreṣṭha
- Hamāla
- Bhāṭa/Bhāṭa Jaisī
- Some ascetic sects (such as Jogī, Jaṅgama, Sannyāsī, Sevaḍā, Kanaphaṭṭā, Udāsī, Baghara, etc.)

2. Caste group of the ‘Non-enslavable Alcohol-drinkers’ (*namāsinyā matuvālī*)

- *Guruṅga
- *Magara
- *Ghale
- *Sunuvāra
- *Limbu, Kirātī
- *Newar castes from whose members water is acceptable

3. Caste group of the ‘Enslavable Alcohol-drinkers’ (*māsinyā matvālī*)

- *Bhoṭe (ethnic groups who speak Tibeto-Burmese languages)
 - *Cepāna/Cepānga
 - Danuvāra
 - Hāyu
 - Darai
 - *Kumāla
 - *Paharī
 - Ghartī (descendants of freed slaves) from hill regions, also called Pāre Ghartī
 - *Lāpacyā (Lepcha)
 - *Mājhī
 - *Thokryā
 - *Galahaṭyā
 - *Newar castes from whose members water is unacceptable
-

Table 3 (continued)

<p>4. Water-unacceptable but Touchable castes (<i>pāni nacalnyā choi chiṭo hālnu naparnyā</i>) according to MA-ED2/160 §17.</p> <ul style="list-style-type: none"> • Muslim (Musalamāna) • Telī of Madhesa (Oil sellers) • Kasāī (butchers) • *Kusle (Newar caste who brush and sweep the courtyards of the palaces, of the houses of high-ranking officials or in the temples, and play musical instruments in the temples) • Dhobī (washermen) • *Kulu (leather-workers) • Christians, Mleccha (European) • Curaute (Muslim bracelet sellers, mainly in the Kathmandu Valley) • Kalavāra (brewers, merchants) • *Mecyā
<hr/> <p>5. Untouchable castes (<i>pāni nacalnyā choi chiṭo hālnu parnyā</i>) according to MA-ED2/160 §17</p> <ul style="list-style-type: none"> • Sārki (tanners, shoemakers) • Kāmī (blacksmith) • Cunāro/Cunāra • Hurkyā • Damāī (tailors and musicians) • Gāine (singers, players of musical instruments and beggars) • Bādi Bhāḍa (singers, dancers and beggars) • Cyāmakhala (Newar scavengers) • Kaḍārā (stemming from unions between Kāmī and Sārki) <hr/>

The caste regulations assiduously laid down in the MA are centred on the bodily purity or impurity of a person. The degree of purity possessed depends upon caste status. For example, Brahmins possess the highest degree of purity in comparison with the other three caste classes. The lower one's caste status, the less purity one possesses. However, one can lose one's purity either permanently or temporarily, mainly through different kinds of physical contact with low-caste persons or consuming tabooed food, and also through certain crimes. More than half the content of the MA deals with impurity and pollution, whether coming from impure food or various forms of contact (such as adultery, marriage, commensality etc.) with low-caste persons. As an example, I shall analyse the regulations from the Article 'On Drinking Alcohol and Untouchability' (*madapāna achutī*).³⁸⁸

388 See MA-ED2/87.

Article 87: Regulations regarding drinking alcohol and untouchability

Basic categories

1. Castes

The Article on ‘Drinking Alcohol and Untouchability’ refers to offenders and victims only by their caste class but not, as in most Articles, by their individual caste group.³⁸⁹ The only exception is in the second section,³⁹⁰ where Christians, Muslims, Kāmīs, Sārkiīs, Damāīs are mentioned as individual castes and classified as Water-unacceptable and Untouchable caste groups.

2. Food items

Similarly, under normal circumstances, food is divided into two categories, edible (*bhakṣya*) and inedible (*abhakṣya*). What is edible object for lower caste groups may be inedible for upper groups. For instance, chicken is not edible for Sacred Thread-wearers but edible for Water-unacceptable groups and Untouchables. Several passages³⁹¹ deal with what can and cannot be accepted from the impure and lowest caste groups, namely, Water-unacceptable but Touchable and Water-unacceptable and Untouchable. Raw grain including rice, everything which has not been washed or mixed with water, raw fish, meat, tobacco for the hookah, perfume, spices, and fruits with a sweet scent, are classified as pure, although they have been touched or kept by impure caste groups. A clay vessel is not considered impure unless it is filled with water. Similarly, Chinese pots, bottles, drinking glasses and pots made out of wood are pure. Liquor, chicken meat, beef and buffalo meat are forbidden for Sacred Thread-wearers. An exception is he-goats, which are edible by Sacred Thread-wearers under Nepalese customary law. If an Untouchable touches certain objects, the transfer of his impurity to the receiver can be averted either by throwing the object away, if it cannot be purified, or by purifying it ritually. Some objects are acceptable even from Untouchable caste groups as long as the object has not come into contact with water.

389 See, for example, MA-ED2/61 and 62.

390 See MA-ED2/87 §2.

391 See MA-ED2/87 §§1–9.

3. Punishments

The following degrees of punishment are prescribed in this Article of the MA for offences relating to drinking liquor and untouchability:

- A fine (to be paid to the government) including compensation depending on the damage caused (*biga barābara jarivānā*), an expiatory fine (*patiṃyā*) and a fine for purification §§1, 4, 6, 8–9, 13–14, 16–19 and 21–25
- Imprisonment (*kaida garnu*) §§4, 7, 8, 15–16, 18 and 20–21
- Penance together with the ritual of offering a cow to the *dharmādhikārin* §5
- The ritual of offering a cow to a Brahmin for purification (*prāyaścitta godāna*) §6
- Confiscation of property §§7, 12 and 15
- Enslavement (*māsidinu*) §§7 and 15
- Exile (*deśa nikālā garnu*) §7
- An ordinary bath (*nityasnāna*) §10
- Caste degradation (*tallo jātamā milāunu*) §§12 and 15–16
- Performing a purification ritual according to the tradition of one's own caste (*jātako rīta garī śuddha*) §§15–16
- Rice defilement (*bhātabāheka*) §4

4. Offenders

Similarly, offenders are distinguished along the following lines:

- those who knowingly, deceitfully and forcibly commit a crime,
- those who deceive themselves into committing a crime,
- those who commit a crime while intoxicated,
- those who commit a crime by mistake or under outside compulsion and
- those who commit a crime because of certain circumstances.

The degree of punishment is the highest for an offender of group (a) and decreases in descending order for the lower groups. Table 4 presents examples which clarify the descending degrees of punishments.

Moreover, punishment for a violation of purity rules concerning food decreases according to the receiver's status. Table 5 shows that the degrees of the punishment for offenders is wholly based on the caste group of the victims ('receivers' in the table). As we see in the table, the lower the victim's caste group, the less the punishment for the offender. Conversely, the punishment is higher, the higher the victim's caste group. However, it is clear from the above table that even the

Table 4: Degree of punishment according to the nature of crime

Group	Nature of the crime	Punishment
a	Deceitfully feeding cooked rice to a member of an upper caste §7	enslavement if an Enslavable, confiscation of property and exile if a Non-enslavable
b	Knowingly accepting liquor etc. or taboo food from a Non-enslavable Alcohol-drinker §5	caste degradation
c	Polluting objects belonging to a member of an upper caste while intoxicated §1	compensation depending on the damage caused and a fine of 5 rupees
d	Accepting taboo food from an Untouchable by mistake or under compulsion §19	purification by performing a ritual according to the tradition of one's own caste
e	Entering into the house of an Untouchable to act as a midwife in case of emergency §10	an ordinary bath (no expiation is necessary)

lowest caste group is not outside the purity–pollution scale. For example, if a Brahmin knowingly, forcibly or deceitfully feeds taboo food to an Untouchable, he, too, is fined, which gives the lie to the notion that Untouchables are impure by birth and that external impurity cannot increase their impurity. Thus the hierarchical order presented in the MA seems to be a reflection of practised customs ‘as they have “come to be” among the various castes and which are now codified as such.’³⁹²

Nepal has become a common ground shared by various historical ethnic and caste groups. In a survey conducted by the Central Bureau of Statistics (CBS), 60 caste groups were tabulated on the basis of the 1991 census. This number reached 100 and 125 respectively for the 2001 and 2011 censuses. For 2002, 81 cultural groups were tabulated.³⁹³ Similarly, the Dalita Āyoga listed 29 separate cultural groups among Untouchable castes.³⁹⁴ The complexity of Nepalese caste society raises the question as to how the MA went about establishing a hierarchy of castes within such a mixed social context. Barring a few individual enumerations of caste

392 See Höfer 2004: 72.

393 See Central Bureau of Statistics 2014: 3.

394 See Central Bureau of Statistics 2014: 3.

Table 5: Degrees of punishment according to caste status for breaking food-offering rules

Offerer's caste group	Receiver's Caste group	Offering taboo food	Punishment to the offerer
Sacred Thread-wearer and Non-enslavable Alcohol-drinker	Sacred Thread-wearer	knowingly, forcibly or deceitfully	confiscation of all property in accordance with the <i>Ain</i> and imprisonment for one year and enslavement (if Enslavable)
Sacred Thread-wearer and Non-enslavable Alcohol-drinker	Non-enslavable Alcohol-drinker	knowingly, forcibly or deceitfully	fine of 50 rupees and enslavement (if Enslavable)
Sacred Thread-wearer, Enslavable Alcohol-drinker or Non-enslavable Alcohol-drinker	Enslavable Alcohol-drinker	knowingly, forcibly or deceitfully	fine of 25 rupees
Sacred Thread-wearer, Non-enslavable Alcohol-drinker, Enslavable Alcohol-drinker or Untouchable	Water-unacceptable but Touchable	knowingly, forcibly or deceitfully	fine of 12 rupees
Sacred Thread-wearer, Non-enslavable Alcohol-drinker, Enslavable Alcohol-drinker, Water-unacceptable but Touchable or Untouchable	Untouchable	knowingly, forcibly or deceitfully	fine of 6 rupees

groups in several Articles and sections,³⁹⁵ the MA seldom mentions such groups individually (see Table 2). This suggests that the aim of the MA was to create a broad legal framework that took account of the dominant Hindu caste customs of pre-modern Nepal without attempting to create a clear-cut status for all caste groups. One exception, however, is the internal hierarchy for the Untouchable caste groups drawn up on the basis of customary distinctions, as presented in Table 6.

395 See, for example, MA-ED2/145 §§ 8–12 and MA-ED2/147 § 3.

Table 6: Internal hierarchy among Untouchable castes

Caste group and its hierarchical order	Customary reason
1. Kasāī	they do not accept food from any other Untouchable castes, and high castes accept milk from them
2. Kusle	they do not accept food from a Cyāmyā, Poḍhyā, Bādī, Gāinyā, Damāī, Kaḍārā, Sārki, Kāmī, Kulu or Hindu Dhobī, and they clean temple premises and the courtyards of high officials
3. Hindu Dhobi	they do not accept food from a Cyāmyā, Poḍhyā, Bādī, Gāinyā, Damāī, Kaḍārā, Sārki, Kāmī or Kulu, and they do not wash laundry for Untouchable castes
4. Kulu	they do not accept food from a Cyāmyā, Poḍhyā, Bādī, Gāinyā, Damāī, Kaḍārā, Sārki or Kāmī
5. Sārki and Kāmī	they do not accept food from a Kaḍārā
6. Kaḍārā (offspring from a Sārki man and Kamyāni or vice versa)	they do not accept food from Damāīs, but Damāīs accept food from them
7. Damāī	they do not accept food from a Gāinyā and do not accept their offspring as fellow caste members if they are born to a Gāinyā woman
8. Gāinyā	they do not accept food from a Bādī
9. Bādī	they do not accept food from a Cyāmyā or Poḍhyā
10. Poḍhyā	they do not accept food from Poḍhyās who consume others' leftovers
11. Clan of Cyāmyās	they accept leftovers from the high castes down to Poḍhyās

1.7.3 Were Caste Regulations a Strategy for Hinduization?

Scholars often theorize the caste regulations laid down in the MA as a strategy for establishing the supremacy of Hindu values and the reinforcement of Hindu norms.³⁹⁶ Since one of the major aims of the codification was to protect the autonomy of the country from British

396 See for example, Sharma 1977b: 285 and 293; and Michaels 2005b: 8.

imperialism by creating an effective unified legal bond between the state and its diverse subjects, the MA declared that Nepal was the only Hindu kingdom in the Kali era. However, such a claim was political propaganda meant to rhetorically warn the British not to threaten the country's autonomy. In order to convince oneself of this, a careful review of the structure of the Law Council (Ain Kausala) responsible for the formulation of the MA is required. That Council had 219 members and consisted of all the senior Rāṇās, royal noblemen (*bhāradāra*), royal priests and civil, judicial and military functionaries, but only a limited number of Brahmins. Figure 3 shows the distribution of the caste groups in the Law Council which gave final approval to bringing the MA into effect. The diagram demonstrates that among all members of the Law Council only 21 percent were Brahmins. Among these, only four persons of high rank and 12 of middle rank could have played an influential role during the codification of the MA. If the main aim of the caste regulations laid down in the MA were to create a strong Brahmanical Hindu state, the number of learned Brahmins would have been comparatively greater, and the norms of Brahmanical orthodoxy would have been incorporated into parts of the MA relating not only to religious affairs but also to state affairs.

Secondly, as stated by D. Bista, the caste system laid down in the MA was not a new scheme but rather an attempt to place the diverse caste practices implemented by Jaya Sthiti Malla and earlier Śāha kings within a single legal state framework.³⁹⁷ Were the MA meant to achieve a strategy of Hinduization, it would have put in place the rigid caste hierarchy laid down in the *dharmaśāstra* texts. For example, the *Gautamīyadharmasūtra* (GDhS) specifies certain duties for all four classes: All Twice-born classes have to fulfil the duties of engaging in study carrying out sacrifices and offering oblations.³⁹⁸ Brahmins have the additional duties of teaching the Vedas, sacrificing for others and accepting gifts.³⁹⁹ The king, and Kṣatriyas in general, are tasked with protecting all creatures, imposing punishment in order to maintain justice and supporting Brahmins versed in the Vedas.⁴⁰⁰ Vaiśyas should engage in agriculture, trading, animal farming and money lending.⁴⁰¹ Śūdras are assigned the task of being of service to all members of

397 See Bista 1977: 19.

398 *dvijātīnām adhyāyanam iṣyā dānam.* (GDhS 10.1).

399 *brahmaṇasyādḥikāḥ pravacanayājanapratigrāhāḥ.* (GDhS 10.2).

400 *rājño dhikam rakṣanam sarvabhūtānāṃ nyāyadaṇḍatvam bibhryād brāhmaṇāc chrotriyān [...].* (GDhS 10.7–9).

401 *vaiśyasyādḥikam kṣīvaṇīkpaśupālyakusīdam.* (GDhS 10.49).

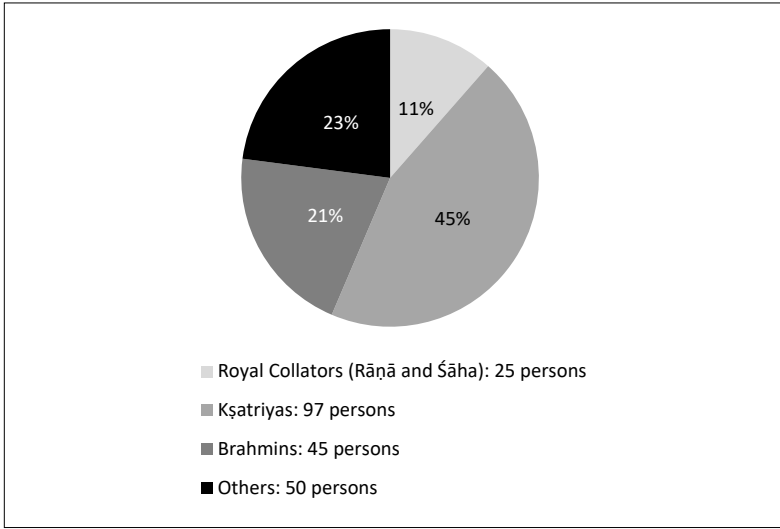


Figure 3: The distribution of caste groups in the Law Council. Note that two individuals who should be listed under the category of ‘Others’ are missing in the figure.

the three other upper *varṇas* and earn their livelihood from such service.⁴⁰² It is this model of the Brahmanical *varṇa*-system that Jaya Sthiti Malla’s caste reformation follows.⁴⁰³ The MA by contrast explicitly refrains from assigning type of livelihood according to a person’s caste status.⁴⁰⁴

One’s occupation (*ilama*) is not governed by caste [membership]. [The members of] all of Four *Varṇas* and Thirty-six *Jātas* may earn their living by sharpening tools (i.e., the smith’s occupation), cobbling shoes or sewing clothes, working in mines, panning for gold, firing brick-kilns (*avāla*), pursuing the potter’s (*kumhāla*) trade, preparing leather for *mādala* drums or any other [such] work as an occupation, [or else] may work in commerce (*beca-bikhana*). Nobody is to be reduced in caste,

402 *paricaryā cottareṣāṃ tebhyo vṛttiṃ lipseta*. (GDhS 10.56–57).

403 NyāV, p. 269 and a parallel in NārSm 18.47.

404 For example, the injunction of Manu tells that *na lokavṛttaṃ vartteta vṛttihetoḥ kathaṃcana. ajihmām aśaṭhām śuddhām jived brahmaṇajīvikām*. [Brahmins] “must never follow a worldly occupation for the sake of livelihood, but subsist by means of pure, upright and honest livelihood proper to the Brahmin.” (MDh 4.11, translated in Olivelle 2005: 124).

and anyone who says otherwise and refuses cooked rice or water commensality will be fined 50 rupees.⁴⁰⁵

What is striking in the above passage is that contrary to both shastric and customary practices, such professions as cobbling shoes, sewing clothes and working metal used to be carried out by Water-unacceptable and Untouchable castes according to Hindu customary practice.⁴⁰⁶ More surprisingly, the MA explicitly permits all caste groups to carry out trade in any articles, irrespective of the degree of their impurity. It states:

[The members of] all Four Varṇas and Thirty-six Jātas shall be allowed to engage in work, from [dealing with] human and pig excrement at the bottom to [dealing with] diamonds and pearls at the top. [They] shall also be allowed to weigh [using] *mānā*,⁴⁰⁷ *pāthī*⁴⁰⁸ [and] *kuruvā*⁴⁰⁹ [measures] and scales (*tulā*). No fault shall be assigned [to them for doing so,] nor shall they be degraded in caste. Whoever says otherwise shall be fined 50 rupees.⁴¹⁰

Similarly, contrary to Manu and customary practice in Nepal, the MA permits people of all *varṇas* and caste groups to plough irrespective of sex:

No fault shall be ascribed to men or women from all Four Varṇas and Thirty-six Jātas [including] Upādhyāya Brahmins, Jaisī Brahmins, Rājapūtas and Newars from the three cities [of Bhaktapur, Kathmandu and Patan] for ploughing with a yoke of bulls, he-buffaloes or horses in order to earn their livelihood. No expiation needs to be undertaken by those who plough. If

405 *ilam bhanyāko jāta jātako chaina. cāra varṇa chatisai jāta savaile pāina hālanu juttā kapaḍā syuna khāni khamṇa suna dhuna avālamā āgo lāunu kumhāiko kāma garna mādalahaṛūmā khari laḡāunu gaihra savaī kāmako ilam garnu veca vikhana gari jivikā garna huṃcha. jāta jādaina. esmā jāta jāma-cha bhamnyā ra bhāta pāni kāḍhnyā[lā]i 50/50 rūpaiyā daṃḍa garnu. (MA-ED2/31 §7). This section is translated in Höfer 2004: 92 and Subedi 2010: 140–141.*

406 See MA-ED2/160.

407 A volumetric unit equivalent to 0.568 litres, or 1/5 of a *pāthi*.

408 A volumetric unit equivalent to 4.546 litres comprising 8 *mānās*.

409 Volumetric unit equivalent to two *mānā*, or 20 *muṭhi*.

410 *cāra varṇa chatisai jāta gaihrale tala mānis sūgurako naraka ubho hirā moti sammako vaṃdavepāra garna huṃcha. mānā pāthi kuruvā tulā ḍhakle bharnu taulanu joṣanu paṇi huṃcha. khata lāḡdaina jāta paṇi jādaina. khata lāḡ-cha bhamnyā ra jāta jāma-cha bhamnyā[lā]i 50/50 rūpaiyā daṃḍa garnu. (MA-ED2/31 §8).*

somebody refuses [anyone] cooked rice commensality (*bhāta kāḍhanu*) for having ploughed, he shall be fined 10 rupees; if water commensality (*pānī kāḍhanu*), 5 rupees.⁴¹¹

If a man or woman of any of the Four Varṇas and Thirty-six Jātas is faulted for having ploughed and is fined by an *adālata*, *ṭhānā* or *amāla*, the person in the *adālata*, *ṭhānā* or *amāla* who [agreed with the accusation and also] ascribed [such a] fault shall be fined an amount equal to the fine they (i.e., the legal bodies) imposed.⁴¹²

The above provisions demonstrate that the MA is fundamentally liberal in terms of letting people choose or change their form of livelihood (*jīvikā*) at will, in contrast to the Brahmanical *varṇa*-system and Hindu customary practices, according to which the spectrum of occupations open to one was set at birth as one of the elements essential for protecting a person's social and religious purity. Occupations, then, were a measure of purity, and authorities were ordered to punish anyone who chose a conventionally improper way of making a living. One can argue, therefore, that the aim of the MA was not to establish a strong hierarchical Hindu society. It rather incorporated new and contemporary social practices that were arising from within a caste system in which Hindu norms continued to be dominant. Since a complete modification of the existing social and caste customs was beyond the power of Jaṅga Bahādura, the existing Hindu caste customs were liberalised and brought within a single legal framework, one consequence of which was to advance the weak state economy of the Rāṇā regime. For example, the centralisation of the collection of fines paid in settlements of caste- and norms-related disputes increased the state's income, while letting people choose their own livelihoods spurred economic activity. The MA, then, did not radically call the existing caste system into question, which could have resulted in political and social chaos, but it did alter it in ways that improved the economy. Since the caste system

411 *upādhyāya jaisi rajaputa tina saharakā nevāra jāta gaihra cāra varṇa chatiṣ jātakā lognyā svāsniharūle āphnā jīvikā nimitta goru rāṅgā ghoḍā nāri halo jotanyālāi khata lāgdaina. jotanyāle prāyaścitta pani garnu pardaina. kasaile halo jotyo bhani bhāta kāḍhyā bhanyā 10 pānī kāḍhyā 5 rūpaiyākā darale kāḍhanyālāi daṃḍa garnu.* (MA-ED2/31 §5).

412 *cāra varṇa chatiṣai jāta gaihrakā lognyā svāsniharūle halo jotyo bhani khata lagāi adālat ṭhānā amālavāta daṃḍa garyā bhanyā unle garyākā daṃḍako vigo vamojim khata lāunyā adālata ṭhānā amālavāla jo ho usailāi daṃḍa gari linu.* (MA-ED2/31 §6).

had never been implemented in all its rigidity in most of pre-modern Nepal, it was fairly easy to integrate newcomers and the non-Hindu parts of the population into caste society, since they were allowed to continue engaging in their own customary activities.⁴¹³ For example, section 18 of Article 99 permits a man to marry a female cousin on his father's side if that is the customary practice:

People of caste groups who have had the ancestral custom of marrying one's own paternal aunt's daughter (*phupukā chori*), the descendant of a shared grandfather, are allowed to do so. No fault shall be ascribed to them [for doing so]. If people of caste groups who have had no such custom since ancient times wed [in such a manner], they shall be punished in accordance with the *Ain*.⁴¹⁴

Nepal was thus known as a Hindu kingdom without many key characteristic features of a mainstream Brahmanical society.⁴¹⁵ Moreover, even though the MA displays many marks of a confessional state, the regulations that enshrined religious pluralism in the caste system represent further evidence that the caste system of the MA was not a strategy of Hinduization. The MA explicitly safeguards the right to practise one's own religion and customs, which Höfer⁴¹⁶ interprets as confessional tolerance. The following provision demonstrates this:

Upādhyāya Brahmins, Rājapūtas, Jaisīs, Kṣatriyas and so forth who [belong to] the caste groups of Sacred Thread-wearers, all castes belonging to the Non-enslavable and Enslavable Alcohol-drinkers, Europeans (lit. caste of Europeans), Muslims (lit. caste of Muslims), all castes belonging to the Water-unacceptable but Touchable [caste class] and all castes belonging to Untouchable [caste class], all these people, within the territory of Gorkhā Kingdom, may perform any act in accordance with the practices carried out by their clans of [their] own tradition [which leads] to *dharma* except cow slaughter. Nobody shall get angry about such matters. If somebody gets angry or quarrels in such matters

413 See Bista 1977: 18.

414 *aḡhī piitā purṣādeṣi phupukā chori vihā garṇyā rīta caliāyākā jātale āphnā ekā bājyābāṭa janmyākā phupukā chori bihā garna humcha ṣata lāgdaina. parāpūrvadeṣi nacalyākā jātale vihā garyā aina vamojima sajāya garnu.* (MA-ED2/99 § 18).

415 See Bista 1977: 18 and 20.

416 See Höfer 2004: 93.

and comes to complain in a Kacaharī, the one who does such an act that ruins others' tradition shall be fined one hundred rupees. If the fine is not paid, he shall be imprisoned in accordance with the *Ain*. If it comes to be known that a fight occurred [regarding such matters] in which somebody dies, the killer, if he is a member of the caste groups who are allowed to be sentenced to death, shall be sentenced to death. [If the killer] is a member of the caste groups who are not allowed to be sentenced to death, he shall be branded and [his] share of property shall be confiscated in accordance with the *Ain*.⁴¹⁷

To a certain degree, then, the MA represented an attempt to create a confessional state by accommodating the pluralistic social and religious cultures and customs of pre-modern Nepal within a single legal framework in which a Hindu caste system—if one vastly deviating from the classical Brahmanical orthodoxy—was still dominant. Except for a few regulations, such as the ban on cow slaughter, a rigid Brahmanical orthodoxy was not imposed on anyone not belonging to the Hindu tradition. Furthermore, again barring a few exceptions, the MA does not specify which caste group (*jāta*) falls under which caste class. This, too, shows that the strategy guiding caste regulation in the legal code was not to intervene in customary practices. For example, the Alcohol-drinking Kṣatriyas in the Western Himalayas do not fall under any caste category laid down in the MA. Since they consumed alcohol, they could not, according to the MA, retain their caste status as Kṣatriyas, but still they were regarded as Kṣatriyas by birth.⁴¹⁸ Thus, the specific stance of the MA requires careful historical analysis and contextualization if one is to accord it its proper place within the larger debates on caste in South Asia.

417 *upādhyā vrāhmaṇa rajaputa jaisi kṣatri gaihra tīgādhāri jāta namāsinyā matavāli gaihra māsinyā matavāli gaihra jāta iyuropiyena jāta musalmān jāta choi chiṭo hālanu naparnyā pāni nacalnyā gaihra jāta choyā chiṭo hālanu parnyā gaihra jātale gorsārāja bharmulukamā govadha garnā vāheka arū āphnā kulale gari āyā vamojima āphnā āphnā majhapkā dharmā hunyā kāma kurā savaike garnu huṅcha. yaskurāmā kasaile risa nagarnu. estā kurāmā risa rāga jhagaḍā bhāi kacaharimā karāuna āyā bhanyā arkākā majhaplāi khalal hunyā kurā garnyālāi 100 rūpaiyā daṃḍa garnu. rūpaiyā natiryā aina vamojim kāida garnu. jhagaḍā bhāi jyāna marecha bhanyā mārmā kāṭinyā jāta bhayā jyānako vadālā jyāna linu. nakāṭinyā jāta bhayā aina vamojima aṃsa sarvasva gari dāmala garnu. (MA-ED2/89 §10). This section has been translated in Michaels 2005b: 92 and quoted and explained in Höfer 2004: 134.*

418 See Bista 1977: 19.

2 The *Mulukī Ain* on Homicide

The modern political history of Nepal starts in the second half of the eighteenth century, after Pṛthvī Nārāyaṇa Śāha conquered all petty kingdoms of the realm and, in doing so, established a strong foundation for a politically unified and socially cohesive Nepal. This unification process was a political and military expansion of his Gorkhā kingdom, which can be interpreted as a threefold process, with the political and military expansion featuring as the ‘first’ and ‘second degree’ of unification. The legal unification of the country, on the other hand, represented the third and most difficult stage in the process. For, whereas the unification brought about by Pṛthvī Nārāyaṇa Śāha was only geographical in nature, the enactment of the MA aimed at a social and cultural unification among the country’s various ethnic, caste and social groups within a single legal framework.

Therefore, the political and military unification of Nepal in itself did not bring about significant changes in the kingdom’s legal practices.¹ Prior to the enactment of the first legal code in 1854, a prevailing principle dominated: “sin and crime should be punished—for the sake of order.”² However, this had scarcely been formalized in any specific written code. Therefore, the question always remained as to how the moral, religious and legal standards were to be practically applied by individuals and by social and religious institutions; who, in Michaels’s words,³ would be the agent to implement them: a god, king or priest? The pre-*Mulukī Ain* period saw various principles and practices being observed in jurisprudence. On the one hand, royal decrees and other official documents such as *rukkās*, *lālamoharas*, *sanadas*, *pūrjīs* (writ/written notice), *pramāṅgīs* and *hukumas* were issued by wielders of power—kings, prime ministers, court pandits, legislative bodies and the like—either to establish new laws or to re-enforce the legal norms that had been introduced at some earlier point, such as

1 See Pradhananga 2001: 206.

2 See Michaels 2005b: 5.

3 See Michaels 2005b: 5.

the existing customs relating to the various castes and ethnic groups.⁴ For their part, royal priests and preceptors (*rājagurus* or *rājapaṇḍitas*) were given prominent positions in the legal administration of the royal courts. They also acted as judges in cases concerning matters of purity and pollution.⁵

The enactment of the MA, however, established a firmer foundation favourable to the legal unification of modern Nepal by harmonizing previously practised legal procedures, political and social cultures, customs and new political thought into a single legal framework. The MA not only provided an integrated system of unified law that applied most parts of the kingdom (and under which the principles of legal pluralism and relativism are accepted) but also assigned positions, roles and tasks to the various state and social bodies tagged to universally implement the nation-state's principal doctrine ('sin and crime should be punished'). This minimized the role of royal priests, who had previously functioned as minor state authorities granting expiation⁶ if instructed to do so either by the courts or, in exceptional cases, by the head of state.

It is against this background that I shall be discussing the history of homicide law in Nepal in the following section. The Article 'On Homicide' from the MA versions of 1854 and 1870 I regard as paradigmatic for the following reasons: (i) no extensive formulation of homicide law existed before the promulgation of the MA; (ii) the MA sets forth detailed regulations on homicide that are bound to the concept of the rule of law expressed in the words 'every offender irrespective of his ritual, social or individual identity shall be punished'; (iii) it largely accepts the shastric ban on putting the king, Brahmins and women to death, but at the same time (iv) it develops a new course of action whereby offenders who are exempt from the death penalty are not banished but rather imprisoned for life, thus enacting the death penalty in a symbolical fashion; (v) under some specific conditions, it does sanction the execution of Brahmins; finally, (vi) it introduces the new standard of basing judgement on whether the crime was committed intentionally or not, and whether the person is of sound mind or not. Bearing as it does all these characteristic features, the 1854 MA Article 'On Homicide' serves as a suitable template for addressing all the problems posed to research mentioned at the beginning.⁷ The 1870

4 See R. R. Khanal 1985: 157–158.

5 See Michaels 2005b: 12.

6 See Michaels 2005b: 17.

7 See Part I, 1.1.

MA Article ‘On Homicide’ for its part will help to show the growing awareness and cumulative experience gained within legal practice during the codification process, which in turn will help to answer the question whether the MA was merely a scholarly composition or actually served practical ends.

2.1 The History of Homicide Law in Nepal

The term ‘homicide’ is a neutral term designating any act involving the killing of a person by another person—neutral in the sense of not explicitly pronouncing upon whether the killing is lawful or unlawful.⁸ The rationale for the criminalization of homicide is based on the basic value of human life accepted in almost all societies. According to J. Michael & H. Wechsler, “... the principle end to be served by the law of homicide is the preservation of life....”⁹ Concerning the history of homicide law in Nepal, no systematic¹⁰ development of it can be traced back before the codification of the MA. Thus, the historical development of law on homicide in Nepal can be divided into the pre-codification period (from Licchavi times until the emergence of the MA in 1854) and the post-codification era (after the MA).

2.1.1 Homicide Law before Unification

Licchavi period

As was discussed in the first chapter, the recorded legal history of Nepal starts with the Licchavi period in the form of around two hundred inscriptions.¹¹ The inscriptions are mostly concerned with memorialising personal deeds (e.g., donations or the like) and otherwise glorifying Licchavi elites, and there are no clear hints that the Licchavi rulers had in place a systematic penal system based on concrete legal codes or doctrines. Specialists such as T.R. Vaidya and T.R. Manandhar, and R. B. Pradhananga¹² who have extensively contributed to the historical

⁸ See Morris & Howard 1964: 113.

⁹ Wechsler & Michael 1937: 730.

¹⁰ Colonel Ujira Simha proposed some regulations relating to homicide, which I shall deal with below (see Table 8).

¹¹ See Dh. Vajracharya 1973 and Verma & Singh 1994.

¹² See Vaidya & Manandhar 1985 and Pradhananga 2001.

evaluation of crime and punishment in ancient and modern Nepal argue that the Licchavi jurisprudential system was based on Hindu legal scriptures. T.R. Vaidya & T.R. Manandhar write: “In ancient time the laws of Manu, Yajnavalkya (sic), Bṛhaspati and others were implemented in Nepal.”¹³ Similarly, following T.R. Vaidya & T.R. Manandhar, R.B. Pradhananga states: “With the rise of the *Licchavi* in ancient Nepal, they started not only [a] social system on the basis of *Hindu Dharmasastra* but also they introduced political and legal system based on *Hindu Dharmasastra*.”¹⁴ Such arguments with very limited historical sources to back them up do little to verify the hypothesis that Hindu legal scriptures were the main sources of Licchavi jurisprudence. However, it can be safely argued, on the basis of the available Licchavi inscriptions, that Licchavi rulers did give thought to establishing a working legal system. For example, the edict issued by Śivadeva and Aṃśuvarman (dated Saṃvat 519) permits subjects living in Kādun village in the Satuṅgala area to collect wood and grass from the forest. If they are prevented by the subjects of Pheraṅkoṭṭa from doing so, the latter will be subjected to punishment. The inscription reads:

Hail! The enthroned great king, glorious Śivadeva, who resides in Mānagr̥ha, whose success is [grounded] in his enormous virtue, who resembles the banner of the Licchavi clan and who is in sound health, [first] the inhabitants of Kādun village—the headmen [and] village householders—about their well-being, and [then] ordered [the following]: You should know [that] out of respect for the glorious Mahāsāmanta Aṃśuvarman, whose face resembles the moon of a cloudless autumn [sky] and whose might is well known to rivals, and in kindness [to you], I, having been requested [by him to do so,] have inscribed this order on stone. This favour is done for you. The inhabitants of Pheraṅkoṭṭa or any other [place] shall neither seize sickles, machetes, axes or wood from the inhabitants of your village, nor restrain them on their way to or from collecting wood or pasture grass (*ghāsa-patra*) from around the forest. Whoever disobeys this order and acts or causes acts contrary to it (*anyathā*) will be subdued for disobeying a royal order (*nṛpājñā*). This favour shall be kept [in place] also by future kings who [know] the weightiness of

13 See Vaidya & Manandhar 1985: 20.

14 Pradhananga 2001: 198–199.

dharma and who respect the favours done by their great predecessors. ... Saṃvat 519....¹⁵

The legal prescription contained in the above royal edict is quite short and clear, but it does not contribute significantly to understanding the contemporaneous penal system. The edict codifies the basic sanction that anyone who violates the regulation inscribed on stone will be punished. It does not, however, define the nature of that punishment, whether, for instance, it took the form of a fine, imprisonment or a verbal reprimand (*dhigdanda*). Many similar general expressions can be observed in the other inscriptions.¹⁶ For example, the Vasanta-deva inscription of Bāhālukhā (Patan) dated Saṃvat 435 mentions: "... No one among you who is dependent on us [for your livelihood] shall violate this [royal] order. I shall assign to whoever flouts this order and violates it suitable punishment in accordance with the law."¹⁷ This implies that the Licchavi legal system provided for a defined set of punishments for a defined set of offences, but it is not clear whether it was explicitly based on Hindu legal scriptures. The scattered references relating to homicide observed in Licchavi inscriptions suggest that murder was taken as one of the *pañcamahāpātakas* (five heinous sins),¹⁸ but the punishment for murder during the Licchavi period seems to have varied depending largely on the temperament of the rulers.

15 (*om svasti*) *mānagrāhān niratīśayagūṇasampadāva (...)* (*li*)*cchavikulaketur bhaṭṭāarakamahārāja(śrī)(śiva)devaḥ kuśalī kāduṅgrāmanivāsinaḥ pradhānapurassa(rāngrāmaku)ṭumbinaḥ kuśalam ābhāṣya samājñapaya(ti viditam bhavatu bhava)tām yathānena śaradaghanaśaśānkamu(khena) śatrusaṃkhyāpramītabalapārākrameṇa śrīmahāsā(ma)ntām(śu)varmmanā vijñāpītena satā mayaitadgauravād yu(śmad) anukampayā ca śilāpattakaśāsane 'bhilikhya prasā(do) 'yam vaḥ kṛto yuṣmdgrāmanivāsinaṃ itaḥ kāṣṭhaghāsapattrāharaṇāya sarvvatra vanabhūmiṃ gacchataṃ tadādāyāgacchataṃ cādhvani pheraṅkoṭṭanivāsibhir anyaiś ca na kaiścid dātrakaṭṭārakakuthārakāṣṭhād ākṣepo vidhāraṇā vā kāryyā yas tv etām ājñām avigaṇayyānyathā kuryyāt kārayed vā sa ni(ya)tanrājñātikramanīyamanam avāpsyati bha(vi)śyadbhir api bhūpatibhir ddharmmagurubhir ggurukṛtaprasādānuvarttibhir yam prasādo 'nupālaniya (...)* *saṃvat 519 (...)*. (Inscription no. 65, Dh. Vajracharya 1973: 263–266).

16 See, for example, Inscription nos. 64, 71, 105, 107 and 109 in Dh. Vajracharya 1973.

17 *kathañcid yuṣmābhir amat(!) pādopajīvibhir iyaṃ ājñā vilaṅgayitavyā yaś cemām ājñām ullaṅghya smarayet smārayad vā tasyāhaṃ yathocitam maryyādābandham anuṣṭhāsyāmīti*. (Inscription no. 24 in Dh. Vajracharya 1973: 113).

18 The concept of the *pañcamahāpātakas* is based on the *dharmasūtras* and *-śāstras*. For example, the VDhS (1.20) and MDh (11.55) list having sex with the wife of an elder (*gurūtālpa*, MDh reads: *gurvaṅganāgama*), drinking liquor (*surāpāna*), killing a learned Brahmin (*brahmahatyā*), stealing gold from a Brahmin/stealing (*brahmaṇasavarṇāpaharaṇa*, MDh reads: *steya*) and union with outcastes (*patitasamyoga*) as the five grievous sins.

For example, the inscriptions of Bhīmārjunadeva and Viṣṇugupta at Yaṅgālahiṭī/Yanlahiti and Bhṛṅgāreśvara dated Saṃvat 64 and 65 state that a murderer should be punished by confiscating his property. It also mentions that only the offender himself, not his family members, is to be held accountable for the crime he committed. The first inscription reads:

If somebody who lives in this territory, the fourth part of Draṅga, commits thievery, adultery or murder, or rebels against the king, only his own property, consisting of house, land, cows or the like, shall become [the property] of the royal family. Not even a small portion of property of the offender's kinsmen ... shall unjustly be confiscated.¹⁹

The second inscription reads:

If somebody is convicted for committing the crime of thievery, adultery, murder or rebellion against the king, only his own property [consisting of] house, land, cows or the like shall be confiscated. [No property] of his kinsmen shall be seized. Anyone who has suffered what is unthinkable, [namely] the crime of ... must be compensated [only] with the offender's own property....²⁰

By contrast, the Narendradeva inscription at Yāgabahāla states that murder should be punished by enslavement, with the perpetrator's entire property, including his wife, being given to the Āryasaṅgha:

The regulation [provides] the royal family with the right only to enslave an [offender] (lit. body of an offender) who has committed [one] of the five heinous crimes—thievery, adultery, murder and the like—[and] the Āryasaṅgha to the entirety of the

19 *taddraṅgacaturbhāgasīmābhyanantaravartinaś cauraparadārahatyārājadrohakāparādham avāpnuyus teṣām evāmunāparādheṇa doṣavatām yadātmīyam eva gṛhakṣetragodhanādīdravya(n) (ta)d eva rājakuḷābhāvīyam etad doṣābhiśāstānām ye dāyādās tebhyo ... (nā)nyāyenālpam api kraṣṭavyam ity eṣa ca bhavati* [...]. Inscription no. 117 in Dh. Vajracharya 1973: 442–443.

20 [...]. *cauraparadārahatyārājadrohakāparādhamś ca prāpnuvato yad acintyañkara (...)* *līpratibaddhagr̥hākṣetragavādinā svadravyeṇaiva (...)* *jayitavyas tad-dāyādebhyaṃ nātrāpahāraḥ kartavya iti* [...]. (Inscription no. 118 in Dh. Vajracharya 1973: 449).

property of the offender: his house, land, wife and the like. We transfer the [reign over such a village] to Āryabhikṣusaṅgha of the venerable Śivadeva *vihāra*, home to persons [coming] from all four directions.²¹

It may be observed in the above-discussed inscriptions that homicide was considered to be one of the grievous crimes by Licchavi rulers, and so grievous as to be punishable by death and the confiscation of their property (but in no case that of their kinsmen). The inscriptions of Bhīmārjunadeva and Viṣṇugupta at Yaṅgālahiṭī and Bhṛṅgāreśvara, on the one hand, which assign personal liability for the crime, and the Narendradeva inscription at Yāgabahāla, on the other, which apportions collective accountability, bear witness to the different ways of punishing homicide. This suggests that the Licchavi penal code was not based on any particular Hindu law scripture. R. B. Pradhananga, referring to T. R. Vaidya & T. R. Manandhar, argues that Licchavi rulers ended capital punishment, replacing it with enslavement and confiscation of property.²² It seems that they came to this conclusion through a misunderstanding of a phrase in the Narendradeva inscription at Yāgabahāla: ‘... *śarīramātraṃ rājakulābhāvyān tad [...]*’²³ (“the royal clan will have the right to the body of a murderer”), which T. R. Vaidya & T. R. Manandhar and R. B. Pradhananga understand as enslavement. However, the syntax and other parallel references suggest that the right to the body means the king’s final authority to execute him. For example, the inscription nos. 31, 32 and 44²⁴ explicitly prohibit local judicial bodies from investigating and imposing punishment on perpetrators who committed one of the five heinous crimes, thereby directing them to forward such cases directly to the king.

Further, regarding the law on homicide during the Licchavi period, T. R. Vaidya & T. R. Manandhar²⁵ and R. B. Pradhananga²⁶ both reach the conclusion that Brahmins were exempted from the above punishments because of their superior social standing. The inscriptions

21 [...] *cauraparadārahatyāsambandhādipañcāparādhakāriṇāṃ śarīramātraṃ rājakulābhāvyān tadgṛhakṣetrakalatradīsarvadravayāny āryasaṅghasyety anena ca sampannaḥ śrīśivadevavihā(re) caturdiśāryabhikṣusaṅghāyāsmābhir atisṛṣṭaḥ [...]*. Inscription no. 133 in Dh. Vajracharya 1973: 496–497.

22 See Pradhananga 2001: 199 and Vaidya & Manandhar 1985: 36.

23 See Inscription no. 133 in Dh. Vajracharya 1973: 496.

24 See Dh. Vajracharya 1973: 146–147 and 187.

25 See Vaidya & Manandhar 1985: 36.

26 See Pradhananga 2001: 199–200.

themselves do not reveal whether these punishments were meant also for Brahmins or were waived in the face of the legal privileges accorded them in the *dharmaśāstras*. More generally, it is uncertain just how much the *varṇa*-system served as a model during the Licchavi period and what the exact position of Brahmins was during it.

Malla period

It is hard to draw a sharp temporal divide between the Licchavi and Malla periods. No documented evidence so far has been found which can tell us when Licchavi rule ended and the Mallas started controlling the country from its centre in the Kathmandu Valley. As M. R. Panta argues, the Malla period²⁷ probably started from the time when the first complete sentences in Newari appeared in the inscriptions.²⁸ Starting from around 982, we find hundreds of legal and administrative records written on palm leaves, and some on copperplates, that go back to the Malla period. Such sources mostly are deeds relating to real property and the like.²⁹ For example, a copperplate of King Jayāditya II records a deed granting a village to one Udayāditya, a merchant. It reads:

[...] You [who are living in this village] know that we, pleased with the outstanding service [received from you], have granted the above-mentioned village [called] Vilivilikā including Tala, Draṅga, land and water [resources], mangos, *mahuvās*³⁰ and [other] trees, and all royal taxes [to be collected] within the boundaries of this village, to the merchant Udayāditya, a son of the merchant Kulāditya, a resident of Vikrama,³¹ under such terms whereby we ourselves do not charge [this village] for anything [...]³²

27 M. R. Panta calls the Malla period the Newar kingdom (see M. R. Panta 2013b: 1).

28 See M. R. Panta 2013b: 1.

29 To get an overview of the legal records from the Malla period, see, for example, Rajvamshi 1983a, 1983b and 1984; also, Śākyabhikṣu 1999, 2000 and 2001.

30 The name of probably two different varieties of the *Engelhardtia* tree species: *E. spicata* and *E. acerifolia*.

31 Probably the name of a village.

32 [...] *akiñcid grāhyo niratīṣayasevārādhitair asmābhir vikramavāstavyasya vaṇīkulādityaputrasya śreṣṭhi-udayādityasya sampradattāḥ* [...]. Copperplate of King Jayāditya, edited in D. Acharya 1997.

Such legal records can prove useful in shedding light on the economic and administrative history of mediaeval Nepal, but they do not contribute much to an understanding of criminal legal policies and their historical development during that time. Nevertheless, it has been often reiterated by native Nepalese scholars that homicide law in mediaeval Nepal was explicitly based on Hindu legal scriptures.³³ Since their arguments are based on the oral transmission of history, it remains difficult to ascertain the extent to which Hindu legal scriptures were implemented regarding homicide law in mediaeval Nepal before the last quarter of the fourteenth century. Jaya Sthiti Malla is the first ruler who, thanks to his nation-state, ensured that the legal history of his own time would not be forgotten. But while the NyāV is often taken as the first law code of Nepal,³⁴ it should be rather understood only as a first attempt towards a full-fledged written law, given that it lacks the characteristics of such codification: The incorporation of new political-legal thought as well as custom and usage.³⁵ The NyāV resembles more the colonial Hindu legal digests (*dharmanibandha*) composed in the late eighteenth century under direct colonial command.³⁶ Just as the production of the digests of Hindu law of colonial India finally resulted in the codification of the Indian penal code, so too did the NyāV represent a milestone on the way to establishing a fully operational legal system in Nepal. That the NyāV was composed in the vernacular Newari as well as in Sanskrit makes it all the more probable that it was not merely a utopian construct but was meant to be applied to the current social setting. The colophon of the text states that the work was written for the ordinary public, who would have had no ability to understand the source text, the *Nāradasmṛti*. It reads:

This weighty body of law handed down (*udīta*) [by] the Nārada school is hardly understandable for those of little knowledge. [Therefore,] this clear commentary on it is written in Naipālabhāṣā (i.e., the language of the Malla kingdoms in the Kathmandu Valley, and still spoken today by the Newar

33 See, for example, Vaidya & Manandhar 1985: 63, and Pradhananga 2001: 201.

34 See, for example, Pradhananga 2001: 201.

35 See J.E. Wilson 2007 for a discussion of the constitutive concepts of codification.

36 For an in-depth examination of the legal digests (*dharmanibandha*), commissioned in colonial India, see Cubelic 2021, also see J.E. Wilson 2007: 16.

community). May kings and others understand it, and progress along the path of proper law.³⁷

However, no historical evidence is available to substantiate the hypothesis that the NyāV reflected the social realities of that time. It is based on the *Nāradaśmṛti*, and shares the basic elements from the latter regarding homicide law. Table 7 outlines the regulations on homicide and capital punishment laid down in the NyāV.

It is evident that the NyāV was following the NārSm—and thereby ignoring other Hindu legal scriptures in which women are punished differently when charged with homicide—when it formulated the general rule stating that everyone not a Brahmin was to be punished by death for capital crimes.³⁸ The same text states that those who kill women are sinners.³⁹ This would imply that it would be a sin to sentence a female criminal to death.

Table 7 demonstrates that the NyāV formulates a general injunction that, since murder is the unlawful killing of a human being, murderers should be punished according to their caste status. Some noteworthy exceptions are mentioned: Brahmins, for example, may not be killed. Although the NyāV does not elaborate upon homicide law in detail, it nevertheless took the initial step towards a codification of it in vernacular languages.

Another noteworthy document of mediaeval Nepal dealing with homicide law is Rāma Śāha's edict.⁴⁰ Sections 15 and 16 briefly deal with homicide law. The edict exempts ministers, male kin of the king, clan members, ascetics, Bhāṭa⁴¹ and Brahmins from being sentenced to death whenever they committed, or attempted to commit, murder. They should instead be punished by having their head shaved and being

37 *idam alpādhiyām(!) nṛṇām(!) durvviññeyam yadodītam(!). nārādīyam yad astīha nyāyaśāstram mahārthavat.yasyeyam(!) likhyate tikā spaṣṭā naipālabhāṣayā. imām vijñāya bhūpādyaś caranu(!) nyāyavartmanā.* (NyāV, p. 326).

38 *aviśeṣeṇa sarvveṣāṃ eṣa daṇḍavidhiḥ śmṛtaḥ. vadhāhi(!) r̥te brahmaṇasya(!) na vadhā(!) brahmaṇo(!) 'r̥hati.* “[Be it] kept in mind that the types of punishment mentioned [here] are to be equally [applied] to all [castes] excluding Brahmins [in the case] of capital punishment. Brahmins may not be killed.” (NyāV, p. 226, and the parallel in NārSm 14.8).

39 See NyāV, p. 298, and the parallel in NārSm 20.1 fn. 1.

40 See above, Part I, 1.3.2.

41 Offspring born from the union of a Brahmin man and his Upādhyāya concubine, or a Jaisī woman with whom he is not related, but who was previously married with two husbands; offspring born from the union of an Upādhyāya or Jaisī Brahmin with a concubine or widow belonging to the Daśanāmī, Jogī, Jāngama, Sannyāsī, Sebādā, Kanaphaṭṭā, Vairāgī or other kinds of ascetics.

Table 7: Regulations pertaining to homicide according to the NyāV

Type of crime	Caste / Group / Individual	Capital punishment	Parallel in NārSm
Murder with the use of a weapon or the administration of poison, or attempted murder	Brahmins	no; shaving, exile from the city, branding and made to ride a donkey ⁱ	14.8
	non-Brahmins	yes	14.7
It is noteworthy here that, contrary to the common acceptance of this, ⁱⁱ there is no clear statement in the NyāV that women are exempted from capital punishment.			
Theft of high degree ⁱⁱⁱ	Brahmins	no; shall receive the same punishment as for homicide	14.20
	non-Brahmins	yes	14.20
Violation of customary practices ^{iv}	A śvapāka, ^v napuṃsaka, ^{vi} cāṇḍāla, cripple, butcher, an elephant rider, pravātya ^{vii} or wife(s) of an elder or preceptor	yes	15/16. 12–13
Insulting a Brahmin	a Śūdra	yes	15/16.16
Abduction of an unmarried girl	non-Brahmins	yes	19.35

i Brahmins who were punished for committing murder were not readmitted into the caste, i.e., they could not undergo expiation or penance (see NyāV, p. 227, and the parallel in NārSm 14.10).

ii See Vaidya & Manandhara 1985: 62, and Pradhananga 2001: 202.

iii The NyāV categorizes theft as of low, middle and high degree depending on the object stolen (see NyāV, p. 229–230, and the parallel in NārSm 14.13–16).

iv The source text in Sanskrit reads: [...] *maryādātikrame sadyo ghāta evānuśāsanam. na ca tad daṇḍapāruṣyadoṣam āhur manīṣiṇaḥ* “[...] should [people] violate customary rules, an immediate beating [or killing] is their punishment; the wise say that is not an offence amounting to [excessive] harshness of punishment.” Whether this is seen as imposing the death penalty varies from scholar to scholar. For example, R. W. Lariviere (2003: 419) discusses Bhavya’s comment that beating or even killing these persons for violation of customary rules does not constitute an offence. Lariviere himself restricts the meaning of *ghāta* here to ‘beating’. The Newari version of the NyāV, by contrast, translates this term as *syācamālava*, meaning not ‘beating’ but ‘killing’. The context suggests that the intended sense is more likely to have been ‘beating’, but the Newari version may have actually led to imposing the death penalty for violating customary law during Jaya Sthiti Mallā’s time. This demonstrates that deviations from the *dharmaśāstras* within the vernacular tradition were thinkable in spite of that tradition’s being based specifically on the *śāstras*.

v A person from an outcaste tribe.

vi A man who is impotent.

vii A man who is uninitiated.

exiled from the city. If other groups, such as Khasas, Magaras or Newars, do the same, they are to be punished by death, though their family members are exempted from legal scrutiny. It reads:

Edict the fifteenth: If ministers (*cautarīyā*),⁴² their brothers or members from the same clan commit grave offences leading to the loss of life, they shall be shaved and exiled to a foreign territory. If ascetics [from different schools such as] the [Daśanāma/Daśanāmī]⁴³ Sanyāsins, Vairāgins⁴⁴ or Bhāṭas, commit [such] a grave offence too, they shall be shaved and exiled to a foreign territory. The purpose of exiling brothers [of, *cautarīyās*], or [other] members of their clan to a foreign territory is what is stated in the *sāstras*, namely that if somebody commits the offence of taking a [human] life, his [own] life shall be taken. If [the murderer] is executed, [the king] commits the sin of killing a kinsman; if [he] is not executed, the king commits the sin [of not punishing a criminal]. Therefore, it is said that they should be shaved and exiled to a foreign territory, since expulsion from the country is equivalent to death. [Similarly,] if a Brahmin is executed, the king commits the sin of killing a Brahmin; if he is not executed, he commits the sin [of not punishing a criminal]. It is said that shaving [a Brahmin's head] is also equivalent to death. Thus, they are to have their heads shaved and to be exiled to a foreign territory. It is said that, since the Daśanāma and Vairāgī ascetics are not to be executed because they wear renunciants' clothes (*bheṣa*), and Bhāṭas, too, are not to be executed, so they are ordered exiled. [The king] has therefore made provisions [for all] to act accordingly.⁴⁵

42 A *cautarīyā* is a principal officer of state. The role of a *cautarīyā* in mediaeval and pre-modern Nepal is not always the same. During the early Śāha period, he was a royal appointed usually to perform the functions of a chief minister, minister or councillor. They were also appointed to such important administrative posts as governor of a district (see Kumar 1967: 164–165).

43 An order of Śaiva ascetics said to be founded by Śaṅkarācharya.

44 A Vaiṣṇava ascetic of the Rāmānandī Sampradāya.

45 *paṃdhrau thīti. cautarīyā bhāi gotiyā inahrūle jiya saṃbadhi thūlo virāu garyā muḍi videsa garāunu. saṃnyāsi vairāgi bhāta inale pani thūlo virāu garyā bhanyā muḍi videsa nikālā garāunu. bhāi cautarīyā gotiyālāi videsa garāunu bhanyāko kyā artha bhanyā jiu māriyā pirāu garyo bhanyā jiu linyāko jiu linu bhanyā sāstramā pani kahyāko cha. jiu māryā bhanyā gotrahatyā lāganyā namāryādeṣi bhanyā rājālāi pratyavāya lāganyā tasārthā desanikālā garnu pani māryai tulya cha bhani muḍi videsa garāunu bhanyāko ho. brahmaṇālāi pani māryā brahmahatyā lāganyā namāryā rājālāi pratyavāya lāganyā taskāraṇa muḍanu pani māryai tulya cha bhani muḍi videsa garāunu bhanyāko ho vairāgi*

Edict the sixteenth—the king has made [the following] provisions: If among tribal groups (*jāta*) such as the Khasas, Magaras, Newars [anyone] commits an offence leading to the loss of life, only he who committed [such] an act shall be executed, [in accordance with adage] ‘The neck of him who is guilty.’⁴⁶

King Rāma Śāha’s brief regulations relating to homicide, principally based on ideas drawn from the *dharmasāstras*,⁴⁷ did not contribute greatly to the further development of homicide law. However, the principle of ‘only the offender himself shall be punished but not his family’ seems to have been enforced to a certain degree by him. Some degree of influence from the Licchavi period in this regard is notable. The move, as R. B. Pradhananga notes, was a progressive one since it ended the system of punishment of a culprit’s family members.⁴⁸ Although such strict adherence to personal accountability for crimes could be taken as a big step forward, it was neither the brainchild of Rāma Śāha⁴⁹ nor did it have a long-term impact on the development of the concept of a murderer’s personal liability. For example, a *rukkā* issued by King Raṇa Bahādura Śāha in 1795 (VS 1852), around one and a half centuries later than Rāma Śāha, orders Kisna (Kṛṣṇa) Dhāmī, the father of a murderer, to pay a fine of 300 rupees. It reads:

Hail! This is a *rukkā* of the supreme king amongst great kings.

[Addressed] to Kisna Dhāmī:

[We have come to know that] the drummer (*naḡārcī/naḡarcī*) who used to play the *nagarā* in the morning was assaulted by

saṃnyāsī bheṣa liyākā hunāle avadhya chan. bhāṭa paṇi avadhya chan bhani deśa nikālā garnu bhanyāko ho. tatartha yasai garnu thiti vādhivaksanu bhayo. (RŚEdict 15).

46 *sohrau thiti. śasa maḡara nevāra prabhṛti jāta madhyamā jīyesambaṇdhi virāu garyā bhanyā jasale virāyāko cha usaiko mātra jīye māṛnu. jasko pāpa usko gardhana bhāṃnyā thiti vādhi vaksanu bhayo.* (RŚEdict 16).

47 It is noteworthy here that the provisions of King Rāma Śāha’s edict are based on Nārada’s scripture, the same one from which the NyāV borrowed. The scripture states that “there is as much disregard of law in freeing one who should be executed as in executing one who should not be executed, and the king’s law is [thereby] kept in check.” *yāvān avadhyasya vadhe tāvān vadhyasya mokṣaṇe bhavaty adharmo nṛpateḥ dharmas tu viniyacchataḥ.* (NyāV, p. 289, and the parallel in NārSm 19.47).

48 See Pradhananga 2001: 203.

49 As mentioned above, the notion goes back to the Licchavi period, as documented in Bhīmārjunadeva’s and Viṣṇugupta’s inscriptions at Yangālāhiṭī and Bhṛṅgāreśvara.

your son for having played the *nagarā* in the 7th and 8th *ghaḍīs*⁵⁰ of the night. [The drummer] survived the night and died [the next day]. [...] One must observe [the rules] of society (*saṃsāra*). Therefore, [in lieu of your son] a fine of 300 rupees is imposed on you for the offence of [your son's] having killed that person. Send the money through the hand of Tilamṅā.⁵¹

This document shows that homicide law in force in mediaeval Nepal was not always adopted in later times. The earlier regulations were abandoned by rulers who wanted to develop standards they thought better suited to the political context of their times.

Post-unification

As said earlier,⁵² the unification of various principalities did not bring any considerable change in the development of a countrywide legal system. After his victory over the rulers of the Kathmandu Valley, Pṛthvī Nārāyaṇa Śāha imported Gorkhālī political and social norms, which resulted in the co-existence of a dual set of legal practices: Gorkhālī and Newar. However, late post-unification bureaucracies faced a considerable number of administrative orders in the form of *lālamoharas*, *rukkās*, *sanadas*, *pūrjīs* and the like to implement, and in doing so they set out on a trajectory towards the unification of the country's legal systems. Since such documents are mostly royal orders having to do with economic activities, it is hard to undertake a comprehensive study of the law on homicide during that time. A more extensive document which delineates legal regulations of homicide during the post-unification period is the *Ainapustaka* (UjAin). Although the UjAin was an attempt to effect a small-scale reformation of the law, it features certain elements of a proper code, one that embodies both customary practices and innovative political thought. Many of the UjAin's regulations had a direct

50 A measure of time equal to twenty-four minutes, usually measured by floating a bowl with a hole on a bucket filled with water.

51 *swasti śrīmanmahārājadhīrājakasya rukkā--- āge kisna dhāmi prati. tāhā nagarā bajāunyā nagārcilāi byāhāna bajāunyā nagarā 7|8 gari rātri jādā nagarā bajāyo bhani tāmrā chorale kuṭikana ek rāta rahi marecha. [...] saṃsāra tin tin gar-nyaiparcha. Tasārtha tyo mānis māryāko ṣatbāpat tin sayo 300 rupaiyā timilāi daṃḍa bhayo. tilamṅāhāta rupaiyā cahrāyipathāva.* (Edited in D. R. Panta 1985: 25).

52 See Part I, 1.3.3.

influence on the MA.⁵³ The drafter of the UjAin, Ujīra Siṃha, explicitly stated that he had observed the British court system (presumably that in practice in its Indian colony) before preparing his code-like text. Such attempts to recommend changes to legal practices by members of the aristocratic elite like Ujīra Siṃha contributed greatly to the development of the idea of codification. Among other things, they offered the rulers new insights into homicide law. The UjAin bears the following key features regarding homicide law and capital punishment.

Table 8 demonstrates that the section of the UjAin dealing with capital offences basically breaks down into the following main areas: Offences committed against a person's body, offences against the sovereignty of the state and crimes relating to incest. What is striking here is that the UjAin altered the ancient practice of exempting Brahmins and women from capital punishment. This shows that the dharmashastric ideas were not always perceived and interpreted from a shastric point of view but, were understood to depend also on the temperament and personal interests of rulers. The UjAin's attitude towards executing Brahmins and women for murder seems to be, as stated by Ujīra Siṃha himself, influenced by the British legal system enforced in colonial Bengal and based on equality before the law. Although Ujīra Siṃha tried to continue the tradition of not killing Brahmins or women by reinterpreting shastric principles in his own way: Brahmins and women charged with homicide would not be sentenced to death per se but subjected to conditions that all but meant certain death. The first section of Article 5 reads:

Article five, first regulation: If somebody commits the crime of taking another's life, a situation ensues wherein there will be injustice lest [the offender] is executed. [Therefore] the latter shall be either decapitated or hanged if he is from a caste that may be executed by means of a martial instrument. If a Brahmin and so forth⁵⁴ or a woman has committed a [similarly] grievous sin, being convicted of murder by means of a martial weapon, and they must be executed, they shall be chained [and left to perish] or, if they have to be executed promptly, they shall be sent [to an area] where malaria is prevalent during the rainy

53 See above, Part I, 1.3.3.

54 The reference is to various subcategories of Brahmins and some sects of ascetics who may not be executed, such as a Jaisī Brahmins, Newar Brahmins or non-household ascetics.

Table 8: Types of capital punishment called for by the UjAin for murder and other offences

Circumstances of crime	Caste / Gender	Capital punishment	Method of punishment
1. Committing gratuitous (UjAin/5 §1)	Brahmin	yes	(1.1) to be sentenced to death indirectly if authorities consider the crime to be of a heinous nature; either putting the offender in chains until his demise or else taking him somewhere where he dies as a result of disease or some other pernicious environmental influence.
	woman	no	(1.2) branding, caste degradation and chopping the nose off if authorities consider the murder not to be exceedingly heinous.
	others	yes	(1.3) decapitation or hanging
2. Murder committed out of spite, greed for property or sensual desire, or else in order to hide an earlier crime or to avoid paying a debt and the like (UjAin/5 §6)	Brahmin	yes	same as above (1.1)
	woman	no	same as above (1.2)
	others	yes	same as above (1.3)
3. Attempted murder, the victim surviving with or without having received help from others (UjAin/5 §7)	Brahmin	yes	same as above (1.1)
	woman	no	same as above (1.2)
	others	yes	same as above (1.3)
4. Participating in a failed murder plot, whether merely giving advice or actively planning, that targeted a ranking royal or political official (UjAin/5 §8)	Brahmin	yes	same as above (1.1)
	woman	no	same as above (1.2)
	others	yes	same as above (1.3)

Table 8 (continued)

Circumstances of crime	Caste / Gender	Capital punishment	Method of punishment
5. Participating in a failed murder plot, whether merely giving advice or actively planning, that targeted a subject of the realm (UjAin/5 §9) ⁱ	all	no	a fine of 50 rupees if the offender has property worth 100 rupees, or else half of his property
6. Forging an alliance with enemies during wartime (UjAin/5 §2)	Brahmin	yes	same as above (1.1)
	woman	no	same as above (1.2)
	others	yes	to be cast into a deep pit, sprinkled with a handful of salt and buried under earth
7. Spying for the enemy during war (UjAin/5 §3)	Brahmin	yes	same as above (1.1)
	woman	no	same as above (1.2)
	others	yes	to be disembowelled
8. Hiding letters received from the king addressed to the chief minister (UjAin/5 §4)	Brahmin	yes	same as above (1.1)
	woman	no	same as above (1.2)
	others	yes	to be disembowelled
9. Aiding an enemy's army so as to enter one's own territory (UjAin/5 §5)	Brahmin	yes	same as above (1.1)
	woman	no	same as above (1.2)
	others	yes	to be executed by using a pellet bow or stoning

i It is worth noting here that only those who assist in murdering a royal or political authority are sentenced to death; if the victim is an ordinary person, the main culprit is put to death, but not any accomplices. This regulation reflects the chaotic political turmoil in Nepal characteristic of the first half of the nineteenth century, when there was a strong power struggle going on between the Thāpā and Basnyāta families.

Table 8 (continued)

Circumstances of crime	Caste / Gender	Capital punishment	Method of punishment
10. Incestuous relations with one's mother (UjAin/5 §10)	Brahmin	yes	same as above (1.1)
	others	yes	depending on the offender's caste status, his genitals are to be severed, then the genitals are to be put in his mouth and the mouth sewn shut, after which the offender is to be hanged

season or to the northern borderland (Bhoṭa)⁵⁵ during winter-time, and [authorities] shall keep them there until they die. If the punishment is the severing of genitals, the genitals of those who may be executed shall be severed. In the case of Brahmins and so forth who are [again] convicted of murder by means of a martial weapon, they shall be shaved and exiled from the country. Women have less intelligence and they are impetuous by reason of their excessive anger. They cannot evaluate the consequences of different courses of action. Therefore, when punishing women, either reduce their caste or exile them. If the offence they committed is [considerably] graver, cut off their nose and exile them.⁵⁶

This explicit deviation in the UjAin from both *dharmaśāstra* and customary practice—to my knowledge, the first such documented instance—likely is a result of the close encounter with the colonial

55 Lit. 'Tibet'. However, here it does not mean the main plateau of Tibet but rather any uninhabited snowy region along the Tibetan border.

56 *pācau vandejako pahilo tajaviṅ kasaila (read: kasalle) jiu māriṅyā takasīra garyo uslāi namāri nisāpa parṅyā chaina bhanyā hatiyāra calāi māriṅyā jātalāi jhunaḍāi kāṭihari yeka tarahasāga usko jyāna māridinu. hatiyāra calāi mārḍā hattyā lāganyā vrāhmaṅa gairaha jātale ra strīharūle ṭhulo aparādha garyāko cha unlāi namāri hunyāchaina bhanyā nelaimā gāhnu. athavā cāḍai māru paryo bhanyā varṣā aulāmā hiudamā bhoṭamā rāṣanu. namarikana nachoḍanu. jāta ansāra nalphal kāṭanu bhanyāmā kāṭiṅyā jātakā nalphal kāṭanu. vrāhmaṅa gairaha hatiyāra calāyā hattyā lāganyā jātalāi muḍi des nikālā garidinu. svāsniharuko akal kam humcha. dherai risa humāle āṭi hunchan. yeso garyā yeso holā yeso garyā yeso holā bhani aghipachi dhera deṣṭainan. tassartha svāsnilāi sāsanā gardā jāta patita garidinu. athavā desa nikālā garidinu. ṭhulo aparādha cha bhanyā nāk kāṭi desa nikālā garidinu. (UjAin/5 §1).*

administration after the ratification of the Sugaulī Treaty in 1816. Henceforth the colonial power was allowed a permanent residency in the Kathmandu Valley in order to maintain close political ties with Nepal's government. Since criminal transactions between Nepalese and the East India Company controlled territories were a big problem of that time,⁵⁷ the colonial administration negotiated with the Nepalese administration not to exempt anybody from the death sentence in cases of capital crimes irrespective of what Hindu legal scriptures state and what the customary practices were. This diplomatic communication resulted in a reciprocal treaty meant to be put into force between the East India Company and the Nepalese government in 1834 (VS 1891) to control cross-border crime, especially theft and robbery. The treatise explicitly mentions that irrespective of caste and gender status,

57 See, for example, the letter written by the envoy Lokaramaṇa Upādhyāya to the Nepalese palace from Calcutta about tensions that arose between Nepal and the East India Company over cross-border crimes. The letter reads in part: “[...] when I (i.e., Lokaramaṇa Upādhyāya) met Captain Vaca Sāhaba (i.e., Captain F.W. Birch), the Superintendent of Calcutta Police, he told me in the course of conversation that ‘the relationship between Nepal and the Company State will certainly be spoilt. My platoon is in Banaras, and I have also been ordered to go there. At the time of deployment of the platoon, I too will join it, leaving this job.’ ‘We did not intend to make war. If the unique commitment (*ahada paimāna*) is spoiled from the Company's side without any reason, we shall spoil it from our side too. Friendship will remain if it is maintained from both sides; it cannot be maintained only from one side.’ When I (i.e., Lokaramaṇa Upādhyāya) said this, Captain Birch replied jestingly that ‘there has been impropriety from your side. It is not the custom of the English to spoil [a relationship] first. Your troops came everywhere within the borders and robbed within the Company's territories. Is this proper in friendship? There are several other matters, too. It seems that you have been informed of nothing, and you know nothing. Because of such mismanagement on the part of Hindustanis, we, having come from another place, took Hindustan,’ I (i.e., Lokaramaṇa Upādhyāya) replied to him that ‘actual information has [always] been arriving to me in writing. As opposed to your country, we do not have the custom of writing false [information] in our country [...]’ [...] *kalkattākā puliskā superindānta kaptāna vaca sāhavasita bheṭa hudā vātacitkā prasaṅgamā nepālasita sarkāra kampanikā avasya viṅrancha mero paṭṭan vanārasma cha malāi pani jānu bhani hukum bhayāko cha paṭṭan kuca hunyā tākamā ma pani mokāma choḍi āphnā paṭṭanmā sāmela huna jālā bhannā kurā garyā hāmra ta ladāiko mansuvā thiena kampanikā tarphavāta śanaśā ahada paimāna choḍi viṅranchau bhanyākā velāmā hāmra tarphavāta pani viṅranai parlā saluki duvaitiravāta rāṣyā rahancha ekatiravāta rāsi rahadaina bhani maile bhantā timiharukā tarphavāta acākli huncha hāmra amrejako pailhe āphu viṅranā dastura hoīna jahā tāhā sivānāmā laskara āi hāmra kampanikā jagāmā liṭapīṭa garera laigyā dostimā yasto cāhinyā ho kyā tava aru pani dherai kurā chan timilāi kehi leṣi āvado rahenacha timi kehi thāhā pāudā rahenachau hindusthānikā estai vevaṃdovasta hunāle hāmle arkā velāetvāta āi hindusthānko velāet liṅyu bhani thattā garyā jhai gari kurā garyā bhayāko vistāra malāi lekhi āudaicha nabhayāko timiharukāhāko jasto phaiki hāmra mulukamā leṣanyā dastura chaina bhani maile javāva diñā. (NGMPP DNA 1/68).*

anybody who commits an act of cross-border robbery is to be sentenced to death by the legal authority where the crime took place.⁵⁸ Such standpoints insisted upon by the colonial administration helped not only to ensure smooth diplomatic relations regardless of what the *dharmasāstras* and customary practice enjoined but also to somewhat stabilize Nepal's chaotic political situation under successive rulers. It is likely, for instance, that the idea of putting Brahmins to death floated in the UjAin and concretized in the treaty must have given pause to Brahmins among the power elite who might have otherwise considered engaging in subversive acts.

The above passage shows the growing awareness of the need for proper homicide laws during post-unification Nepal. These regulations put forward by Ujīra Siṃha represent a comparatively detailed approach to homicide. They deal not only with murder committed by a single person but also attempted murder and murder committed collaboratively by multiple persons. The seventh and eighth sections of Article 5 state:

If someone plans and attempts for no reason (*nāhaka*) to kill a person in one of the ways [mentioned before,]⁵⁹ the [intended victim] having not died [only] because he received some sort of help, then even so the offender shall, depending on his caste status, be executed because he dared for no reason to make a plan and attempted to kill [the victim,] and would have killed him had he been able to do so. The victim was able to survive by divine intervention; still, the life of him shall be taken who for no reason practised treachery against another's life.⁶⁰

Even if someone low in rank (*choṭā ādamī*), having intended to take revenge on a high-ranking person who has received his post either as a royal appointment etc. or as a stroke of luck, does not carry out [the deed] but participated in a plot to take revenge or

58 See NGMPP DNA 4/100 below, Part II: C, Document 1.

59 See UjAin/5 § 6.

60 *pācau vandejako sātau tajavī. yestā nānā trahale (read: tarahale) nāhakmā arkāko jiu māṛnyālāi matalap gari puryāyo arū kehi tarahako sahāya miḷyo guhāri payā (read: pāyo) ra usko jiu mārena bhanyā paṇi nāhākmā arkāko jiu mārna āṭi kāmako matalap puryāunyālāi usle sakyā māṛnyai thīyo daiva saṃhāya bhāi usko jiu vācyo tāpaṇi nāhākmā arkāko jiu dagā garnyāko jivai jāncha. jāta viśeṣa māridinu.* (UjAin/5 § 7).

merely provided his advice, he shall—depending on his caste status—be executed.⁶¹

In addition to the above documents, B. H. Hodgson’s memoranda of the Jail delivers of prisoners during the Dasain festival found in the Indian Office Library⁶² are key documents relating to homicide law and criminal jurisprudence of the pre-MA period, as are his works and miscellaneous essays.⁶³ According to him, homicide law fell strictly under the jurisdiction of the central courts of justice, namely: the Koṭīlīṅga, Itācapalī, Ṭaksāra and Dhanasāra.⁶⁴ As soon as a local judicial body received information regarding a homicide, the informant was interrogated in order to establish a corpus delicti. If the informant’s evidence turned out to be false, he would be punished for giving false information. Otherwise, the court’s soldiers were immediately deployed to secure the site and prevent the murderer from escaping. The most reliable, and indeed mandatory, evidence in order to make possible a court decision regarding a murder trial was the murderer’s written confession. It was mandatory to obtain a written and attested confession from the murderer before sentencing him. In order to get it, convicts might be scolded, beaten or otherwise terrorised. The MA displays the same pre-MA attitude toward the need for a written confession before a court handed down its decision.⁶⁵ On the other hand, it strictly forbids confessions to be obtained by force, and imposes fines on non-compliant officials—greater or less depending on the severity of crime brought before the court.⁶⁶ After a murder confession is obtained, the verdict is announced and forwarded to the Council for its assessment and final approval. Adding his own to the Council’s assessment, the prime minister then referred the matter to the king. Once sanctioned

61 *pācau vandejako āthau tajavīja rājakāja prabhṛtile bhayo athavā āphnā nasīvakā jorale bhayo bhayākā yestā vaḍā ādamikā daḡā nimittya choṣā ādamīle āphule mārana jiu mārṇāko matalap gari puryāyena ta ni daḡā garṇyā kurā kāma ta pasnyā ra sallāha dīnyāmātra rahecha bhanyā paṇi jāta ansāra jiu māridīnu.* (UjAin/5 §8).

62 See Adam 1950.

63 See Hodgson 1880 (vol. 2): 211–236.

64 See Hodgson 1880 (vol. 2): 212.

65 See MA-ED2/37 §§1–13.

66 “If [authorities] without having obtained [any concrete evidence] obtain a confession [from a defendant] by beating him regarding a capital crime but later [the crime] is not verified, the chief [officer] shall be fined 360 rupees [...].” *jiyū jānyā ṣatatmā* (read: *khatmā*) *dasī saṣalaṣa napāi kuṭpīṭ gai kāyelanāmā leṣāyo pachi thaharena bhanyā testā hākimalāi 360 rūpaiyā daṃḍa garṇu* [...]. (MA-ED2/37 §1).

by the king, a *ḍiṭṭhā* was ordered to carry out the punishment. Murderers were always punished corporally. If they were not Brahmins, women or certain types of ascetics, they were taken to the banks of the Viṣṇumatī River and either decapitated or hanged in public at the hands of a Poḍhyā, a member of one of the Untouchable castes. There was no provision for having personal lawyers defend the accused.

Broadly speaking, the following categories of homicide can be sketched in the pre-MA period: lawful killing (killing in self-defence,⁶⁷ killing a paramour of one's wife and killing in order to save a cow's life), murder (by a single person or by a group of people), attempted murder and assisting a murderer.⁶⁸

2.2 Regulations Relating to Homicide in the MA

2.2.1 The Structure of Articles on Homicide

The Article of MA 1854 on homicide is laid out under three rubrics: 1. taking up murder weapons, 2. types of murder and 3. unintentional homicide. The revision of it that resulted in MA 1870 affected both the linguistic component and the content: the complex language structure of the 1854 version was markedly simplified, with many small sections supplanting the more ceremonial prolixity of the earlier paragraphs.⁶⁹ What were considered unnecessary provisions were deleted, and long sections rephrased. In the Article 'On Homicide', for example, MA 1870 groups 160 sections under four headings and 13 subheadings, in contrast to MA 1854's three headings, 20 subheadings. The latter thus tends to treat multiple topics under single sections. I shall first present the contrasting headings of the Article 'On Homicide' from the both *Ains*.

MA 1854

1. Taking up murder weapons (MA-ED2 1854/63 §§ 1–6)
2. [First- and second-degree] murder [and miscellaneous topics]
 - 2.1 Killing by privileged groups §§ 1–4
 - 2.2 Killing by a mute or dull person § 5

67 See HMG. *Pokā* no. 16, quoted in Vaidya & Manandhar 1985: 145.

68 See UjAin/5.

69 See MA 1870/4, 18, 5 and 161.

- 2.3 Killing by women §§6–7
- 2.4 Jointly executed murder §§8–10
- 2.5 Self-defence §§11–12
- 2.6 Bodily harm with lethal consequences §§13–16
- 2.7 Killing while being arrested §§17–19
- 2.8 Extradition §20
- 2.9 Failure to provide assistance §21
- 2.10 Exceptions to homicide law and failure to report a homicide §22
- 2.11 False accusations §23
 - 2.11.1 False accusations §40
 - 2.11.2 False accusations in doubtful cases §33
- 2.12 Assault on security personnel §24
- 2.13 Permitting or facilitating an escape §25
- 2.14 An attack on a security post §§26–27
- 2.15 Attempted homicide §§28–29
- 2.16 Regulations regarding capital punishment §30
- 2.17 Bodily harm without lethal consequences §§31–32
- 2.18 Killing under the influence of drugs §34
- 2.19 Killing by a person of unsound mind §§35–36
- 2.20 [Killing of a weak or wounded person] §§37–39
- 3. Accidental homicides (MA-ED2 1854/65 §§1–19)

*MA 1870*⁷⁰

- 1. Assaulting a sentry (§§1–4)
- 2. The law imposed in cases of manslaughter and unintentional injury (§§1–18)
- 3. Being held captive and having food and water withheld (§§1–5)
- 4. Homicides
 - 4.1 The law pertaining to cases when a weapon is unsheathed or when a weapon causes injury (§§1–8)
 - 4.2 The law pertaining to punishment when a single person intentionally kills a human (§§9–17)
 - 4.3 The law pertaining to cases of conspiracy to murder (§§18–43)
 - 4.4 The law pertaining to punishment for physical injury caused by a single person acting with the intention to kill (§§44–48)

⁷⁰ Note that the sub-sections 4.8 to 4.13 are newly introduced in the MA of 1870 thus, they are not in the MA of 1854.

- 4.5 The law pertaining to punishment for conspiracy to kill resulting in permanent incapacitation (§§49–66)
- 4.6 The law pertaining to punishment in cases where a single person, [in attacking someone else] with the intention to kill, causes no bodily injury and the person survives by chance or through help received from others (§§67–70)
- 4.7 The law pertaining to punishment in cases where a multiple number of persons who conspire to attack someone with the intention to kill do not cause injury and that person survives, whether by chance or through help received from others (§§71–78)
- 4.8 The law pertaining to punishment when a single person with murderous intent injures another person (§§79–83)
- 4.9 The law pertaining to punishment for a murder planned jointly by a group of people that results in the victim being injured (§§84–101)
- 4.10 The law pertaining to punishment when a single person intentionally strikes at a person but misses the intended victim (§§102–105)
- 4.11 The law pertaining to punishment when a group of people intentionally strikes at a person but miss the intended victim (§§106–143)
- 4.12 The law pertaining to punishment for the crime of striking someone with the intention to kill (§§144–146)
- 4.13 The law pertaining to execution, branding and other forms of punishment for the crime of homicide (§§147–160)

2.2.2 Basic Categories

Accidental homicide

The MA terms one category of homicide *bhormā jyāna mārnu* ([killing by] mistake) or *bhavitavya hatyā* (accidental [killing]), that is, death inflicted indeliberately. The MA makes a clear distinction depending on whether a killing takes place intentionally or not. For example, in most sections of the *Ain* the phrase *mārauṃ bhanī* (with the intention to kill) is used to define unlawful homicide. The following are the categories recognized as constituting accidental homicide by the MA.

a) Beating a person with hand-blow

This is one of the new criteria introduced into the MA to differentiate premeditated murder and accidental murder.⁷¹ According to this distinction, if somebody above the age of twelve dies as a result of one or two fisticuffs to the back or a cheek but not to sensitive body parts, it is taken as an accidental occurrence. However, if under the same circumstances the victim is less than twelve years, it will be considered a murder, and the offender is punished by death.⁷²

b) Setting traps*Setting defensive traps*

The MA recognized the death of someone who dies upon falling into trap set up in or around a redoubt, path, fortress or fort closed down earlier by royal decree as accidental murder.⁷³

Setting animal traps

To set a trap under specified circumstances is allowed by the MA. The death of someone who dies after falling into a trap set with conventional methods for purposes of hunting is defined as an accidental homicide. For example, if in response to a tiger, bear or the like having killed a human, somebody sets a trap, and a person who has been notified in advance falls into it, this is taken as an accidental homicide.⁷⁴ Even if somebody dies after falling into a trap set for any purpose other than that of killing, the MA does not recognize it as a murder. Instead, it is taken as a minor unintentional crime. Thus, the punishments take only the form of fines, compensation for the deceased's funerary rites or a *pretium doloris*.⁷⁵

c) Unintentional manslaughter

The MA considers obvious human error which results in death as a mishap and therefore unpunishable. For example, if somebody during the night strikes at what he misperceives as an animal or the like and a human dies in that attack, the act is recognized as a mishap. However, there is an ancillary condition that the slayer and the deceased should have harboured no mutual malice or engaged in any dispute concerning

71 See Pradhananga 2001: 226.

72 See MA-ED2/64 §1.

73 See MA-ED2/77 §6.

74 See MA-ED2/77 §5.

75 See MA-ED2/77 §§1–4.

any matter before.⁷⁶ Similarly, if a human dies in a shooting at the hands of someone hunting in a jungle targeting what he takes to be a deer or other animal, this too is treated as death caused by human error.⁷⁷

d) Death caused by accident

This is also one of the categories of accidental homicide, which happens during unexpected accidents caused by humans while engaging in daily activities. The person who caused the death is not subject to punishment as long as he and the deceased harboured no mutual malice beforehand. The MA mentions a number of typical situations: (i) An arrow or bullet goes astray when discharged because of breakage, slippage or other loss of control; (ii) Similarly in the case of slippage of an axe or the like from its wielder's hand while cutting down a tree or the like; (iii) Other such accidents: wood being dragged, a field being ploughed, or a path, water channel or temple being constructed; (iv) Men, women or children, when being led across a river or ford, are swept away and drown, having slipped loose from the grip of the person leading them across;⁷⁸ or (v) Open agricultural burning gets out of control.⁷⁹

e) Death during interrogation

The MA provides the right to government interrogators to use mild force if permitted by the prime minister during the process of interrogation. If the use of such force under restricted circumstances lead to the death of an accused person, this is counted as an accidental homicide. This issue is dealt with in Sections 1 and 2 of the Article 'On Theft.'⁸⁰ If someone has stolen four or five different objects but confesses to having stolen only one of them, interrogators are allowed to flog the accused. If by chance he dies, this is taken as a mishap. Similarly, if someone who is charged with murder or theft is detained on the strength of solid evidence and interrogated by forcible means, the interrogators are not held accountable if the accused dies.

f) The death of captives

The MA of 1870 introduces a new category of homicide, namely the death of a captive. The code allows holding somebody captive only on

76 See MA-ED2/65 §2.

77 See MA-ED2/65 §4.

78 See MA-ED2/65 §3 and §§5–10.

79 See MA-ED2/65 §12.

80 See MA-ED2/68 §§1–2.

condition that he is provided food and drink, and only over a dispute involving a commercial transaction, a debt or credit or the like. If the person who has taken the other captive provides food and water but the latter does not eat and drink what is offered, and then dies in a fearful state of mind, this is taken as a mishap and thus unpunishable.⁸¹

Lawful homicide

The MA uses the expression *khata bāta lāgadaina* (no blame shall be assigned) to indicate lawful homicide. Homicides committed under the following circumstances are defined as lawful in the MA. Although the MA dedicates a separate chapter to accidental murder, several other references relating to the same issue are observed elsewhere too in the MA.

a) Killing to protect the sovereignty of the kingdom

To ensure a system of checks and balances between the monarchy and the executive head of the country, namely the prime minister, while safeguarding the country's autonomy and the king's throne, the MA grants the king a unique legal prerogative to authorize the execution of the prime minister. This provision applies only under specific circumstances where the prime minister is found to be involved in plotting to usurp the throne, attempting to assassinate the reigning monarch and queen, or intending to surrender the kingdom's sovereignty to rulers from the southern or northern regions.⁸²

b) Killing in self-defence

The basic value of human life is enshrined in the MA. He who has been attacked and injured by someone else is granted the right to defend himself, even if that results in killing the attacker. Such killing is not a murder, nor is it punishable. Especially interesting in this case is that the caste status of the attacker is irrelevant. Although the MA strictly forbids the killing of Brahmins and woman at any cost,⁸³ the ban breaks down in the case of self-defence:

If anybody from any caste including an Upādhyāya Brahmin, with the intention of killing, wields a weapon against some person

81 See MA 1870, p. 83 §2.

82 See MA-ED1/1 §§31–33.

83 See MA-ED2/64 §1.

who has done nothing wrong, and wounds, and if he who has been wounded shall strike the attacker and kill him—irrespective of whether the attacker is an Upādhyāya Brahmin or from any other caste—then [the slayer’s] life shall not be taken, nor is he assigned any blame.⁸⁴

Women are granted the right to kill in order to defend themselves against sexual assault. They are allowed to kill the assaulter by any means wherever he is found within forty-eight minutes after the assault. The text reads:

If a man from any of Four Varṇas and Thirty-six Jātas including Sacred Thread-wearers forces sexual intercourse upon an unmarried girl, somebody’s wife or a widow—irrespective of whether she is from a caste higher than his, equivalent to his or lower than his—and she kills him during the time he is assaulting her or within 2 *ghaḍīs* afterwards, be it by striking him with a weapon such as a cane or stone, making him fall off a cliff, making him be swept away in a river or by strangling him, she shall be assigned no blame for having killed an assaulter during that time. She shall be made to obtain ritual expiation for taking a life and be let off.⁸⁵

Again, then, whoever sexually assaults a woman can be killed in self-defence irrespective of his caste status or his family relation to the woman.

c) Killing while protecting private property

For a property owner to kill a thief at the site and in the course of a theft in order to protect private property is considered to be a lawful

84 *upādhyā vrāhmaṇa arū gairha jāta kasaile kōhi virāva nagaryā mānisalāi mārau bhani hatiyāra calāi ghā lāyo bhanyā tyo ghā lāunyā upādhyā havas vā arū kōhi jāta havas testā ghā lāunyālāi ghā lāi māgnyāle hāni jyāna māryo bhanyā pani tesko jyāna pani jādaina śatavāta pani lāgdaina.* (MA-ED2/63 § 4).

85 *āphubhaṇḍā upallā jātakā havas āphu mildā jātakā havas āphubhaṇḍā ghaṭi jātakā havas arkākā sadhavā vidhavā kaṇṇyā svāsnilāi tāgādhāri lagāyat cāra varṇa chattisai jātakā loṅnyā mānisa kasaile manomāna nagarāi valajaphata javarajasti karaṇi liecha ra karaṇi gardaimā havas karaṇi garyā 2 gharibhitramā havas tesai svāsnile karaṇi linyā tesailāi hatiyāra lāthā dhūgāle hāni bhiramā laḍāi ṣolāmā vagāi pāso lāi mārīcha bhanyā usai velāmā māryāko hunāle śatavāta lāgdaina. jyāna māryā vāvat ko patiyā garāi chāḍidinu.* (MA-ED2/133 § 18).

homicide in the following situations: If the thief has been already convicted once or twice of thievery, and he again comes to steal at the same place and the owner of the property is unable to fight against him;⁸⁶ Or if thieves come in a group and break down a house wall or they come with weapons.⁸⁷ Similarly, if the owner is not able to resist the thieves or robbers by other means.⁸⁸ Further, for a person to kill a friend who had been a travelling companion in a foreign land and who had tried to kill him is lawful if it is proved through the interrogation that both had previously harboured no mutual malice and the deceased had been convicted of thievery once or twice before.⁸⁹

d) Killing by sentry

A sentry who is stationed by royal decree or through some other authorized order is allowed to kill anyone who threatens him with a rifle or other weapon while being stopped and told not to enter into a restricted area.

e) Killing a witch

Killing a witch who had failed trial by ordeal undergone of her own free will is lawful. By contrast, since forcing trial by ordeal is forbidden in the MA, killing on the basis of it is unlawful.⁹⁰

Killing during elephant or horse riding

An incident resulting in the death of an individual during a formal or informal ride on an elephant or a horse is considered accidental if the rider is unable to control the animal despite their attempts to do so. For instance, if a mahout fails to control an elephant because it is afraid of something or the animal being in a state of mating aggression (*matta*), resulting in the death of someone, it is regarded as an unfortunate occurrence.⁹¹ Likewise, if a horse-drawn cart inadvertently runs over and causes the death of a person, it is also classified as an accident.⁹²

86 See MA-ED2/68 § 5.

87 See MA-ED2/68 § 6.

88 See MA-ED2/68 § 10.

89 See MA-ED2/68 § 22.

90 See MA-ED2/64 § 27.

91 See MA-ED2/72 §§ 1–2.

92 See MA-ED2/72 § 8.

*Excusable homicide***a) Homicide committed by a minor**

The MA does not define the age limit of minors in a consistent fashion. The age of full legal responsibility depends on various circumstances. For example, a person below the age of sixteen is recognized as a minor if the matter in question is trade and monetary transactions. Any such transaction made with a person below the age of sixteen is considered invalid.⁹³ When it comes to bodily impurity regarding food, anyone below the age of twelve is defined as a minor.⁹⁴ When adultery within Sacred Thread-wearing castes is at issue, a male below the age of eleven and a female below the age of ten are defined as minors. In the case of homicide, finally, the MA defines anybody who is below the age of twelve as a minor. If a minor commits homicide, he is to be imprisoned for a month, undertake expiation and then set free. The respective section reads:

If a child below the age of 12 commits a crime involving bodily harm, from something minor [to] taking a life, they shall be assigned no blame. If someone is killed by [a child], the latter shall be calmly interrogated [in front of] five notable persons from an *adālata*, *ṭhānā* or *amāla*. The child shall not be scolded. If the child says that somebody else ordered him to commit the act and he did so, [the authorities] shall investigate whether the deceased and the one who instructed [the child to kill] harboured any grudges over something. If while conducting the investigation it is determined that the instruction [to kill] was truly [given] and a confession is given, the confession shall be written down and he who instructed [the child] to kill shall be executed. The child who committed the murder shall be imprisoned for 1 month and let go after making him undergo expiation.⁹⁵

93 See MA-ED2/92 § 2.

94 See MA-ED2/92 § 6.

95 *12 varṣadeṣi udhokā vālaṣale sānātinā kurādeṣi jyāna māryā jyānako taksira garyā tinlāi ṣatavāta lāgdaina. jyū māryāko rahecha bhanyā teslāi adālata ṭhānā amālakā paṃca bhalā mānis rāṣi phulyāikana sodhapucha garnu. nahavakāunu. arkāle arhāyothyo ra maile garyāko ho bhanyo bhanyā mārna sīkāunyā māni-sko ra marnyāko aghi pachiko kehi kurāko ivi paryāko rahecha ki rahenacha tahakikāta gari ṭhaharāudā ahrāyāko sācai ṭhaharyo sīkāunyā kāyela bhayo bhanyā kāyelanāmā leṣāi sikāi marāunyā cāhiko jyāna linu. mārnyā ketāketilāi 1 māinhā kaida gari prāyaścitta dilāi chāḍidinu.* (MA-ED2/92 § 2).

Attempted homicide

Attempted murder is punished in the same way as murder. Table 9 lists the conditions and outcomes.

Table 9: Regulations relating to attempted homicide

Conditions constitutive of attempted murder	Offenders	Punishments
Attempting to cut a person's throat, stab or strike him, crush him under a log or rock, strangle him or gag him while awake or asleep, with the intention to kill	those who may not be executed	branding and confiscation
	women	branding
	those who may be executed	capital punishment
Capturing or holding a person captive without authorization and with the intention to kill	those who may not be executed	branding and confiscation
	women	branding
	those who may be executed	capital punishment
The punishment for attempted murder is comparatively severer if the victim is a member of a security force.		
Assaulting a sentry with a weapon such as a bow and arrow, even if the victim is only slightly wounded	those who may be executed	capital punishment
	Women/ones who may not be executed	branding

Unlawful homicide

The term the MA uses to denote unlawful homicide is *jyānamārā* (lit. killer of life). As pointed out by R. B. Pradhananga, modern law relating to homicide in Nepal has kept this term to denote serious types of murder.⁹⁶ The MA defines any unauthorized killing of—or the attempt to kill—someone, and with the specific intention to do so, out of greed for property, envy or the like, as unlawful homicide. The punishment for

96 See Pradhananga 2001: 10.

committing unlawful homicide is death and the confiscation of property if the culprit is a man from a caste that may be executed, branding and confiscation if the culprit is a man from a caste that may not be executed, and branding and banishment if the culprit is a woman.

The MA categorises the following types of killings as unlawful homicide:

a) Murder (*jyāna mārnu*)

Murder is defined in the MA as the killing of one person by another person with the intent to do so, out of greed for property, envy or the like. The MA enumerates some examples to show how murder may take place, such as cutting the throat, stabbing, striking, pressing under a log or rock (*dhunigo*), strangling, gagging, administering poison, causing the victim to fall to his death or be swept away by a river, or hanging.⁹⁷

The MA 1854 distinguishes the following types of specific individual offenders in a killing carried out by a single person

- Murder committed by someone who is mute or dull but who is clever enough to know what should and should not be done § 5
- Murder committed by someone who is mute or dull but who is not clever enough to know what should and should not be done § 5
- Murder committed by an insane individual § 36
- In particular, murder committed by an insane individual who knows what should and should not be done and what should and should not be avoided, who does not eat inedible food and who does not wander aimlessly around § 36
- Murder caused by biting § 13

b) Group murder

In a murder committed by a multiple number of persons, the different types of offences are categorized into: (i) catching, (ii) dealing the fatal blow, (iii) commanding (ordering to kill), (iv) acting as barrier (helping by barring the victim's path) and (v) onlooking (bystanders to a murder who are larger in number than the murderers but do not try to save the victim).

Furthermore, different types of facilitators are distinguished:

- Those who plot a homicide §§ 9–10
- Those who hide a murderer § 22
- Those who help a murderer or thief to escape § 25

97 See MA-ED2/64 § 12.

Table 10 summarises the punishments for killing someone intentionally out of greed for property or for some other base motivation, whether during the day or night and by any of a host of means (assaulting and stabbing with a weapon, administering poison or the like).

Table 10: Regulation on killing by a multiple number of persons

Nature of participation in the crime	Punishment for men	Punishment for women
1. The following persons who facilitate a murder: (a) Those who order the killing (b) Those who help to kill or abduct (c) Those who strike or push the victim (d) Those who are in on the planning of the murder, and (e) Those who provide a weapon	death if he may be executed; confiscation and branding, if not	branding
2. Those who patrol the streets and block access to the site to facilitate the killing	confiscation and branding	imprisonment for 12 years
3. Those who participate in the plot and go to the site but do not use weapons or block (or patrol) access	confiscation and imprisonment for 12 years	imprisonment for 6 years
4. Those who participate in the plot but do not go to the site of killing	confiscation and imprisonment for 6 years	imprisonment for 3 years

c) Killing of a minor below 12

It is a notable feature of the MA that it explicitly safeguards minors who are under their age of twelve. No assault is tolerated against them under any circumstances. If a child dies even from one or two light blows of the hand to sensitive body parts, that is treated as unlawful homicide—irrespective of whether the intention was to kill or not.⁹⁸

d) Killing during robbery

Homicide committed during an act of robbery is unlawful. If a person is killed by robbers wielding weapons or by any other means during the robbery, up to five types of participants—those who block the street to prevent the victim's escape, those who hold the victim captive, those who strike him, those who order him to be struck, and those

⁹⁸ See MA-ED2/65 § 1.

who provide weapons—are liable to conviction for having committed unlawful homicide.⁹⁹

e) Killing of authorised personnel on sentry duty

Killing an authorised sentry while on duty is unlawful. Even attempting to kill one with a weapon is treated as if it were a murder. If someone opens fire with a rifle, shoots an arrow or discharges any other weapon which injures a sentry at a government post or treasury; a guard at any other place who stands watch by government order; a guard watching over money, immovable property, cattle or a person; or a member of a night patrol—irrespective of whether the victim dies or not—the wielder of the weapon is charged with murder.

f) Causing a person’s death by a snake or dog bite

MA 1870 introduces a category of unlawful homicide not dealt with in the first version of the code. It states that if anyone intentionally kills a fellow human by causing him to be bitten by a snake or dog, he is guilty of murder and will be punished under the sections of the code governing unlawful homicide.¹⁰⁰

g) Causing injury resulting in death

The MA defines intentional acts of injury that lead to death within specified timeframes as murder. The following table presents a summary of the corresponding time periods. For instance, if an individual inflicts harm upon another, resulting in death within seven days, the most severe punishment will be applied based on that duration. However, if the death occurs after that timeframe, it may be considered a natural death (Table 11).

Caste, group, gender and punishments

The MA classifies offenders into one of two categories: *kāṭīnyā jāta* and *nakāṭīnyā jāta* (those who may be executed and those who may not be executed). Brahmins, the king, certain groups of ascetics, women and persons of unsound mind fall under the first category. The general relevance of caste when meting out punishment for homicide is spelled out in Table 12.

⁹⁹ See MA-ED2/68 §52.

¹⁰⁰ See MA 1870, p. 94 §§40–41.

Table 11: Regulations governing bodily injury resulting in death

Condition	Time period	Punishment
Injuring a person by hitting him with a stick or stone	the victim dies from (various diseases, such as) diarrhoea, smallpox, remittent fever, by drowning or from having been bitten by someone	a fine according to the 'brawling' category of offences
Striking or other form of assault	the victim dies within 22 days	death
	the victim dies after 22 days	a fine of 60 rupees
Slapping a person on the cheek or hitting a sensitive part of the body	the victim cannot move and dies within 7 days	death
	the victim dies after 7 days	a fine according to the 'brawling' category
	the victim starts walking and moving after one or two days after the assault but dies within 7 days	a fine according to the 'brawling' category

Table 12: Regulations governing punishment based on caste, group and gender

Punishment	Not applicable to		Applicable to
Death	rank-wise	king	the rest, and also to Brahmins if charged with killing the king
	caste-wise	all categories of Brahmins	
	group-wise	certain ascetics ⁱ	
	gender-wise	women	
	health-wise	insane or dull persons	
	age-wise	anyone below the age of 12	
Confiscation	rank-wise	king	the rest
	gender-wise	women	
	group-wise	slaves	
Branding	applicable to all		all
Imprisonment	applicable to all		all

i This is dealt with below; see Part II: B.

Table 12 (continued)

Punishment	Not applicable to	Applicable to
Imprisonment in the Golaghara		women
Fine	applicable to all	all
Fine as substitute for imprisonment		only women

2.2.3 Capital Punishment and Exceptions to It

The exceptions to carrying out capital punishment in consideration of caste, gender or social group are laid out in Table 13: kings, Brahmins, ascetics, and women may not in general be executed but are to be branded. The branding takes a very specific form: The offender's left cheek is branded with the mark *dāmala/ḍāmala*¹⁰¹ marking him out as a prisoner for life. This seems to have been adopted from the dharmashastric practice. For example, the NyāV states: “[In the case of crimes punishable by branding,] one should shave the culprit's head, imprint a mark of the crime on his forehead, take him around on a donkey and exile him from the city.”¹⁰² Instead of exile, the MA institutionalises imprisonment for life. While branding spares the life of the guilty party, it amounts in fact to social death and the need to wage a constant struggle to stay alive.¹⁰³

101 The term *dāmala*, originating from the Arabic word *dāyamulahabsa* and derived from the root verb *ḍāmnū*, meaning ‘to brand,’ represents a form of punishment employed as an alternative to capital punishment for individuals ineligible for a death sentence. Specifically, this punishment is applied to certain groups of offenders who cannot be sentenced to death, such as Brahmins, specific groups of ascetics, or women (MA-ED2/64 §1, §3 and §5). The branding mark, *dāmala* or *ḍāmala*, is marked on the left cheek or forehead of the offender. In cases involving offenses related to sexual impurity, the initial letter of the caste name may be employed instead of the *dāmala* mark (MA-ED2/42 §2, Vaidya & Manandhar 1985: 20). Furthermore, the offender receives a life imprisonment sentence. Despite the absence of physical execution, the *dāmala* punishment is regarded as tantamount to death due to its profound social and moral consequences. Those branded with the *dāmala* mark are deemed socially and morally deceased (Khatiwoda, Cubelic & Michaels 2021: 40). Additionally, Rāma Śāha's edict (RSEdict 15) explicitly affirms that branding punishment bears similarity to a death sentence by virtue of the loss of social status.

102 *śīraso muṇḍanaṃ daṃḍas(!) tasya nīrvāsanam purāt. lalāto(!) vābhiṣastāṅkāl(!) paryāna gardabhena ca.* (NyāV, p. 227; see the parallel in NārSm 14.9).

103 The edict of Rāma Śāha (RSEdict 15) explicitly states that punishment by branding is similar to a death sentence in virtue of the loss of social status.

Table 13: Exceptions to capital punishment

Offender	Punishment	Parallels	Differences in MA 1870
Brahmins of all categories § 1	confiscation and branding with lifetime imprisonment	GDhS 21.1–3, MDh 11.55–59 RŚEdict 15	none
<p>No reason is given in MA 1854 as to why Brahmins are not to be put to death. The 1870 MA, however, provides the reason: brahmahatyā, the killing of a Brahmin, is considered as a grievous sin.¹</p>			
Ascetics among Upādhyāya Brahmins, Jaisī Brahmins or Rājapūtas; someone whose maternal descent is untraceable and who has become an ascetic; children born to a Daśanāmā ascetic, a Jogī, a Jaṅgama ascetic or Sebaḍā ascetic and a concubine Brahmin widow of an Upādhyāya Brahmin or Jaisī Brahmin who has not had illicit sexual intercourse; and a Ramātā ascetic, Phakira or Kānacīrā/Kānaphaṭṭā ascetic whose father and maternal descent is untraceable §3	confiscation and branding with lifetime imprisonment	RŚEdict 15	only non-householder ascetics are exempted from capital punishment
Females above the age of 11	branding with lifetime imprisonment	RŚEdict 15	none
A woman (for killing her husband or her own children)	branding and lifetime imprisonment in the special prison called the Golaghara with hands and feet fettered	NyāV, p. 189	

i See MA 1870, p. 125 §147.

Gender-specific regulations: More lenient punishment for women

Also shown in the table above, women may not be executed. Other forms of punishment are also less severe for women than what men could look forward to for the same crimes. The following table compares the punishments imposed on women and men for the certain crimes.

Table 14: Gender-specific regulations: More lenient punishment for women

Nature of the crime	Punishment for a woman	Punishment for a man
Murder	branding and imprisonment	death sentence if he may be executed; if not, branding, confiscation and imprisonment
Murder of one's own children or husband	branding and imprisonment	
Note: A man who has killed his own children or wife would have been punished by death.		
Facilitating a murder:	branding	death sentence if he may be executed; if not, branding, confiscation and imprisonment
(i) giving the order to kill, seizing the victim to be murdered, striking and pushing the victim, planning the murder, giving the order to kill, and providing the weapon		
(ii) guarding the street to prevent the victim's escape or surrounding the site to keep others out	imprisonment for 12 years	branding and confiscation
(iii) participating in the plot and going to the site of murder but not using a weapon, not blocking the site and not seizing the victim	imprisonment for 6 years	confiscation and imprisonment for 12 years
(iv) participating in the plot but not going to the site of murder	imprisonment for 3 years	confiscation and imprisonment for 6 years
Note: A woman could buy her way out of prison by paying a fine, but a man sentenced to death could not do so.		

Homicide with diminished responsibility

The MA deals with offenders of unsound mind separately. Those judged to fall under this category were held accountable but with diminished responsibility.

Table 15: Regulations relating to diminished responsibility for homicide

Offender	Punishment
A dull-witted (<i>gvāgo</i>) person who does not know what is to be done and what not	12 years imprisonment

Note: Someone of sound mindⁱ and able to understand but unable to speak (i.e., was mute) would have been sentenced to death for committing murder.

An insane person who does not know what should and should not be done, who invites loss of caste by eating tabooed food, and who roams around as if in the state of liberation (<i>nirvāṇa</i>)	branding and confiscation
An insane person knows what should and should not be done, does not eat tabooed food and does not roam around as if in the state of liberation	branding and confiscation (for those who may not be executed) death (for those who may be executed) ⁱⁱ

i Although the phrase *sabai thoka thāhā pāṇyā* literally means '[one who] knows everything', it seems to refer to mental sanity, a prerequisite for being held legally responsible for one's deeds.

ii If such insane persons did not eat tabooed food before committing the homicide but started doing so only afterwards, they would be branded and their property confiscated if they could not be executed; if they belonged to a caste group whose members could be executed, they were sentenced to death.

Regulations relating to execution

The MA recognises only two methods of execution: decapitating or hanging. Other methods than these are considered to be unlawful. The prime minister is subject to a fine of one thousand rupees if he orders an execution to be carried out in any other way.¹⁰⁴

104 See MA-ED2/64 §30.

Extradition

The MA has provisions regarding the transfer of a murderer from one country to another. Domestic authorities are not allowed to press charges against a foreign fugitive accused of a crime who has entered Nepal. It mandates instead going through official channels to bring about extradition. For example, it states:

If someone kills a person and flees towards Madhesa¹⁰⁵ or Tibet and crosses a border pillar or a border demarcation, he shall be brought back in consultation with the English resident (*rajiḍamṭa*) if he flees to Madhesa, and with the Chief Kājī if he flees to Tibet. He should then be sentenced to death by domestic authorities.¹⁰⁶

An exceptional regulation for Rājapūtas on adultery and theft

Table 16: Regulations relating to Rājapūta on adultery

Offender	Crime	Punishment	Parallels
Rājapūta § 2	adultery or thievery within his own caste or involving a higher caste	no death sentence but rather ban- ishment, shaving, caste degradation, imprisonment or confiscation	MDh 7.376, NārSm 12.7 and 12.69

As we have seen in Table 16, capital punishment for adultery or thievery within their own caste or involving a higher caste is forbidden when it comes to members of the ruling family. It is very surprising that a regulation relating to adultery and thievery figures at all in the Article ‘On Homicide,’ and that it should apply only to members of the ruling family, particularly since the MA has separate Articles (68 and 114) on

105 The name *madhesa* (Skt. *madhyadeśa* and var. *madesa/madesa*) refers to the flat region south of the Himālaya, north of the Vindhya range, east of Kurukṣetra and west of Prayāga (see MW s.v. *madhyadeśa*). This includes the flat lands in the possession of the Nepalese state of that time. In this context, however, the name refers to that portion of the region controlled by the British in colonial India. The other name, *bhoṭa*, which designates Tibet, also support the argument that both were used to indicate the neighbouring realms (see NGMPP K 175/18 below in Part II: C, Document 4).

106 MA-ED2/64 § 20.

adultery and theft. The effect is to seem to leave unanswered the question of whether a similar offender from another caste group would be subject to the death penalty or not.

2.2.4 Other References on Homicide

The MA attempts to regulate all sorts of possible crimes resulting in death. The Article ‘On Homicide’ does not itself cover all the possibilities dealt with in the code. Thus, I shall now proceed to present other references to murder in it found outside the Articles specifically devoted to homicide.

a) Homicide committed by members of royalty

The notion that the king was an incarnation of Viṣṇu long absolved the monarch from any kind of legal accountability in pre-modern Nepal. The Nepalese state remained true to its patrimonialist roots according to which the state was organized as an extension of the monarch’s household.¹⁰⁷ Monarchy itself was defined in religious terms, with the king as the upholder of the purity of the realm and its lawgiver. Such a polity was laid out by Jaya Sthiti Malla in his NyāV.¹⁰⁸ The MA of 1854 for the first time not only reduced the monarch to a ceremonial (and primarily ritual) authority but also subjected him to strong legal scrutiny—on a par with state agencies. Therefore, the MA held that even the king should be punished if convicted of homicide in accordance with the written law. The regulations dealing with homicide committed by a king or other royal members were incorporated into the Article ‘On the Throne,’ which contains, for example, the following provisions:

If an enthroned king kills a younger brother or son—one who would get the throne after him—by administering poison on his own or by having another person do it, such a king shall be dethroned, reduced in caste and put under house arrest outside the palace, [and there] provided with food and clothing suitable

107 See Edwards 1977.

108 See NyāV, p. 259–262, and parallels in NārSm 18.21 and 23–30.

to his rank. Such a king shall not be entitled to the throne. The one who is [next in line] to get the throne according to the roll shall be enthroned.¹⁰⁹

If an enthroned king kills with his own hands an innocent person without due process of law, he shall be dethroned and put under house arrest outside the palace, [and there] provided with food and clothing with honour. The rightful claimant to the throne shall be enthroned.¹¹⁰

If a crown prince, the rightful claimant to the throne after the king's death, kills the enthroned king by administering poison, he shall not be allowed to be enthroned. Such [a crown prince] shall be reduced in caste and imprisoned outside the palace, [and there] provided with food and clothing. The one who according to the roll is to get the throne among those who come after him shall be enthroned.¹¹¹

Table 17 summarises the regulations relating to homicide committed by a member of the royal family in connection with royal matters.

- 109 *gaddinasida rājāle āphnā sekhapachi gaddi pāune bhāi chorālāi āphule jahara bikha khuvāi bhayo aru mānisa lagāi bhayo jyāna mare bhane testā rājālāi gaddibāṭa khāreja gari jātapatita gari darjāmāphika khāna lāuna di darbāradekhi bāhira najarbandī gari rākhnu yastālāi gaddi hudaina rolale gaddi pāune jo hun gaddimā unai lāi rākhnu. (MA-ED1/1 §9).*
- 110 *gaddinasida rājāle bekasura benisāphamā āphnā bāhulile kasaiko jyāna mare (read: māre) bhane gaddibāṭa khāreja gari darbāradekhi bāhira najarabandī gari khāna lāuna ijjatasita di rākhanu. gaddimā gaddi pāune hakavālālāi rākhanu. (MA-ED1/1 §11).*
- 111 *rājākā sekhapachi gaddi pāune hakawālā balihadale takhatamā basekā rājālāi bikha khuvāi māre bhane tinale gaddimā basna pāudainan. yastālāi jātapatita gari khāna lāuna di darbāra dekhi bāhira kaida gari rākhanu. gaddimā inadekhipachikāmā rolale jasale pāune ho unailāi gaddimā rākhanu. (MA-ED1/1 §10).*

Table 17: Regulations relating to homicide within the royal family

Perpetrator	Description of crime	Punishment
Enthroned king	killing his successor (MA-ED1/1 §§9 and 29)	dethronement, caste degradation and lifetime imprisonment
Enthroned king	killing anybody else unlawfully (MA-ED1/1 §11)	dethronement and lifetime imprisonment
Crown prince	killing an enthroned king (MA-ED1/1 §10)	cancellation of succession, caste degradation and lifetime imprisonment
Crown prince or other prince in line to the throne	killing the next in line (MA-ED1/1 §30)	removal from the line of succession and imprisonment
Other sons or brothers of an enthroned king who may be put in line to the throne	killing an enthroned king (MA-ED1/1 §12)	capital punishment
Other sons or brothers of an enthroned king who may not be put in line to the throne	killing an enthroned king (MA-ED1/1 §13)	capital punishment
Sons or brothers of the crown prince who may be put in line to the throne	killing a crown prince (MA-ED1/1 §22)	capital punishment
Queen	killing an enthroned king (MA-ED1/1 §14)	caste degradation, lifetime fettered imprisonment inside the palace
Queen	attempting to kill an enthroned king (MA-ED1/1 §14)	lifetime imprisonment outside of the palace
Prime minister	attempting to kill an enthroned king, queen or anyone in line to the throne (MA-ED1/1 §§31 and 32)	capital punishment
Prime minister	plotting to kill an enthroned king, queen or anyone in line to the throne (MA-ED1/1 §31)	dismissal from his post and imprisonment

Table 17 (continued)

Perpetrator	Description of crime	Punishment
Brahmin	killing an enthroned king or anyone in line to the throne (MA-ED1/1 §25)	capital punishment
Anyone who may not be executed	killing or attempting to kill an enthroned king (MA-ED1/1 §15)	branding and confiscation
Anyone who may be executed	ditto	capital punishment
Anyone	lying in a matter pertaining to the life of the prime minister (MA-ED1/2 §4)	branding
Anyone	plotting to kill the prime minister (MA-ED1/2 §6)	capital punishment

b) Exemption on homicide through royal decree

The MA contains complex and strict regulations on how to deal with homicide, including exceptions under very special circumstances. As discussed above, the king was both lawgiver and executor of the law before the codification of the MA. In order to counterbalance the preponderance of kingly power, the MA, in formulating a regulation that the king could appeal for exemptions on behalf of murderers if he considered them extremely loyal or of great benefit for the kingdom, qualified this by requiring that such an appeal be sanctioned by the prime minister, the Council, a court and the army; otherwise, the executive body would reject the appeal. The text reads:

If an *umarāva*, army [soldier], subject or the like—whether high or low in rank—commits a crime punishable by execution, branding or confiscation of property, and if the enthroned king gives an order to the effect: ‘Such and such a person has been true to our salt, wishes us well or is useful for such and such work,’ and if the venerable prime minister, *umarāvas* of the Council, chiefs of the courts or army officers shall pardon [the one] facing corporal or monetary punishment, then the Council shall consider the matter, and if it [deems that the offender] has been true to the [king’s] salt, has wished him well or is useful, it shall accept the king’s having pardoned him; if it [deems] that

such is not the case, it shall not accept [the king's opinion], and [the offender] shall be punished in accordance with the *Ain*.¹¹²

This provision shows that nobody had the individual capacity and authority to thwart legal action taken in response to homicide. It bespeaks a political respect for the rule of law and the value of human life.

c) Diplomatic immunity on homicide and protection of envoys

The Rāṇā rulers were aware that only a peaceful and cooperative relationship with British India and China could secure their survival and the country's autonomy.¹¹³ The MA attempts to ensure that political and legal actions with a foreign dimension to them were subservient to the higher-ranking state principle of maintaining such cooperative relationships. Therefore, it adopted practices common between states of guaranteeing certain rights to the other's citizens, including diplomatic immunity to its foreign envoys and diplomats. In cases of suspected homicide, it states that official representatives of the Chinese and English governments did not fall under domestic procedures for dealing with murder charges. Not only did these representatives enjoy such an exemption; their residences in Nepal were also granted the status of special zones of immunity, and in effect recognized as an autonomous territory, as spelled out in the following sections:

If an official representative or the official resident of China or England, having come to our realm, [spills] blood or commits [any other] crime, the courts of [our] own government shall not investigate the case. One shall send notice in writing to their government.¹¹⁴

112 *kohi umarāva phauja raiyata gaihra choṭā baḍā kasaile jyū jāne dāmala hunyā dhana jānyā kurāko birāvā garyāko cha testālāi gaddinasida rājābāṭa phalānāle ta hāmṛā nimakako sojho garyāko cha khararavāhī (conj. kāravāhī) garyāko cha athabā phalānu tā kāmakō mānisa cha teskā jīya dhanako sajāya hunu parnyā kurā jo ho tesko śrī prāim miniṣṭara ra kauśalakā umarāva adālatakā hākima paṭṭaniā aphisarale māpha deu bhani hukuma bhayo bhane kausalale tajabija gari nimakako sojho garne khairavāhī garnyā rahecha kāmakō mānisa rahecha bhane sarkārabāṭa māpha gari bakseko maṃjura garnu. yatī kurā rahenacha bhane maṃjura nagarnu. ainabamojimakō sajāya garnu. (MA-ED1/1 §20).*

113 See M. C. Regmi 1988: 9–10.

114 *cīna amgrejakā ukil bakil rajitāntale hāmṛā mulukmā āi kehi khuna taksīra garyā bhanyā tinako nīsāph āphnā sarkārakā adālatabāṭa herna hudaina. unākā sarkāramā lekhī paṭhāunu. (MA-ED1 1854/2 §17).*

If somebody who has been staying inside a compound where an official British or Chinese representative or their official resident lives [spills] blood or commits [any other] crime, he shall be seized and brought to his superior, who shall be informed that such and such a person [spilt] blood or committed such and such a crime.¹¹⁵

The two passages not only bear witness that the Nepalese state had internalised interstate norms of diplomacy, while applying limits to the king's authority as well. According to the *śāstras*, one major expression of the king's sovereignty over the sacred realm (*deśa*) was his duty to keep the realm pure from defilement by punishing criminals and maintaining the social order. The recognition of diplomatic immunity goes back to ancient times, but the Rānās' codification of it in the MA amounts to a realisation that state security required laws in writing that the state could be held to, even by foreign states. Thus, the MA not only guarantees the diplomatic immunity of foreign representatives but also puts up strong safeguards to discourage attacks against them, stating that '[...] whoever plans to take the life of a [British] resident or representatives of China [...] shall be executed.'¹¹⁶

d) *Abortion and infanticide*

Neither abortion nor infanticide is dealt with in the Article 'On Homicide.' The MA has a separate Article dealing with both entitled as *jātakamārā*.¹¹⁷ This is a compound combining *jātaka* (a newborn child) + *mārā* (killer).¹¹⁸ The rationale behind formulating a separate Article 'On Infanticide' lies in the dharmashastric and customary notion of impurity attached to the process of giving birth. Although in terms of content the Article 'On Infanticide' could have been incorporated

115 *cīna aṃgrejakā ukīla bakīl rajītaṃṇṭaharu basyākā thāukā unkā khalamgābhītra basnyā mānisale khun garyo aru kehi taksīra garyo bhanyā uslāi pakri tīmrā phalānāle esto khuna taksīra garyo bhanī usaikā mālik cheu puryāidinu.* (MA-ED1/2 § 18).

116 MA-ED1/2 § 6.

117 See MA-ED2/143. The MA of 1870 retitles it as *garbha tuhāunyā ra jātaka mārnnyāko* ('On Abortion and Infanticide'; MA 1870, p. 136–139).

118 According to pre-MA legal practice, killing a new born child was one of five exceptionally grievous crimes, the other four being the killing of a Brahmin, woman or cow and adultery. Such cases were taken up by the central court, the Sadara Adālata (see Hodgson 1880 [vol. 2]: 215).

into the Article ‘On Homicide,’ the MA deals with matters having to do with bodily impurity separately, regardless of relevance to other categories. As discussed above in the chapter on caste, in regulating matters, which have some connection with purity and pollution, the MA assigns a vital role during the process of purification of an offender or victim, for instance, to their caste status, and it is no different in the case of abortion and infanticide. Since both occur in the context of childbirth, those involved—for the MA’s purposes, mainly the mother—have first to remove the impurity that comes with childbirth by performing certain rituals depending on caste status. The injunction of Manu states that

... both the mother and father share in the impurity of giving birth. The mother alone is subject to a period of birth impurity, [whilst] the father becomes pure by bathing. [A woman] is purified after the same number of nights as the months [of her pregnancy] if she has a miscarriage.¹¹⁹

Regulations relating to infanticide in the MAs of 1854 and 1870 are listed in Table 18.

Contrary to the dharmashastric view on abortion,¹²⁰ the MA does not consider the act as homicide.¹²¹ However, it stipulates that abortion is not permitted by law, and therefore whoever aborts a foetus or contributes to such an act should be punished. The punishment for aborting a foetus is prescribed as enslavement (if the offender is enslavable), and otherwise payment of a fine and acts of penance if such is permitted by law. Both parties, the mother and collaborators, have to undertake expiation for killing a foetus. Further, the MA states that if a woman or

119 *janane ’py evam eva syān mātāpitros tu sūtakam. sūtakaṃ mātūr eva syād upa-sprśya pitā śuciḥ. rātribhir māsatulyābhir garbhasrāve viśudhyati.* (MDh 5.61 and 66).

120 The VDhS categorises the killing of a foetus (*bhrūṇahatyā*) as one of the exceptionally grievous sins, other four being adultery with the wife of an elder brother, drinking liquor, slaying a Brahmin and stealing gold from a Brahmin (see VDhS 1.20). The ĀpDhS also mention that having an abortion (*garbhasātana*) is a grievous sin (see ĀpDhS 1.21.8).

121 The Penal Code of British India instituted by the British Indian government seven years later than the MA contains the same stance: The killing of a foetus is not a homicide. It reads: “Causing the death of a child in the mother’s womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.” (See section 299.3 in *The Indian Penal Code of 1860*).

Table 18: Regulations relating to infanticide

MA 1854	MA 1870
1. Killing a newborn child is homicide. A female perpetrator is branded, a male perpetrator who may be executed is executed, and he is branded and his property confiscated if he may not be executed (MA-ED2/143 §§ 1 and 4)	1. Similar (MA 1870:138 § 8)
2. Not regulated	2. Plotters to commit infanticide and those who order infanticide are punished in accordance with the Article ‘On Homicide’ (MA 1870:138 § 9)
Regulation 2 shows the growing awareness between 1854 and 1870 regarding outside actors who facilitated killings in different ways	
3. Exposing a newborn child with the intention to kill is homicide if the child dies. Those who may be executed face a death sentence, and those who may not be executed are liable to branding and confiscation of property (MA-ED2/143 § 4)	3. This is not the highest degree of murder since the victim is not directly killed. Male perpetrators are branded and their property is confiscated; a non-enslavable woman is imprisoned for 12 years; an enslavable female is enslaved. A prison term cannot be avoided by the payment of a fine (MA 1870:138 § 10)
4. Exposing a newborn child with the intention to kill, but the child survives. A male perpetrator undergoes confiscation of property and branding, and a woman 6-year imprisonment. A prison term cannot be avoided by the payment of a fine (MA-ED2/143 § 4)	4. Exposing a newborn child with the intention to kill, but the child survives. A male perpetrator undergoes confiscation of his property and 1-year imprisonment; a woman undergoes 6-month imprisonment. A prison term cannot be avoided by the payment of a fine (MA 1870:138 § 11)
Regulations 2, 3 and 4 bear witness to a process of penal reform between the two versions of the code. The 1870 MA reduces both the application of the death sentence and the severity of other punishments. Further, it explicitly does not accept a fine in lieu of imprisonment. Thus the 1870 MA developed the principle that criminals should be punished but not as harshly as called for in the 1854 MA.	
5. 30 rupees fine for hiding information relating to infanticide (MA-ED2/143 § 5)	5. Similar (MA 1870:140 § 19)

a fetus dies from an accidental injury caused by her husband, midwife or any other woman while helping during childbirth, this falls under accidental killings, and thus nobody is punished:

If a husband, midwife or any other woman is helping a woman during her delivery by pressing her womb or body in order to deliver a child which is unable to be delivered [otherwise], and the woman dies [because of] the labour pains or the child is still-born, those who helped [her] shall not be held accountable, nor need they undergo expiation.¹²²

e) *The ritual process of self-immolation*

Self-immolation as a form of ritual suicide was a common practice in ancient and pre-modern Nepal. Although most commonly self-immolation was carried out by widowed women as part of the funerary mourning for their deceased husband, the documented evidence suggests that even servants used to immolate themselves during the period of mourning the death of their master.¹²³ The MA has a separate Article, which regulates the process of self-immolation in detail. Since an in-depth discussion of self-immolation is beyond the scope of the present study, and A. Michaels has already extensively dealt with the Articles on self-immolation in the 1854 and later codes,¹²⁴ I shall here focus only on the provisions dealing with suicide.

The MA bans a widow from self-immolating as part of funerary rites mourning her son. It further mandates that anyone who allows a woman to do so commits murder, and therefore—if he belongs to a caste whose members may be executed—is to be put to death, while if he who belongs to a caste whose members may not be executed will be punished by branding and confiscation. The property of those who took part in the funeral procession to the place of cremation are to have

122 *svāsni sutkyāri humdā jātak paidā huna sakena ra tyo vāḷaṣa paidā garāunānim-itta āphnu lognyāle havas aru suḍyāni gāhira svāsni mānisale havas peṭa maḍāudā āga thicatā vāḷaṣa jhikdā tesai vethāko pīrale svāsni mari vā vāḷaṣa jhiktā maryaiko rahecha bhanyā upakāra garnalāi ṣatavāta lāgdaina. prāyaścitta pani garnu pardaina.* (MA-ED2/143 §4).

123 For example, see NGMPP DNA 14/41, ed. and tr. by Axel Michaels in <http://abhilekha.adw.uni-heidelberg.de/nepal/index.php/editions/show/237> (last accessed on 10 June 2023).

124 For detailed treatment of self-immolation, see Michaels 1993 and 1994.

their property confiscated but otherwise to be let off.¹²⁵ Further, the MA explicitly states that the forced immolation of a woman counts as murder. A woman who decides to self-immolate but then reconsiders and leaves the funeral pyre should neither be killed outright nor brought back to the funeral pyre. Anyone who gives an order to kill her, and anyone who seizes and assaults her with the intention to kill are to be held accountable for committing murder, and thus will be punished by branding and confiscation.¹²⁶ Moreover, for anyone except a son to urge a woman to self-immolate, even if she has the legal right to do so, is also considered murder. Such offenders are subject to capital punishment or branding and confiscation, depending on their caste status.¹²⁷

f) Homicide in exercising the right to kill a paramour

Almost half of the MA is devoted to regulating sexual misconduct¹²⁸—clear evidence that sexual offences were a major concern in nineteenth- and twentieth-century Nepal. One pillar of the shastric view of society was to consider sexual relationships as a main transmitter of ‘bodily impurity,’¹²⁹ and it was to a large extent incorporated into the MA. The higher the adulterer’s caste status, the more lenient the punishment.¹³⁰ Jean Fezas¹³¹ has already extensively dealt with the regulations relating to it in the MA, so I shall focus here only on those parts of Article ‘On Adultery’ that are pertinent to homicide.¹³² The MA incorporated the pre-MA practice of permitting an aggrieved husband to kill the paramour of his wife under specified circumstances. The UjAin, to the best of my knowledge, is the first legal document, which mentions this right. The text reads:

125 See MA-ED2 94/ § 8.

126 See MA-ED2 94/ § 16.

127 See MA-ED2 94/ § 22.

128 See MA-ED2/104–163.

129 For example, the NyāV, which is basically only a code of conduct, is comparatively more lenient than the MDh, but it, too, is surprisingly brutal when it comes to adultery, stating: “If a man [commits adultery] with a woman not of his caste, he shall be subjected to the highest degree (*uttamasāhasa*) of punishment; if the woman is from the same caste, he shall be subjected to a middle degree (*madhyamasāhasa*) of punishment; and if the woman is from a higher caste, he shall be slaughtered.” (*svajātyātikrame(!) pumsām uktam uttamasāhasam. viparyāye madhyaman(!) tu pratilome pramaṇaṇam(!)*). (NyāV, p. 179, see parallel in NārSm 12.69).

130 See MA-ED2/132 and MA-ED2/133.

131 See Fezas 1993.

132 See MA-ED2/134.

The fifteenth regulation of the fifth Article: If a man from any caste knowingly commits adultery with a woman who is a paternal blood relation up from the eighth generation or down from the fourteenth, or else with a woman from the maternal side up to the sixth [and down from] the seventh generation, then if the husband of that woman kills the paramour, so be it. If he does not, the paramour's genitals shall, depending on his caste status, be severed.¹³³

The sentence suggests that killing the paramour of one's wife had long been a common practice in pre-modern Nepal. As argued by J. Fezas,¹³⁴ no dharmashastric text acknowledges the specific right of an aggrieved husband to kill his wife's paramour. However, it was indeed an unwritten law in pre-modern Nepal. For example, K. K. Adhikari mentions that a husband who did not kill his wife's paramour and who did not cut off his unfaithful wife's nose was not entitled to enter into government service in the early Śāha period.¹³⁵ The MA officialises the law, while strictly regulating it. Among other provisions, only residents of the kingdom may exercise the right, while someone who once was a resident but left for a foreign land and was serving there is disqualified to return home and carry out such a retributive killing. The regulation states:

If somebody of any caste from the Gorkhā kingdom east of [the river] Mecī to west of [the river] Mahākālī leaves [the kingdom] for purposes other than trade, pilgrimage and religious observances, renounces his allegiance to the king and gives allegiance to a foreign king, and if his wife runs off with another man, then he who has given allegiance to a foreign king shall not be entitled to kill, shave and confiscate the property of his wife if he returns to his homeland, even if he has renounced allegiance [to the foreign king]. If he does so, then in accordance with the *Ain* he—if he is a Brahmin—shall have his property confiscated and be branded. If he is of another caste class, he shall be executed—taking life for life. If [such a person] has sexual intercourse with

133 *pācau vandejako pandhrau jatavīja kohi jātakā pani yekā hāḍakā āṭha pustādeṣi puḍho (emend. ubho) caudha pustādeṣi oḍhokā (emend. ūdhokā) dāṅgyu bhāimā ra vāvukā āmākā aphnā mavalipatti chaito sātāu pustāsammakā gairaha sanahamā jāni jāni virāu garecha bhanyā u svāsnūko lognyā rahecha ra jāra hānyo bhanyā hānyo hānena bhanyā jāta ansāra nalphal kāṭidinu. (UjAin/5 §15).*

134 See Fezas 1993: 4.

135 See K. K. Adhikari 1976: 109.

Table 19: Regulations relating to the killing of a paramour

The woman	The woman's paramour	Legal right to kill a paramour
Sacred Thread-wearers or Non-Enslavable Alcohol-drinkers	a blood relation or of the same clan	no
Upādhyāya Brahmins or Jaisīs	son-in-law	no
Upādhyāya or Jaisī Brahmins	Upādhyāya or Jaisī Brahmins	no

a blood relation including through use of force, he shall be punished in accordance with those same [Articles] of the *Ain*.¹³⁶

The MA specifies that in order to exercise the right of killing a paramour, the husband must belong to a caste whose members are granted the right to do so (*jāra hānne jāta*). Rājapūtas, Kṣatriyas, Magaras, Guruṅgas, Ghales and Sunuwars are listed by name as enjoying this right.¹³⁷ Table 19 summarizes conditions applying to all cases of such honour killings as spelled out in the Article ‘On Adultery.’¹³⁸

Thus, a Rājapūta, Kṣatriya, Magara, Guruṅga, Sunuvāra and so forth may kill his rival if the latter is not a blood relation or a Brahmin. It is especially interesting that the MA does not make such revenge killings mandatory. Those who had a legal right to take revenge could decide whether to kill, reduce caste status, confiscate property or impose a fine.¹³⁹ Moreover, it is expressly stated that one has only once chance to kill. If the paramour emerges from the attempt still alive, no second attempt is allowed. Any second attempt is dealt with in accordance with the law relating to homicide.¹⁴⁰

136 *mahākālī pūrva meci paścima gorṣā bharamulukakā cāra varṇa chattisa jāta gairhale vaṃda vepāra tīrtha varta garnā vāheka āphnā sarkārako muluka nīmaka chādī virānā rājako nīmaka śānyā māniskā svāsni arkāsita poila gayā bhanyā pachi nīmaka chādī āyā bhanyā pani virānā rājako nīmaka śānyāle āphnā mūlukmā āi jāra kāṭṇa muḍana sarvasva lina pāudainan. jāra kāṭṇo bhanyā vrāhmaṇale bhayā aina vamojima aṃsa sarvasva gari dāmala garnu. arū jātale bhayā jyānako vadālā jyān kāṭi māridīnu. hādā nātāmā karaṇi garnyā ra javarajasti karaṇi garnyālāi usaikā aina vamojima sajāya garnu. (MA-ED2/135 §6).*

137 See MA-ED2/135 §7.

138 See MA-ED2/135.

139 See MA-ED2/135 §7.

140 See MA-ED2/135 §18.

g) *Killing of a cow*

The protection of cows is a major concern addressed in Brahmanical shastric texts. The NyāV seems to be the first documented evidence of this concern being topicalized in mediaeval Nepal. Its provisions include cutting off part of a thief's limbs for stealing a cow,¹⁴¹ while to kill one is to commit the most heinous kind of sin, on a par with killing a Brahmin, one's own father or mother, preceptor, wife or newborn child.¹⁴² Such shastric practice continued in mediaeval Nepal, and it was explicitly adopted starting from the early Śāha period.¹⁴³ As observed by A. Michaels, King Raṇa Bahādura Śāha seems to have been the first Śāha king to enforce a ban on killing cows throughout his realm.¹⁴⁴ The MA formalised the ban by making it a strict legal restriction. Although the MA does not directly specify the reason for doing so, it is obvious that cows were of great significance for the Gorkhālī kings. The name Gorkhā, a contracted form of the Sanskrit term *gorakṣa*, means 'protection of cows.' The ban in the MA had its source not only in the strong spiritual ties with this Brahmanical and royal tradition; it also was one of the more significant symbolic acts meant to tout Nepal as the last remaining Hindu kingdom.¹⁴⁵ Thus, the MA equates the killing of a cow to committing murder.

The following are the ways the killing of a cow is considered to be murder in the Article 'On the Killing of Cow:'

- Killing a cow intentionally amounts to murder, and so offenders are branded.¹⁴⁶
- Striking a cow with a weapon with the intent to kill, even if the cow does not die, amounts to attempted murder. The offender's property is confiscated and—if not enslavable—he is not further punished; if enslavable, he is arrested and enslaved.¹⁴⁷

141 "If someone steals cows or [the belongings] of Brahmins, his limbs shall be chopped off." *goṣu brahmanaśaṃsthāsu(!) sthūrāyaś chedanam bhavet.* (NyāV, p. 287, and the parallel in NārSm 19.40).

142 "The realms where they go who kill a Brahmin, father, cow, mother, preceptor, newborn child, foetus or woman, who violate a preceptor's bed or overstep the bounds [of propriety] are where they reach to after life who do not speak truth." *brahmahā pitṛhā goghno mātrhā guruhā tathā. bālahā bhrūnahā ceva(!) tathaiḥ gurutaḥpaḥ. maryādābhedakaḥ strīghno yān(!) yām(!) lokām hi gacchati. tāṃ(!) lokām prāpmuyān mithyād(!) yaḥ praśnam anṛtam vadet.* (NyāV, p. 298, and the parallel in NārSm 20.1 fn. 1).

143 See Michaels 1997 for a detailed study on the concept and legitimation of cow protection.

144 See Michaels 1997: 86.

145 See MA-ED2/1 §1.

146 See MA-ED2/66 §1.

147 See MA-ED2/66 §2.

The lawful killing of a cow slayer

Killing someone who has intentionally slain a cow or an ox at the site where this has just occurred is classified under lawful homicide.¹⁴⁸ If anybody in the Gorkhā realm sees someone who is deliberately setting about to kill a cow or an ox with a handheld weapon, he should first try to dissuade the latter from doing so. If he is ignored and the animal is slain, he may kill the offender on that day, at that moment and at that site.¹⁴⁹

The unlawful killing of a cow slayer

Killing someone, then and there, who has accidentally killed a cow or an ox is an unlawful homicide, and thus the offender is subject to capital punishment if his caste allows for his execution.¹⁵⁰ Killing someone on the basis of second-hand allegations of a cow having been slain amounts to unlawful homicide, and thus such a person is to undergo capital punishment if his caste allows for his execution.¹⁵¹

The accidental killing of a cow

- If someone kills a cow under the following circumstances, it is taken as an accident and thus not punishable:
- When a cow or an ox dies while being driven back with a stick or a stone, while undergoing a vasectomy or while ploughing a field.¹⁵²
- When a cow or on ox dies when being struck two to seven times while being chased away from standing near or consuming harvested crops.¹⁵³
- When a cow or an ox is killed by a tiger or lightning strike, or else dies from some disease or for no apparent reason.¹⁵⁴

The MA of 1870 has basically the same regulations relating to the slaying of cows. In addition, a provision was added to include yaks:

If anybody within the Gorkhā realm consciously kills a male or female yak, each individual [involved] in the killing shall be

148 See MA-ED2/66 §7.

149 See MA-ED2/66 §10.

150 See MA-ED2/66 §7.

151 See MA-ED2/66 §10.

152 See MA-ED2/66 §§3–4.

153 See MA-ED2/66 §3 and §11.

154 See MA-ED2/66 §3 and §13.

fined 40 rupees. If the fine is not paid, he shall be imprisoned in accordance with the *Ain*.¹⁵⁵

The ban on the killing of yaks is especially interesting here since the animal was neither considered to be holy nor was it a symbol of Hinduization. Careful reflection is needed for coming up with a rationale behind it. A. Michaels argues that the reason was that “the Bhotiya people of the border areas needed to be brought within the Mora kingdom of Nepal, at least symbolically, thereby marked as subjects of Gorkha, not Tibet.”¹⁵⁶ However, this argument needs to be reanalysed. The MA has certainly set up strict barriers to the slaying of cows, at least partly because of long-established shastric norms and customary practices, but at the same time these need to be placed alongside similarly obligatory provisions not to kill other animals, for example, female goats, buffaloes or pigs. Even during sacrificial processions, female animals may not be sacrificed. It appears, then, that the main reason behind animal protection was the economic: The major source of income in pre-modern Nepal was cattle. The ban on killing yaks can be understood as a measure of protecting the economy in the Himalayan region as well as integrating that region into a centralised law-based polity.

h) Providing false news about death

The MA sets forth the legal response to providing false information about somebody’s death. If such false information results in the death of a kin of the supposedly deceased person, the informant is held accountable for homicide. The pertinent passage reads:

If somebody goes to the home of someone else who has gone to a foreign land and informs [the occupants] that such and such a [member of the household] has died, and if the wife of the one said to have died ritually immolates (*satī*) herself on the basis of information received from that person, then in the case where he who was said to have died returns alive the informant—if he is from the caste that may be executed—shall be executed—taking

155 *gorṣārājabharamā jānī jānī kasaile cauri caurini māryo bhanyā māṛṇyālāi jīya 1 ko 40 rūpaiyākā darale daṇḍa garnu. rūpaiyā natīryā aina vamojima kāida garnu.* (MA 1870 §16).

156 Michaels 1997: 92.

life for life. If [the informant] is a Brahmin, he shall be branded and his share of property confiscated.¹⁵⁷

2.2.5 Fundamental Differences in MA 1870's Approach to Homicide

As previously noted, the *Mulukī Ain* of 1870 saw not only material changes to the content of the text but also linguistic ones: the complex language structure of the 1854 MA was markedly simplified, with many small sections supplanting the more ceremonial tone of the previously prevalent long paragraphs.¹⁵⁸ Provisions considered no longer necessary were deleted, and long sections rephrased. For example, the MA of 1854 narrates three lengthy true-life accounts to highlight why one should not invest one's fiscal resources in foreign lands.¹⁵⁹ The MA of 1870 dispenses with such narrative elements and simply formulates restrictions banning investment in foreign countries.¹⁶⁰ Similarly, the Article 'On Homicide' was simplified and rephrased, and some new legal concepts have been introduced. The significant differences observed in the MA of 1870 are the following:

a) Ascetics and capital punishment

The law on homicide as it applies to ascetics is ambiguous in MA 1854. Sections 3 and 4 deal with murder committed by ascetics.¹⁶¹ However, it is not made clear whether householder ascetics other than Brahmins are exempt from capital punishment or not. Such ambiguity must have caused confusion on occasion. By contrast, MA 1870 explicitly exempts only Brahmin and non-householder ascetics from capital punishment; any householder ascetic not a Brahmin is to be executed if convicted of murder.¹⁶²

157 *kohi pardesa gayākā mānislāi kasalle gharamā āi phalānutā maryo bhani sunāyo ra usai śavaramā svāsni sati pani gaicha pachi tyo maryo bhanyāko mānis jyūdai āyo bhanyā tyo sunāuna āunyā mānislāi kāṭinyā jātalāi jyānako vadalā jyāna linu. vrāhmaṇa jātalāi aina vamojimko aṃsa sarvasva gari dāmala garnu.* (MA-ED2/96 §1).

158 See MA 1870 p. 1–2 §§1–5.

159 See MA-ED2/1 §1.

160 See MA 1870 p. 1 §1.

161 See MA-ED2/64.

162 See MA 1870 §152.

b) Privilege for Rājapūtas

The 1854 MA exempts Rājapūta ascetics from capital punishment if convicted of homicide, with no distinction made between householders and non-householders. The form their punishment takes is branding and confiscation. The 1870 MA removes this exemption, stipulating that if a Rājapūta ascetic is a householder, he should be put to death if convicted of murder.¹⁶³ This shift in the legal code would seem to at least mirror, if not for its own part promote, a gradual erosion of Rājapūtas' social status.

c) Substituting payment of a fine for imprisonment

According to MA 1854, an offender who is not directly involved in a murder can avoid his time in prison by paying twice the fine. For example, those who participate in a murder plot but do not go to the site are to be let off if double the fine is paid.¹⁶⁴ Female offenders are more consistently provided this opportunity. Section nine states:

Those who plan [a murder] but do not proceed to the site of murder and those who plan a murder that is revealed before it can be carried out shall be [subject to having] [their] property confiscated and [being] imprisoned for one and a half years. They shall not be set free [from prison] even if twice the fine is paid [in compensation]. If a woman commits such [crimes], she shall be imprisoned for twelve years if the punishment for a male [offender] is branding. If she commits offences which call for the imprisonment of women, she shall not be [subject to having] her property confiscated, and her imprisonment shall be half of that of a man. If a fine is paid [in lieu of imprisonment] by a woman, it shall be accepted and she shall be set free.¹⁶⁵

In a reversal of MA 1854, the code of 1870 explicitly abandons the system of allowing offenders in homicide cases to forego imprisonment by paying a fine, irrespective of whether they were male or female:

163 See MA 1870 §152.

164 See MA-ED2/64 §1.

165 MA-ED2/64 §9.

myādakā rūpaiyā katti diyā pani nachoḍnu ('whatever money may be offered [in restitution] for the prison term, [authorities] shall not let off [the culprit]')¹⁶⁶ This indicates that the 1870 code acknowledged the notion that criminals should be punished equally, whether rich or poor. The legal provision in MA 1854 that allowed release from prison upon payment of fine may well have encouraged wealthy persons to continue breaking the law. Therefore, it can be argued that the 1870 MA was more sagacious in this respect.

Summing up, the stance taken by the MA regarding the punishment of a king for committing murder can be characterized as a unique blend of shastric ideas and evolving legal perspectives on the role of a monarch. Prior to the MA period, the prevailing belief influenced by the dogmas of the *śāstras* was that the king's words were considered as those of Viṣṇu, possessing the ability to purify the impure, so that 'even as a husband without good qualities is worthy of a wife's worship, [so too] is even a king with bad [qualities] worthy of his subjects' worship.'¹⁶⁷ For example, NyāV states: 'An impure person can immediately become pure, and a pure person impure, just through hearing the speech of a king. [Therefore,] how can a king not be divine?'¹⁶⁸ On the one hand, the MA accepted the shastric position that kings should not be killed even if they exhibit very bad qualities;¹⁶⁹ on the other hand, it established as a common policy under the rule of law that nobody is above the law. Therefore, the punishment introduced for a king's committing murder is life imprisonment. Moreover, as noted in the earlier table, the other interesting regulation relating to homicide within the royal context is capital punishment for Brahmins who attempt to kill the ruler or his successor. This example demonstrates the ideological turmoil within shastric discussions during that time. Despite the unanimous protection afforded to Brahmins in all *śāstras*, the legal discourse prior to codification resulted in significant deviations from these traditional texts. These deviations allowed for the killing of Brahmins in acts of self-defense or their execution if found

166 See, for example, MA 1870 §8.

167 *nirguṇo 'pi yathā strīṇām pūjya eva patis sadā. prajānām viguṇopy eva pūjya eva narādhipiḥ(!)*. (NyāV, p. 258, and the parallel in NārSm 18.22).

168 *aśucir vacanād yasya śucir bhavati pūruṣaḥ(!). śuciś caivāśucis sadyaḥ katham rājā na daivatam.* (NyāV, p. 270, and the parallel in NārSm 18.49).

169 For example, the NyāV states: *loke 'smiṃ dvā avācyāv adandayo(!) ca saṃprakīrtitau. brahmaṇas(!) caiva rājā ca tau hidaṃ bibhrto jagat.* "In this world, two persons, the king and a Brahmin, ought not to be blamed and killed, for both of them have protected the world." (NyāV, p. 243, and the parallel in NārSm 15/16.21).

guilty of killing a king or the heir apparent. Furthermore, the king could also be downgraded in caste if they committed murder. Nor is the king any longer credited with such supreme divine authority that his verbal orders immediately make impure things pure. Rejecting the inherent divinity of kings, the MA re-assigned the attendant powers to the country's executive body leaving the king himself accountable for crimes.

3 The *Mulukī Ain* in Its Application

Jaṅga Bahādura Rāṇā's main aim in promulgating the MA was to unify the penal code by prescribing clear guidelines for meting out punishment. As stated in the previous chapter, since the earlier legal system had not been uniform, two offenders from two different territories, ethnic or cultural groups could easily have received totally different types of punishment for the same crime. Other aims were to bring the existing caste regulations for the multiplicity of Nepal's ethno-cultural groups under a single legal framework, to standardise the legislative process and to create a uniform administration to function throughout the realm.¹ The MA is the first Nepalese codification of civil and penal regulations to deal with almost all existing social, judicial and administrative matters. The codification incorporated normative ideas, customary laws and even British political concepts and practices. It was amended and supplemented several times and is still in use, even if in a form that is completely different from the MA of 1854. However, a major question remains, to be addressed in the following section.

3.1 Was the MA ever Implemented when Making Juridical Decisions?

Before elucidating aspects of the implementation of the MA, I shall briefly go over some issues regarding the question of implementing the Brahmanical legal scriptures (*dharmaśāstras*). There has been a long-standing discussion about the implementation of such law codes in social and legal practice.² It is still not sufficiently clear to what extent Hindu society was administered according to customary practices (*deśācāra*) as opposed to legal practices grounded in the *dharmaśāstra*. It is possible that one of the sources of the dharmashastric texts were

1 See Michaels 2005b: 8.

2 See, for example, Rocher 1993, Lariviere 2004, Davis 2005 and Michaels 2010.

customary practices,³ but it is hard to imagine that the Brahmanical *dharma*-texts could have simply incorporated customs as practised in all the geographically and culturally diverse territories and societies of the Indian subcontinent and ended up with a universally acceptable code. Although piles of such Brahmanical jurisprudence of the ancient Indian subcontinent have been transmitted to us, almost no historical material on the legal practices has survived.⁴ R. W. Lariviere points out that the *dharmaśāstra* was never supposed to be codified law but only to provide guidelines for legal practice:

The application of all law is context sensitive. It is a delusion to think that the law can be proclaimed for all time and in every circumstance. The authors of the *dharma* literature understood this context sensitivity of *dharma*. It was never their intention to exhaustively record and codify all law applicable for all time. It was their intention to provide a means whereby law could be ‘discovered’ in each specific context. In an Indian context, there was never the idea that any two crimes or civil wrongs were identical, so there was no reason to be concerned with precedent. Each dispute was unique and what was needed was a general set of guidelines for procedure and for classification of the dispute. This is what the *dharmaśāstra* provided for dispute settlers of ancient India.⁵

Davis’s conclusion regarding the issue of implementing dharmashastric texts is similar to R. W. Lariviere’s opinion that “sacred texts were not normally sources of positive law, but rather of jurisprudential training.”⁶ One clear strand of opinion, then, is that these texts are more theoretical exercises that paint a series of fictional constructs and could not possibly or reasonably have been meant, as they stand, to be put into practice as strict law codes. They are books of law—or rather, books of laws—containing, as L. Rocher states, “a mass of floating verses of rules and observations ‘that were, indeed, at some time and in some place’ governing the life and conduct of people.”⁷

3 See Lariviere 2004: 616 and Davis 2005: 314.

4 See Michaels 2010: 61.

5 Lariviere 2004: 615.

6 See Davis 2005: 317.

7 Rocher 1993: 267.

To illustrate the point that *dharmasāstra*-texts are more normative and theological than practice-oriented in nature—in the sense that they do not lay down concrete judicial responses to the whole gamut of possible concrete circumstances, and thus could not be used as positive legal texts—I shall present the example of a document that I came across. Preserved in the NAK, it may serve as a solid documentary evidence for the current hypothesis. The document (DNA 4/100) is a letter sent by Raṇavīra Siṃha, a government employee, to General Bhīmasena Thāpā in 1835 (VS 1892) from the Pālpā frontier.⁸ It mentions the reciprocal treaty signed between the East India Company and the Nepalese government in 1834 (VS 1891) to control cross-border crime, especially theft and robbery, which was—and remains—a significant problem. Although Brahmins and women are always exempted from capital punishment in accordance with dharmashastric regulations⁹ and Hindu customary practice in pre-MA Nepal,¹⁰ an exception is made in this very plainly formulated treaty, to the effect that if, irrespective of caste and gender status, anybody commits an act of cross-border robbery, he or she shall be put to death by the authority in power where the crime took place. It is stated that the core reason for such strict punishment is in order to ensure the mutual diplomatic friendship between the two governments, Nepal and the Company state. Thus, Nepalese authority declares that anybody from the Four Varṇas and Thirty-six Jātas will be punished by death if the offences of cross-border theft and robbery are proved. This is a typical example illustrating that the legal practices tended to be based either on customary practices or on wholly practical concerns. Despite the fact that Brahmins and women were customarily exempted from capital punishment in eighteenth/nineteenth-century Nepal, such punishment was meted out for the purpose of ensuring smooth diplomatic relations regardless of what the *dharmasāstras* and customary practice enjoined.

Coming to the MA, it has always posed the riddle whether the text was really made the basis of legal practice or whether it, too, remained a kind of *dharmānibandha* composed in the vernacular. Scholars who have dealt with different aspects of the MA have not focused in any great detail on the issue of its actual implementation.¹¹ As pointed

8 See Part II, C. Document 1.

9 See, for example, ĀpDhS 14 and MDh 11.27.

10 See, for example, RSEdict 15.

11 See, for example, Höfer 2004, K. K. Adhikari 1984, Fezas 2000 and Michaels 2005b.

out by T. Manandhar,¹² scholars argue that the MA did not bring any fundamental change to the courts of law of nineteenth-century Nepal because the Rāṇā aristocracy allegedly ignored court procedures that were written down in the MA.¹³ As observed by these scholars, the Council, which was the supreme executive body and court of appeal, was a mere puppet of the powerful Rāṇā prime minister. H. N. Agrawal even argues that the Council was used only once in 1847 by Jaṅga Bahādura Rāṇā, to declare the abdication of King Rājendra.¹⁴ Similarly, M. C. Regmi writes:

Legislation alone could not circumscribe the reality of the Rana Prime Minister's absolute authority. There were no constitutional safeguards to ensure that he actually complied with the spirit of the restrictive provisions of the code. A tradition gradually evolved according to which the Rana Prime Minister's word was regarded above the law.¹⁵

Such arguments are made by scholars without paying enough attention to the large corpus of documents available in private and public institutions in the Kathmandu Valley and beyond. Among the documents, numbering in the hundreds of thousands, only some of them have so far been studied. These unstudied documents form a basis for the still largely unexplored history of legal practice under the MA in mid- and late-nineteenth-century Nepal.

In this section I shall therefore be discussing some of the noteworthy legal documents related to the MA that, issued nearly contemporaneously, were often directly incorporated into the MA both prior to and following the initial publication of the *Ain*. Subsequently, I shall present documented evidence having to do with criminal cases and with civil law which proves that the MA was in fact not a *dharmanibandha*-like legal tome but rather reflected current realities, and so must be regarded as the basis of and point of reference for the workings of the legal system of the Rāṇā administration.

12 See Manandhar 1999: 25.

13 See, for example, H. N. Agrawal 1976: 12 and M. C. Regmi 2002: 4.

14 H. N. Agrawal 1976: 12.

15 M. C. Regmi 2002: 4.

3.2 Associated Documents and Precursors

Jāṅgabahādurīsthiti

The *Jāṅgabahādurīsthiti* (hereafter JBS), edited by R. Shrestha, was a legal document (*sthiti*) drafted and actuated roughly three months before the initial publication of the MA. It was drafted by a certain Kedāranātha, possibly a scholar of Maithili descent,¹⁶ and finalised on Sunday, the fifteenth of the bright fortnight of Āśvina in VS 1910 (1853).

The invocatory stanzas¹⁷ are historically relevant, stating that the JBS was prepared by order of Jaṅga Bahādura Rāṅā. They signal the specific applicability of the document's contents to Mithilā migrants from northern parts of India who inhabited southern parts of Nepal and, later, the Kathmandu Valley.¹⁸ It chiefly topicalizes rituals of initiation (*vratibandha*), marriage (*vivāha*), annual ancestral rituals (*śrāddha*), adoption (*dharmaputra*), the share of property inherited by a widow (*vidhuvā aṃśadhana*), property partition (*aṃśabaṇḍā*), penal categories, purity regulations and adultery. It also regulates the act of widow burning (*satī jalāunu*) and the annual death ritual related to such widows.

Since the JBS declares that Nepal was viewed as a 'foreign land' by Maithili Brahmins, whose social and ritual regulations are presented as different from—if not incompatible with—contemporaneous Nepalese Brahmin groups, we can safely assume that the JBS was issued with the particular aim of keeping unfamiliar customs from gaining ground

16 Since the underlying documents mostly deal with rituals carried out by the Maithili people, it is highly probable that the author of it, Kedāranātha, was a Maithila Brahmin. In 1812 (VS 1869) Gīrvāṇayuddha made him the head of what appears to have been the Pustaka Khānā. The *lālamohara* issued by him gives Paṇḍita Kedāranātha Jhā charge of an office containing "all" books (see NGMPP DNA 16/93, ed. and tr. by Axel Michaels in <http://abhilekha.adw.uni-heidelberg.de/nepal/index.php/editions/show/839> last accessed on 10 June 2023).

17 *jānakīrāmacandrau dau tadījjimūtasannibhau* (ed. reads: °jibhauṭa°). *navā śiṣṭān maithilāś ca sthitis teṣāṃ prakāśyate. gorakṣeśvaramaṃtrīndraḥ śrīmajiṅgabahāduraḥ. sāksād dharmasya mūrṭiḥ sa kumārasyaṃśāsambhavaḥ* (ed. reads: °sambhamvaḥ). *sarveṣāṃ varṇadharmnāṅām sthitiḥkartā* (ed. reads: *sthitiḥkartā*) *prthūpanaḥ. tadāñjāyā subodhāya sarveṣāṃ deśabhāṣayā*. "Having bowed down [my head to the feet of] both Jānakī and Rāmacandra (who resemble lightning and clouds) and the remaining Maithilī [population], I shall explain the regulations decreed with regard to them. For easy understanding, [they are expressed] in the language of the country (i.e., Nepali), [this] by order of Jaṅga Bahādura, who is the *maṃtrīndra* (prime minister) of the *gorakṣeśvara* (i.e. King Surendra); who has manifested as an embodiment of the *dharmā*; who was born into royalty (lit. born of a prince); who is a creator of all caste-specific duties (*varṇadharmas*); and who is [both] great and eminent." (JBS/Invocation 1–3, p. 7).

18 See Bista 1972: 21.

in the region.¹⁹ Although the force of such ‘foreign’ imports was in this case being stunted, there is otherwise a noteworthy degree of tolerance of such customs, owing, not least of all, to the classical Brahmanical notion of *deśadharmā*,²⁰ according to which quasi-legal acceptance is granted to deviant regional customs practised in parallel to the official codified law, as long as they are not in open contradiction to it. One might even go so far as to speak of a long-standing tradition of legal pluralism, and in some cases of legal relativism; the evidence suggests that the Maithili people were not historically prevented from carrying out their own rituals and observing their own customs in Nepal.²¹

A similar outlook is manifested in the MA: Judges presiding over courts in the Terai are exhorted to pass down judgement without breaching local customs, unless these go directly against the MA.²² However, now that legal relativism has made an appearance, it is necessary to specify that the applicability of multiple legal authorities is limited to a selected set of legal questions, and is supplanted by hierarchical and centralised rules when it comes to actually meting out punishment.²³

19 In fact, this is explicitly stated: *maithila brahmanako nepālādideśako vāsa jo cha so paradeśako vāsa hunāle yi jāṭiyakā vyavahārakā diśāṣiṣale svavyavahāramā katai nyūna katai adhika parna jālā ki bhānī saṁdehale [...]*. “The settlement of Maithili Brahmins in Nepal (i.e., Kathmandu) and other region constitutes an alien influx. Therefore, there being a concern that irregularities may appear in one’s own practices through the adoption of these [alien] caste practices [...].” (JBS/Colophon, p. 17).

20 See Wezler 1985 for a discussion of the concept of *deśadharmā*.

21 See MA-ED1/167.

22 *mahākālīpūrba* (read: °*pūrva*) *mecipaścima madhyesa tariyānikā jillā jillāmā rahyākā madhesiyā [parbatyākā] nātā gotā hāda kuṭumbasāgākā kurāmā ra māṣinyā kalam au upallā [tallā ka]raṇi jāta bhāta pāni sanabandhikā kurā mā aghidekhi ājasammako jo [...] cali āyāko cha sohi bamohima madhesiyālāi nīsāpha garnu. estā muddā ja [...] [...] cha aghidekhi cali āyākāmā ra ainakā ritāmā pani betyāsa parnyā kuro pari āyāmā khasokhāsa behorā pathāunu ra āyāko kāgaja heri [...] tajabija bhai āyābamojima garnu.* “Regarding issues [of adultery] involving Madhyesi and Parbatyā peoples who have settled in the various districts east of the Mahākālī and west of the Mecī—[adultery committed] between relatives or blood relations—issues of enslavement as well as adultery, or issues of [the acceptance] of water and rice between higher and lower castes, judgements in which the peoples of Madhyesa are involved shall be passed in accordance with what has been practised earlier. If something comes up in which the *Ain* and practised customs collide, the exact details shall be forwarded [to the central authority]. [The judges] shall [first] look at the documents that have arrived [from the centre], examine them [...] and pass [judgement] in accordance with them.” (MA-ED1/167 §2).

23 *mahākālīpūrba* (read: °*pūrva*) *mecipaścima madhyesa tariyānikā jillā jillāmā rahyākā madhesiyā ra parbat[tyā]kā kārobāra tartamasuka lina dinakā nagada jinisa sunā cādi jāwāhera kasan taman caupāyā gairhakā jhagarāmā ra gāli guptā kuṭpiṭ cori tarabāra latṭhile hāni jakhama bhayā [...] jyāna māryākā khatamā au pāni nacalnyā achuti choyā chiṭo hālanu parnyā jātasāga karaṇi sanabandhikā kurā pari āyāmā yahi aina bamojima insāpha garnu.* “Regarding disputes

The contextual function of the *Ain*: A treaty between the Nepalese government and East India Company

As discussed in the previous chapter, the MA served multiple functions, the chief of which was that of a binding legal code. At other times, and in other contexts, it stood in as the country's constitution, while the heightened social awareness displayed by this text generated great momentum to craft further administrative regulations and diplomatic agreements. Very often, these ensuing texts followed in the mould of the MA, and that rather closely, since the latter was perceived as a constitutive model.

The treaty signed by the Nepalese government and the East India Company in 1855 (VS 1911) can be taken as an instructive example of how the standards set by the MA—both of a semantic and stylistic nature—were applied and transferred to the political domain. The MA had adopted, and explicitly acknowledged such international norms of foreign diplomacy as diplomatic immunity. In like manner, the treaty is signed by both governments following well-established norms of state-to-state interaction, and the procedures and approaches outlined in it closely follow standards set in the MA. For example, §18 ('On Legislation') states:

If someone who lives inside the compound of the Chinese or British envoys or residents, commits a murder or any other crime, that person shall be arrested and handed over to his superior with the words: 'Such and such a person of yours committed such and such a crime.'²⁴

In further elaborating upon areas of mutual cooperation between the Nepalese and East India Company's governments, the treaty adheres to

involving Madhyesi and Parbatyā peoples who have settled in the various districts east of the Mahākālī and west of the Mecī—[disputes] over transactions, loan deeds, money matters, [such] property [as] gold, silver, jewellery [and] cattle; verbal abuse, brawling, theft, injury from being struck by swords or bamboo sticks; murder; or adultery committed with members of Water-unacceptable and Untouchable castes, the judgement shall be passed out in accordance with this *Ain*." (MA-ED1/167 §1).

24 *cīna aṅgrejakā ukīla bakīla rajīṭaṅtāharu basyākā thāukā unakā khalamgābhītra basnyā mānīsale khun garyo aru kehi taksīra garyo bhanyā us mānīsālāi pakrī tīmrā phalānāle esto khuna taksīra garyo bhani usaikā mālik cheu puryāidinu.* (MA-ED1/2 §18).

the basic tenor of foreign policy norms laid down in the MA, as exemplified in section 6 of the treaty:

If somebody who is connected to the British embassy or lives inside British embassy [compound,] and is not a subject of the Nepalese king, commits a crime within any of the Nepalese king's provinces [but] outside of the embassy border, and the Nepalese palace decides that the accused person is liable for punishment, the Nepalese government shall arrest such a person, shall interrogate [him] and shall hand [him] over to the British embassy for [carrying out] punishment. If under these same circumstances that person is a subject of the Nepalese kingdom, it shall not hand over [the accused] to the British embassy for [carrying out] punishment. If Hindustani merchants or other subjects of the honourable Company's government who have no connection to the British embassy but are living within the boundaries of Nepalese territory commit any crime at any place outside of the British embassy's border and go to the British embassy for asylum in order to avoid punishment likely to be prescribed by the Nepalese palace, the British embassy shall not provide asylum to such persons. [The embassy] shall hand over such persons to the Nepalese government for interrogation and punishment.²⁵

These examples show that the MA served as a constitution, into which legal documents were incorporated piecemeal, if not entirely subsumed. This laid a strong foundation for developing the country into a full-fledged nation-state

25 *yadi kunai vyakti, jasko vṛtīśa dūtāvāsasaṃga sambandha cha, athavā vṛtīśa dūtāvāsako bhītra vasekā chan au nipāla sarakārako prajā chainan, le vṛtīśa dūtāvāsako sīmāko vāhira nipāla sarakārako kunai pani pradeśako bhū-bhāgamā aparādha garyo ra so aparādhako nimiti nipāla daravāravāṭa sajayāko bhāgī thahariemā tyastā vyaktīlāi nipāla sarakārale pakṛī jāca paḍatāla au sajayāko nimiti vṛtīśa dūtāvāsamā sumpine cha, parantu sohī avasthāmā yadi tyo aparādhi vyakti nipāla rājyako prajā cha bhane, nipāla sarakāra dvārā sajayāko nimiti tyastā vyaktīlāi vṛtīśa dūtāvāsamā sumpine chaina. yadi kunai hindūsthānī mahājanaharu athavā mānanīya kampanīkā anya kunai prajāharu jasko vṛtīśa dūtāvāsasaṃga kehī samvandha chaina ra jo nipālako sīmā bhītra vasekā chan vṛtīśa dūtāvāsakā sīmā vāhira anya katai kunai kisimako aparādha garchan ra tīnīharu nipāla darvāra dvārā daṇḍita hune thāha pāera vṛtīśa dūtāvāsako sīmā bhītra śaraṇa lina gaemā, tyastā vyaktīharulāi vṛtīśa dūtāvāsamā kunai āsṛaya diṇe chaina tathā jāca paḍatāla ra sajayāko nimiti nipāla sarakāralāi sumpine cha. (Transcribed in Yogi 1966: 132).*

3.3 Documented Evidence of the MA being Put into Practice

The first piece of evidence of the actual enforcement of the MA to be discussed here was transcribed by T. Manandhar.²⁶ It records the carrying out in 1861 of punishments imposed by the Criminal Court (Iṭācapālī) upon seven criminals, two of whom were sentenced to death for committing murder:

Lachimanyā Jiryāla, who was living in Listi Kokarthali,²⁷ was executed in accordance with [Section] 15 of [the Article] ‘On Homicide’ after he confessed [his crime] and wrote a note of confession stating: “On Tuesday, when the 20th day of the month Maṅsira in the year [VS 19]18 was underway, I was at [my] cowshed in Japhebyāṃsi. In the morning, I had started doing work in the cowshed after freeing the farm animals (lit. cows and buffaloes) [to graze]. I realized that the farm animals were eating from the *kunyūs*²⁸ [standing] on the rice field. Meher Siṃha Basnyāta, the son of Naina Siṃha Basnyāta [born] to [his] Bhoṭinī²⁹ wife, chased the farm animals off and came [towards me] swearing at me. Because he was swearing, I pushed him away and he fell down. When he struck me twice with a stalk of maize, I got angry and struck him, the said Meher Siṃha Basnyāta, on his head with a rod of *kholamyā* wood. He fell down on the spot and could not get up. He could not even gulp down water offered to him, nor did he speak either, or set his foot to stand up. I beat him on Tuesday when 3 or 4 *ghaḍīs* of the day had passed. It is true that the said Meher Siṃha Basnyāta died on Thursday when 10 or 11 *ghaḍīs* of the day had passed from [the effects] of the strike of the rod.”³⁰

26 See Manandhar 1999: 27–28.

27 This probably is a village in Sindhupalchok District in the Bagmati Zone of central Nepal.

28 The word denotes a large heap of grain or straw, or a stack of hay.

29 This term designates a woman who has Tibetan origin. The mountain tribal groups, Bhoṭe have been classified as both Non-enslavable Water-acceptable and Enslavable Water-acceptable castes in the MA, but it does not specify which mountain tribal group falls under which caste group (see MA-ED2/117 §§4–8).

30 *18 sālakā maṅsira mainhākā 20 dina jāṃdā maṅgalābarakā dina japhebyāṃsimā ma goṭh vasyāko thiñāṃ. byāhāna gāi bhaisi phoī goṭhko dhamdā garna lāgyāko thiyāṃ gāi bhaisile naina siṃ vasyātako ṣetako kunyū ṣāidīyecha ra nana siṃ basnyāta ki bhoṭinī svāsni paṭṭiko choro meher siṃ vasyātale*

Gaja Keśara Ṭhakurī, residing in the Sokhala [quarter] of Pharping,³¹ was sentenced to death in accordance with [Sections] 2 and 12 of [the Article] ‘On Homicide’ after he confessed [his crime] and wrote a note of confession stating: “It is true that when 7 or 8 *ghaḍīs* had passed in the evening of Tuesday, the 5th day of the bright fortnight of Māgha in [VS 19]18, I went to the house of Dīpalocanā Jaisyānī, the Brahmin widow of Raghu Jaisī, who was residing in the Pācaṃḍi [quarter] of Pharping. I opened the bar of the door with my hand, entered into the house and went to the upper floor. While she slept, I grabbed her by the throat, knelt down on her breast and grabbed her hands and feet. I killed the said Brahmin lady Dīpalocanā, making her vomit blood, and stole her property as well.”³²

The above self-confessed murderer Lachimanyā Jiryāla was executed after the pertinent section and Article of the MA had been cited. Section 15 states:

If somebody strikes a person either with his foot, a rod or a stone, and that person falls sick, becomes unable to walk and dies from the pain [resulting from the injury] within twenty-two days, the person who struck the blow is considered to have killed the victim. The murderer shall be sentenced to death....³³

kuniñāmbāta gāi bhaisi dhapāi malāi gāli gardai āūdā malāi gāli garnyā bhani maile nija vasnyātalāi ghuceṭi diṃdā loṭayo ra makaikā choḍale 2 pherā malāi hāndā malāi pani risa ūṭhayo ra ṣolamyā kāṭhakā lāṭhāle nija meher siṃ vasnyātakā kapālamā hāndā tāhi loṭyo. ūṭhana sakena. pāni ṣuvāmūdā pani nilena. voldā pani volena. ṣuṭṭā pani ṭekena. maṃgalavāra byāhāna 3|4| ghari dina caḍhadā kuṭayāko ho vrhaspativārakā rāta 10|12 ghari rāta vāmkimā tehi maile lāṭhāle hānyāko coṭale nija meher siṃ vasnyāta maryāko sāmco ho bhani kāyela bhai kāyelanāmā leṣidinyā listi kokarthali vasnyā lachimanyā jiryāla jyānamārākā 15 lambarakā ainale kāṭi māriyāko ---1. (Edited in Manandhar 1999: 27).

31 Pharpin is located to the south of Kathmandu.

32 *18 sāla māgha sudi 5 roja 3 kā velukā 7|8 ghaḍi rāta jāmdā pharpiṃ pācaṃḍi vasnyā raghu jaisiki vidhuvā vāhuni dipalocanā jaisyānikā ghara gai merā hātale dhokāko āglo ūghāri bhitra pasi māthi coṭāmā gai nidāyāki nija dipalocanā vāhunikā ghokrāmā hātale aḍhayāi (emend. aṭhayāi) chātimā ghuḍāle dhasi hāta goḍā pani maile aṭhayāi ragata chadāi nija dipalocanā vāhunilāi māri dhammāla smeta cori liyāko maile sāmco ho bhani kāyela bhai kāyelanāmā leṣidinyā pharpiṃko soṣala vasnyā gaja keśara ṭhakuri jyānamārākā 2 lambarakā ainale ra 12 lambarakā ainale kāṭi māriyāko -1. (Edited in Manandhar 1999: 28).*

33 MA-ED2/64 § 15.

Of the foregoing victims, Meher Siṃha Basnyāta died from an injury within two days after being struck with a rod by Lachimanyā, who therefore, in accordance with the MA,³⁴ is considered to have killed the victim under these circumstances even if he had no such intention. If the victim had died after twenty-two days, the offender would have only faced a sixty-rupee fine. Similarly, Gaja Keśara Ṭhakurī was executed on the basis of two other sections of the Article ‘On Homicide.’³⁵ Section 2 allows the death punishment to be imposed upon a Rājapūta: “... if a Rājapūta kills a person, he shall be executed.”³⁶ Gaja Keśara Ṭhakurī fell under that category. Section 12 allows for capital punishment when there was an intent to kill.³⁷ Even if the victim had not died, the assaulter would have faced the death penalty in accordance with the same section of the *Ain*, which also regulates attempted murder.

The second case (DNA 14/4)³⁸ presented here is a royal order (*rukkā*) issued by King Surendra in VS 1937 to Captain Mvāna Siṃha Svāra Chetrī in order to set forth formal procedures for carrying out the death penalty on Hari Goḍṛyā, who was found guilty of committing murder. The offender, a resident of Maujye Bajhahī Pallāpura, Baharāica, Mogalānā, killed one Vadala Siṃha Thāpā and then fled. After more than a year he was arrested and brought before a court, where, on Thursday, the 7th of the dark fortnight of Phālguna in VS 1935, he confessed his guilt in writing at the Aminī, Adālata and Kacaharī courts that he killed his victim at night while he was asleep and then fled with gold and money concealed at his waist. Half a year passed, and on Saturday, the 30th of the dark fortnight of Śrāvaṇa in VS 1936, Lepṭena Bāla Narasiṃha Svāra Chetrī and Bicārī Kāśinātha of the local Aminī court submitted a report to a higher court, the Iṭācapālī, that the offender had acted out of greed for property and had stabbed his victim twice in the throat at the latter’s residence during the night. Therefore, it was ruled that the offender be sentenced to death at the hands of a local untouchable at the grounds called Pāhāra Pokhara in accordance with Section 9 (‘On Homicide’)³⁹ and Section 7 (‘On Executing, Shaving and Branding’).⁴⁰

34 See MA-ED2/64 § 15.

35 See MA-ED2/64 § 2 and § 12.

36 MA-ED2/64 § 2.

37 See MA-ED2/64 § 12.

38 See Part II: C, Document 2.

39 See MA-ED2/64 § 9 and MA 1870 in NGMPP E 1223/17, p. 520 § 9.

40 See MA-ED2/42 § 4 and MA 1870 in NGMPP E 1223/17, p. 413 § 4 and § 7 for the respective section of the MA.

Subbā Paṇḍita Caṃdrakāṃṭa Arjyāla submitted a request to Prime Minister Raṇoddīpa and Commander-in-Chief Dhīra Samsera on behalf of the Iṭācapalī court to approve the death penalty:

... Regarding the trial which came to our attention through a request sent by the Iṭācapalī court, we give the order to sentence Hari Goḍīyā to death as punishment for his having committed the crime; to take [him] with sounding cymbals throughout the new territory of Kailālī district and to the grounds called Pāhāra Pokhara and there to behead him at the hand of a local untouchable caste member in accordance with Section 9 on homicide [...] ⁴¹ and 11 on executing, shaving and branding. ⁴²

The third piece of evidence (DNA 12/1) introduced here is a *lālamohara* issued by King Surendra in 1870 (VS 1927) to Mahanta Rūpalāladāsa of Basahiya monastery (*maṭha*) in the Mahuttari region (*jillā*). Its purpose was to give final approval to a decision made by the Council (the supreme court of appeal) regarding a court case. The case in question was between Kāsīdāsa and Bālādāsa over the successorship to Basahiya monastery after Mahanta Mohanadāsa's death and control of the monastery's property. As stated in the document, Mohanadāsa had both ritually and according to legal procedure granted the successorship and the monastery's property to Kāsīdāsa in 1863 (VS 1920), as witnessed by three village notables and four of his disciples: Bālādāsa, Sukharāmadāsa, Jīvanadāsa and Prāṇadāsa. One year later in 1864 (VS 1921), however, Bālādāsa wrested control of the monastery, accusing Kāsīdāsa of having acquired the successorship on the basis of forged documents. Kāsīdāsa filed a case against Bālādāsa denying the charge. He presented the note of agreement written by the four disciples and attested by the village notables Gopāla Jhā, Rāma Baksakoi and Bhuvana Maṃḍara on the 14th of the bright fortnight of Māgha in VS 1920 (1863) stating: "Earlier, [our] teacher granted [successorship to the monastery] to Kālīdāsa, [and] today, we four brothers, too, [agree] to grant it to Kāsīdāsa." Bālādāsa came back, arguing that the document had been forged by Kāsīdāsa. To counter this argument, Kālīdāsa presented a note of confession to the court written by the mentioned three witnesses. One of the disciples, Sukharāma, who was the eldest

41 One letter or number is missing in the document due to breakage.

42 See Document 2 (NGMPP DNA 14/4) for the source text.

among the three, said: “The document [presented by Kālīdāsa] is not a forged but [indeed] genuine. We are even ready to take an oath if necessary.” The investigation went on for two years. By the time the court made its final decision in favour of Kāsīdāsa, on Monday, the 2nd of the dark fortnight of Māgha in VS 1923 (AD 1866), the plaintiff had already died. Thus, the court decided to grant the successorship and property to Rāmadāsa, one of the legally recognised disciples of Kāsīdāsa, in accordance with Section 56 of the Article ‘On Court Procedures,’ and to punish Bālādāsa in accordance with the same section and Section 34 of the Article ‘On Guṭhī Endowments.’ The judgement reads as follows:

[Bālādāsa] did not come to the court on daily basis [which is mandatory] in accordance with number [i.e., section] 56 of [the Article] ‘On Court Procedures,’ after the eyewitness [of Kāsīdāsa] wrote a promissory note [to the court], and was absent for 15 days. Bālādāsa presented himself in court until the 9th day, but he fled on the 10th day giving a written statement to the court on 14/15th of the bright fortnight of Mārga in VS 1923 (AD 1866), saying: “Irrespective of the fact that I would win the law suit, [I agree] to let my [fellow disputer] win the case due to the fact that [I have certain] ties.” Since Bālādāsa did not come to present himself in the court till today, the successorship of the monastery shall be granted to Rāmadāsa, a disciple of Kāsīdāsa. Since Bālādāsa claimed the successorship [of the monastery], which he would not get, and also fled, he shall be fined 3000 company rupees in accordance with the section 34 of [the Article] ‘On Guṭhī Endowments’ when he is found due to the reason that he has no property and family to confiscate in accordance with the section 56 ‘On Court Procedures.’ If the fine is not paid, he shall be imprisoned and set free after the term of imprisonment is over.⁴³

Rāmadāsa, a disciple of Kāsīdāsa, did not in the end succeed to the monastery throne. He agreed to hand it over instead to Rūpalāladāsa, another disciple of Mohanādāsa, for as long as he lived. The decision was formally written down, and on Monday, the 2nd of the dark fortnight of Māgha in VS 1923 (AD 1866) was forwarded by Diṭṭhā Chandalāla

43 See Part II, C, Document 3.

Burlākoṭī and Bicārī Kapilamuni Pādhyā of Jaṅgī Adālata 1 to the Council for final approval. After careful review, the Council approved it and issued a *rukkā* to Rūpalāladāsa under the name of Prime Minister and Commander-in-Chief Jaṅga Bahādura Rāṇā (who was also head of the Council) on Sunday, the 13th of the dark fortnight of Phāguna in VS 1923 (AD 1866). Four years later, Rūpalāladāsa made petition to the king through Prime Minister Jaṅga Bahādura Rāṇā and Commander-in-Chief General Raṇa Uddīpa (Raṇoddīpa) Siṃha Kūvara Rāṇā, and therefore the *lālamohara* (presented as Document 3 in Part II: C below) was issued by King Surendra. It contains an extensive report on the history of the case, including a lengthy citation from the Council's decision.

As discussed above, this *lālamohara* rehearses the procedures leading up to a court decision. A local court first investigates the lawsuit, and a decision is rendered only after careful consultation of the pertinent sections and Articles of the MA. This decision is afterwards sent to the Council, which reviews the case to see whether it conforms to regulations in the *Ain* and adds observations of its own. Once the Council approves the final text, it is forwarded to the commander-in-chief and prime minister so that a *rukkā* can be issued. Afterwards it is sent to the king for a red-seal order to be issued by him to the winner of the case (e.g., to Rūpalāladāsa in the present document).

The fourth piece of evidence (K 175/18)⁴⁴ is a complaint (*ujura*) made by Samsera Bahādura Pāḍe, an inhabitant of Naradevī Tola, against his *kākī* (the wife of his father's brother) Rājakumārī Pāḍenī Kṣatryānī/Chetryānī. She is accused of meeting with her incestuous husband, Pṛthi Bahādura Pāḍe, accepting rice from him and having sexual intercourse with him. There is a set of documents relating to this matter, some seventy manuscripts in all, filmed in the NGMPP K series, including K 118/32, 39, 40–41; K 172/57–58, 63; K 175/32–34, 39, 42–44, 47, 49, 52, 57, 60, 66, 68–69, 71–73, 76–77 and 79–80.⁴⁵ This trial thus deals with a family dispute between Rājakumārī Pāḍenī (the lawfully married wife of Pṛthi Bahādura Pāḍe) and the complainant, her brother-in-law's son (*bhatījo*) Samsera Bahādura Pāḍe. From these documents, it is learned that this dispute arose in VS 1918 after Pṛthi Bahādura committed adultery with the non-widowed wife (*sadhavā*)

44 See Part II: C, Document 4.

45 Among these documents, only NGMPP K 172/57, 63, 175/2, 18, 32, 33 and 34 have hitherto been edited and translated. They are particularly relevant to the current discussion and are presented below in Part II: C.

of a fourth-generation cousin and with a similarly distantly related female cousin-in-law (*cāra pustākī didī ra bhāujyū*).⁴⁶ After committing adultery, he fled to the Terai (Madhyadeśa) with his entire family and household personnel.⁴⁷ Later, Rājakumārī returned from the Terai and initiated a court case to obtain her legal share of the inheritance. Samsera Bahādura and his side of the family tried to avoid giving her any of the joint property, accusing her of being guilty of willingly accepting rice from her incestuous husband and having sexual intercourse with him. Rājakumārī Pāḍenī for her part insisted on her just claim, mentioning the expiation she had undertaken by order of authorities and offering further evidence.⁴⁸ Here, I shall discuss this case as an example showing that not only court administration had proper knowledge of the MA but also that the local actors such as Samsera Bahādura Pāḍe and Rājakumārī Pāḍenī Kṣatryānī were well informed regarding its provisions.

In the first paragraph of his formal complain (*ujura*), Samsera Bahādura states that there is no regulation in the MA that grants cooked rice expiation to a person who accompanies and willingly eats rice with someone who has fled after committing adultery with the non-widowed (*sadhavā*) wife of a fourth-generation male cousin or with a fourth-generation female cousin. Moreover, he argues that such expiation has never been granted to anyone.⁴⁹ Thus, he rules out the legitimacy of his opponent's claim: Neither is it grounded in law nor is there precedence for it.

Two issues are seen to be addressed in this statement: (1) adultery committed with an affinal or blood relation (in this case, with the non-widowed wife of a fourth-generation male cousin or with a fourth-generation female cousin), (2) the impossibility of granting expiation to anybody who willingly has eaten together or had sexual intercourse with an incestuous person.

These two issues are dealt with in the MA of 1854: Adultery committed by a Sacred Thread-wearer Kṣatriya is the subject of Article 116 of the *Ain*,⁵⁰ consisting of 21 sections. Section 2⁵¹ addresses adultery committed with blood relations (*hāḍamā*) traceable back to within seven

46 See Part II: C, Document 7.

47 See NGMPP K 172/58 in <http://abhilekha.adw.uni-heidelberg.de/nepal/index.php/catitems/viewitem/10867/1> last accessed on 9 June 2023.

48 See below, NGMPP K 172/57, 63, NGMPP K 175/2 and 34 (Part II: C).

49 See Part II: C, Document 4.

50 See MA-ED2/116.

51 See MA-ED2/116 §2.

generations. The punishment for this offence is prescribed as confiscation of the offender's share of property (*aṃśasarvasva*), removal of the Sacred Thread, shaving of the head, forced consumption of liquor and pork, downgrading of caste and exile—towards the west if the guilty party is from the east and vice versa—across the river. Further, cooked rice may not be received from the offender, nor expiation granted to him. Water, however, can be received.

The second issue is addressed in Article 89, 'On the Religious Judge' (*dharmādhikārko*).⁵² Section 2 of this Article,⁵³ as argued by Samsera Bahādura in the first paragraph of his complaint, explicitly directs the *dharmādhikārin* not to grant expiation to those who have deliberately polluted themselves, only to those who have not (*bhorako mātra patiyā dinu*). Further, he should grant expiation to any offender only after having been ordered to do so in a *lālamohara*. For granting expiation to an offender who was not entitled to such, the *dharmādhikārin* could be made to pay a fine of 500 rupees and be dismissed from his post.

Samsera Bahādura, in the fourth paragraph⁵⁴ of the present document, refers to Section 2 of Article 89 of the MA⁵⁵ when challenging the wife of his middle uncle to show him the *patiyāpūrjī* (certificate of rehabilitation) issued by a *dharmādhikārin*, since Section 3 of the same Article⁵⁶ identifies *dharmādhikārins* alone as entitled to issue such a document. Despite the fact that the *Ain* does not directly order *dharmādhikārins* to issue a *patiyāpūrjī* upon successful completion of the expiation process,⁵⁷ A. Michaels writes, referring to Sections 3, 20 and 29 of Article 89,⁵⁸ that the certificate was an integral part of rehabilitation: "... part of the rehabilitation was a certificate (*purjī*) by which the former caste status was affirmed or reconfirmed. The Dharmaśāstra also prescribed that all certificates of rehabilitation be issued in a written form."⁵⁹ In any case, the present text illustrates that *dharmādhikārins* did indeed issue *patiyāpūrjīs*.⁶⁰

52 See MA-ED2/89 and also Michaels 2005b: 67–68 and 92.

53 See MA-ED2/89 §2.

54 *aḡhi svāyā deśāyāko nabhayā nijalāi bhayāko patiyā lyāum ---4*. (See Part II: C, Document 4).

55 See MA-ED2/89 §2.

56 See MA-ED2/89 §3.

57 See Michaels 2005b: 39.

58 See MA-ED2/89 §3, §20 and §29.

59 See Michaels 2005b: 35.

60 A. Michaels presents an example of such a certificate issued in VS 1890, prior to the *Ain* of 1854 (Michaels 2005b: 40).

In the fifth paragraph,⁶¹ Samsera Bahādura refers to Sections 2, 3 and 6 of Article 89.⁶² Section 2 prescribes the general procedure for receiving *patiyā*: the person seeking to undertake *patiyā* goes to a court, *amāla* or *ṭhānā*, where a *pūrjī* is issued to a *dharmādhikārin* stating that the petitioner is eligible to undertake *patiyā* and that a *patiyā* should be granted to him. The *dharmādhikārin* will then grant him *patiyā* and issue a *patiyāpūrjī*. Thus, Samsera Bahādura's challenge—if the *patiyāpūrjī* is lost, show him the *pūrjī* issued by the court in accordance with the *Ain*—stands on firm ground.

The sixth paragraph of Samsera Bahādura's complaint⁶³ argues in conformity with Section 4 of Article 89.⁶⁴ This section permits the *dharmādhikārin* to grant *patiyā* only if an offence has not been deliberately committed. In cases of deliberate offences, *dharmādhikārins* should grant *patiyā* only if ordered to do so by *mukhtiyāras* or because the king has issued a *dastakhata/daskhata*⁶⁵ or *lālamohara* to that effect. If *patiyā* is granted without a *lālamohara* in cases of deliberate offences, *dharmādhikārins* were fined 500 rupees and dismissed from their post.

The discussed document shows that the MA was consulted not only by the court actors but also by local concerned actors. The discussion of both court verdicts and the supplementary legislation to the MA of 1854 is crucial for understanding the growing need for more precise laws with better applicability. One such supplementary legal document, was promulgated by Raṇoddīpa Siṃha Rāṇā in VS 1936 (hereafter, called R-Ain). Its purpose was to assist in the training of judicial officials. In addition to defining criminal and civil cases, the R-Ain provides a clearer explanation of the hierarchy of judicial offices and officials, which was lacking in the MA of 1854. As stated in the R-Ain §§5–6:

The judicial office where the *hākima* of a *gosvārā*⁶⁶ is appointed shall be designated as *gosvārā aminī kacaharī*. An office where a *lepṭena*⁶⁷ is appointed shall be referred to as *aminī kacaharī*.

61 *patiyāko kāgaja harāyāko bhayā adālatabāṭa patiyā garidinu bhaṃnyā purjī bhayāko holā tesko nakal lyāun --- 5.* (See Part II: C, Document 4).

62 See MA-ED2/89 §2, §3 and §6.

63 *hukūmle patiyā bhayāko ho bhanyā pramāṅgiko kāgaja lyāun ---6.* (See Part II: C, Document 4).

64 See MA-ED2/89 §4.

65 A missive signed by the prime minister.

66 An administrative office of a *baḍāhākima* that looks after the security affairs of the whole district.

67 A lieutenant, according to Kumar below major adjutant (*mejara ajīṭana*) and above *kharadāra/kharidāra* (Kumar 1967: 100).

A *ṭhānā* shall be the name of the office where a *subedāra*⁶⁸ is appointed. [Similarly], a *jamādāra*⁶⁹ or *havaladāra*⁷⁰-appointed office shall be known as *caukī*. These designated terms shall also be used in official documents.

The person vested with the authority to decide a legal case shall be referred to as *hākima*. Other officials shall be recognized as clerks (*kārindā*). When documenting the titles of the respective officials, their specific title shall be used in accordance with their bestowed position.

Moreover, this legislation introduces uniformity in the script used for legal documents, possibly for the first time in pre-modern Nepalese administration. It mandates that reports and documents be sent to the prime minister exclusively written in Deva(nāgarī) script (R-Ain §3). Additionally, it provides guidelines on how to draft various legal documents, including a litigant's application to file a court case, documents for accepting bail or surety, letters from witnesses, confessions, and the written format for taking an oath on *dharmā*, among others.⁷¹

As stated above, these documents indicate that the MA was not merely a theoretical and scholarly work like the classical *dharmasāstra* texts. Instead, it was grounded in practicality and reflected the current realities of the time. Therefore, the MA is not simply a reiteration of Brahmanical moral values but leans more towards positive law compared to the Sanskrit legal texts of that period. However, it is noteworthy that only a limited number of court verdicts from the 19th century have been discovered thus far. This raises the importance of further research to determine whether the MA was strictly implemented throughout the entire country, from east to west, or if its circulation and enforcement were more limited in scope. While the document provided above indicates a broader implementation of the MA, additional investigation is necessary to ascertain the extent of its practical application.

68 A commander of a military company consisting of ca. 100 soldiers.

69 A low-ranking commissioned officer in the army below the *subedāra* and above *havaladāra*, who could be also assigned to civil offices.

70 A lower, non-commissioned military officer, equivalent to Sergeant.

71 Please refer to the edition and translation of the *lālamohara* of the R-Ain below (part C, Document no. 12, A 1375/5). Additionally, I would like to highlight that Simon Cubelic and I are currently collaborating on the preparation of a comprehensive annotated edition and translation of the entire R-Ain. We intend to publish this work in *Abhilekha*, the research journal of the National Archives, Kathmandu.

4 Conclusion

In order to sum up the foregoing, I come back to the core questions raised in the beginning and will show how the findings of the present study can help to elucidate them.

What were the major factors for the emergence of the MA?

The process of codifying law in the Western world started from the eighteenth century onward, in, among other places, Prussia (1794), France (1804) and the Habsburg monarchy (1812). That this trend did not remain restricted to European states is evidenced by similar developments in the non-colonial encapsulated kingdom of Nepal. There, based on the principle that ‘crime and sin should be punished and purified,’ the MA was drafted to replace arbitrary legal practices with a unified system. The motto of the code was “equality in justice irrespective of an offender’s rank and position.”¹ The MA brought about a significant change by enabling expedited resolution of legal matters, bypassing the need to accommodate diverse local customs and shastric norms as previously required. Following the codification of the MA, there was no longer a requirement to consult *śāstras* or past court decisions before delivering court judgments. Despite the absence of pre-existing practical foundations, such as a well-established group of professional jurists, judicially trained ruling elites, or external colonial influence to guide the process of legal unification, Jaṅga Bahādura Rāṅgā, the country’s prime minister, successfully orchestrated the transformation of heterogeneous legal practices into a unified legal framework under state authority. This process was shaped by the following key factors:

1 See MA-ED2/preamble.

(a) **The economic crisis in the country:** The power struggle within the royal palace and among other political elite groups in nineteenth-century Nepal led to a lack of centralized leadership, resulting in a significant depletion of the state treasury. This had a profound impact on the country's economy. Against this backdrop, Jaṅga Bahādura Rāṇā implemented reforms aimed at establishing a unified system of land and revenue management. This was achieved by enforcing a systematic code of law throughout the country. With a central authority possessing such powers, the state gained the necessary means to effectively control the collection and distribution of revenue.

(b) **Protection of autonomy and monarchical fear:** Prior to Jaṅga Bahādura Rāṇā, there was no collective sense of nationhood among the royal family, political elites, and the divided subjects who were characterized by geographical, ethnical and cultural differences. Consequently, there was no unified sentiment to safeguard the nation's autonomy against colonial powers. Jaṅga Bahādura Rāṇā's rise to power further intensified political instability, leading to the emergence of various political factions at both local and national levels. As a result, anti-Jaṅga Bahādura political elites, including the monarch, sought alliances with the Company state, which posed a threat to Jaṅga Bahādura's rule. In response, Jaṅga Bahādura took steps to foster a strong collective sense of nationhood and political patriotism among the population. Central to this effort was the codification of law, establishing a mutually binding legal contract that governed the relationship between the king, prime minister, and subjects.

(c) **Careful observation of colonial politics by Rāṇā rulers:** While the Rāṇā rulers maintained a strong stance of religious isolationism, which had been established by Pṛthvī Nārāyaṇa Śāha as a defence against colonial intrusion, they also displayed a keen awareness of Western political ideas and governance strategies.² They established an extensive network of informants, envoys, and ambassadors in various locations within the Company state, and even undertook state visits to England and France to demonstrate a sense of openness. As a result, Jaṅga Bahādura Rāṇā drew inspiration from the British parliamentary system and its legal practices, which he had closely observed during his state visit. This influence is acknowledged by previous scholarship and

2 See Toffin 2008: 163.

further confirmed by the present study, as evident in the incorporation of British political concepts and legal practices in the Articles ‘On the Throne’ and ‘On Legislative Affairs’ of the MA.

How did the MA change existing notions of sovereignty and legitimacy?

Existing accounts of the monarchy in nineteenth- and twentieth-century Nepal often emphasize the concept of divine kingship, which views the king as a sacred and ritualistic figure closely intertwined with the destiny of the kingdom. This perspective aligns with orthodox Brahmanical scriptures that uphold the notion of divine rulership.³ However, these interpretations of Nepalese kingship and the Rāṇā regime, particularly during Jaṅga Bahādura’s rule, are primarily based on non-textual studies that focus on the ritualistic roles of the king. In contrast, the MA presents a remarkable transformation of the king’s sovereign power and challenges the conventional understanding of the ‘state as the household of the king.’ It merges pre-modern concepts of kingship with new notions of legitimacy through law. By subjecting the monarchy to strict legal oversight, the MA separates the king from the state and ensures the country’s sovereignty by limiting the king’s divine role to ritual acts. The MA establishes the king’s accountability under the ‘rule of law’ and grants the executive body the authority to demote the king’s caste status if he violates regulations. The role of divine kingship requires re-evaluation in light of these developments. The monarchical policy introduced in the MA positions the king as a state actor rather than the sole proprietor of the realm. While the king’s ritual sovereignty still draws upon notions of divinity, the MA binds the king to the law in numerous ways. The king’s exclusive ownership of the realm, his authority to define foreign relations, and his ability to transform impurity into purity, among other executive powers, are visibly curtailed, further widening the gap between the king, the state, and religion.

The formulation of the MA in an isolated and conservative non-nation-state is indeed remarkable, as it reflects the adoption of the concept of the ‘rule of law’ within that context. While Nepalese political actors in the mid-nineteenth century were not closely acquainted

3 See, for example, NārSm. 18.

with the European concept of the ‘rule of law,’ it is apparent that exposure to British political and constitutional history, spanning from the Norman Conquest to the modern era, played a role in its development. However, there was no direct impetus for Nepal to adopt such a system at that time. The MA emphasizes the importance of legality, as it establishes regulations that apply to all individuals without exemption.⁴ It is significant that the concept of the ‘rule of law’ found its place within the legal framework of Nepal, considering the historical and cultural context in which it was formulated. One notable aspect of the MA is the establishment of the autonomy of the Council, which represents the military, civil service, judiciary, local officials, and village notables. This mirrors the English legislative sovereignty accorded to the Parliament and plays a crucial role in promoting the rule of law. The Council is empowered as the supreme executive body, possessing the authority to promulgate new laws and abolish existing ones. On one hand, the courts are accountable to the Council as the supreme legislative body, while on the other hand, the autonomy of the judicial bodies is guaranteed, granting them the right to issue independent judgments. This compatibility between the Council and the judiciary allows the state to function as an autonomous polity, where all employees, including high-ranking and local actors, owe collective loyalty. It reflects a system where the rule of law is upheld and respected, ensuring that the state operates within a framework of legality and accountability.

Was the MA a strategy of Hinduization?

It has become common among scholars to view the MA in terms of a strategy of Hinduization, or establishing the supremacy of Hindu values, by such measures as reinforcing a stricter caste hierarchy or incorporating laws to protect cows.⁵ I would argue, however, that the representation of Nepal as a Hindu kingdom in the MA should more aptly be seen as political propaganda aimed at rhetorically warning the British not to undermine Nepal’s autonomy. This can be seen e.g., in such eye-catching statements as the “rest of the (Hindu) world was in the hands of the Mleccha, (loosely: ‘barbarian’) i.e., the Company”⁶—a

4 See Cubelic & Khatiwoda 2017.

5 See, for example, Sharma 1977b: 285 and 1983: 18.

6 See Fezas 1990: 122.

turn of phrase probably coined in the *Divyopadeśa*, attributed to Pṛthvī Nārāyaṇa Śāha.⁷ To be sure, to a certain degree the MA represents an attempt to create a confessional state by bringing the pluralistic social and religious cultures and customs of pre-modern Nepal within a single legal framework in which a Hindu caste system—for all its being a very limited marker of classical orthodoxy—was principally dominant. Except a few regulations, though, such as the ban on cow slaughter, no rigid Brahmanism was imposed on non-Hindu subjects. Furthermore, barring a few exceptions, the MA does not specify which caste group (*jāta*) falls under which caste class (*varṇa*). This shows that the strategy behind caste regulation in the legal code was not to intervene in the customary practices and invited negotiation on the ground. Moreover, the MA is fundamentally liberal in its letting people choose or change their profession on their own. This is in strong contrast to the Brahmanical *varṇa*-system and Hindu customary practices, in which profession (*jīvikā*) was regarded as one of the essential elements for guaranteeing a person's social status and religious purity. It is obvious, then, that the aim of the MA was not to establish a strongly hierarchical Hindu society. Rather, it was simply adopting contemporary social practices of a caste system in which Hindu norms were dominant. Since a complete modification of the existing social and caste customs was beyond the power of Jaṅga Bahādura Rāṇā, Hindu caste customs were liberalised and brought under a unified legal code, and doing so helped to advance the weak state-economy of the Rāṇā regime—for one, increase in state income came from centralising the collection of fines paid in disputes related to caste and customs. Letting people choose their profession on their own also advanced economic productivity. On the one hand, the MA did not dramatically break with the existing caste system, which otherwise would probably have resulted in political and social chaos. On the other hand, it did alter the caste system to allow for economic improvements. Since the caste system in pre-modern Nepal had never been enforced in all its rigidity in large parts of the realm, it must have been relatively easy to integrate new entrants including non-Hindu populations into the caste society.⁸ Therefore, caste theories based on partial studies of the MA should be re-examined in the context of a larger historical trajectory.

7 As pointed out by M.A. Sijapati, the concept of '*asal hindustān*' was also in "strategic and conscious contradistinction to the Islamic imperial presence looming massively to the south." (Sijapati 2011: 33).

8 See Bista 1977: 18.

Was the MA only influenced by the *dharmaśāstras*?

Although the MA—in comparison to other instances of eighteenth- and nineteenth- century legal practice in Nepal—is progressive insofar as it visibly exemplifies the concept of positive law, it also accepts most social and religious customs as long as they do not pose a threat to the national interest or mainstream norms. The Article ‘On Homicide,’ for instance, recognizes the king as an agent of the state and accords him a focal position in state ritual. However, if he oversteps his ritual role, he is to be punished, like any agent of the state, by the country’s executive body. If, for example, he were to commit murder, he would be imprisoned for life. This shows that the MA attempted to establish a rule of law on the basis of the policy ‘sin and crime should be punished’ irrespective of the offender’s position or rank. In laying such a foundation for the nation-state in law, the MA distanced itself from shastric practice, wherein the king is treated as an embodiment of Viṣṇu, and no sin or crime committed by the king can be held against him. At the same time, the MA, in recognition of the king’s ritual role, does not condemn him to death if he is found guilty of homicide. Following the shastric principle that ‘the king should not be killed,’ it instead punishes him by lifetime imprisonment. Similarly, Brahmins, ascetics and women are also exempted from the death penalty, but instead are branded. Everyone else, however, can be sentenced to death if found guilty of murder. The exemption from capital punishment of the above-mentioned groups is in accord with normative ideas based on the *dharmaśāstras*. However, as noted previously, branding can be considered a form of social death which, under certain circumstances, could be considered a fate worse than actual physical death.⁹ Moreover, the MA safeguards the basic value of human life. For example, following shastric practice its ban on killing Brahmins and woman¹⁰ is not applicable in cases of self-defence. Irrespective of an attacker’s caste status, rank and position, one may kill in self-defence. Doing so does not result in punishment. This is just another example of shastric ideals being abandoned under a growing awareness of the positive nature of law. Similarly, the diplomatic immunity granted to foreign envoys if charged with homicide and the regulations governing extraditing a foreign murderer attest not only to the internalisation of interstate norms of diplomacy but also to a reduction of the king’s authority. According to the *śāstras*, one major

⁹ See RŚEdict 15.

¹⁰ See MA-ED2 1854/64 §1.

expression of the king's sovereignty over his sacred realm (*deśa*) was his duty to keep the realm pure from defilement by punishing criminals and maintaining the social *status quo*. With the new norms of diplomacy recognised by the MA, foreign envoys were exempted from the domestic law on homicide; further, their residences in Nepal were granted the status of special zones of immunity, in effect recognised as an autonomous territory. The above discussion has shown that the source of the MA was not only the *dharmasāstra*, but also the new political doctrine of the rule of law and the prevailing customary practices.

How and why does the MA of 1870 differ from the MA of 1854?

A comparison of the two *Ains* (1854 and 1870) shows a growing awareness and knowledge of more systematic legal practices. The simplification of the complex language structure of the 1854 MA by deleting unnecessary formulations, adding new real-world clarifications and rephrasing long and confusing sections proves that the need was felt to update the code, as it probably served as the primary basis for legal decisions in the courts. Interestingly, however, the comparison also discloses that the MA of 1870 retreats from the more secular approach to jurisdictional practices basic to the MA of 1854, wherein the courts were empowered with absolute autonomy. The MA of 1870 started restricting the fully developed autonomy of the judiciary by modifying the constitutional character of the 1854 MA, probably with the aim of strengthening Rāṇā authority. Although the Article 'On Homicide' of 1854 was greatly simplified and rephrased, and many new legal concepts were incorporated into the 1870 MA, the exemption from the death penalty granted to ascetics after being denied them by the 1854 MA can be interpreted as a reactionary tendency to restore more orthodox positions.

Was the MA enforced?

Finally, there has always been disagreement on whether the MA was merely a scholarly legal composition or if it served as a legal guide during court proceedings. Since no significant scholarly work has investigated the enforcement of the MA, an historical evaluation of it in terms of its actual legal authority has had to be put off. However, the documents

discussed in the present study do answer the question of the enforcement of the code. It could be unequivocally shown that the law code did in fact have legal force and was used as a primary basis for making court decisions. Even the study of this limited number of documents attests that the MA was not only consulted and applied by judicial bodies and the Council in the courts and the court of appeals but was also read, understood and used by local actors. As shown in the example above, the complaint issued by Samsara Bahādura attests to a profound familiarity with the MA, each point of his eight-paragraph complaint being made with reference to the relevant Articles and sections of the MA.

Sundry nineteenth-century documents, then, clearly tell us that the MA was not simply a theoretical and scholarly work like the *dharmaśāstra*-texts, but was written with practical ends in mind, and reflected current realities. Further, the MA cannot be taken as simply restating Brahmanical moral values as governing legal codes. Rather, it is much more modern in nature, with a palpable sense of the rule of law and a strong conceptual bent towards secularism, and indeed is much more in line with positive law than the eighteenth- and nineteenth-century Sanskrit legal tomes in British India.

The MA holds significant importance in the realm of South Asian legal history and serves as a valuable source for comprehending various aspects of state formation, the process of codification, kingship, caste hierarchy, social mobility, Brahmanical orthodoxies, and nineteenth-century political thought, including notions of legality, and religious patriotism in Nepal. However, the existing studies on these subjects have largely overlooked the comprehensive relevance of the MA, relying instead on partial contents of the code. Consequently, their legal and historical analyses suffer from a notable dearth of substantial empirical data to support their arguments. Therefore, a meticulous and critical examination of the MA will undoubtedly prompt a re-evaluation of current scholarly approaches to the history of nineteenth-century Nepal and South Asian history, from legal, political and socio-cultural perspectives. Furthermore, it is important to note that only a limited number of court verdicts from the 19th century have been unearthed thus far. This highlights the need for further research to determine whether the MA was rigorously implemented across the entire country, spanning from east to west, or if its circulation and enforcement were more constrained in scope. Although the aforementioned documents suggest a broader implementation of the MA, it is highly recommended to conduct additional investigations in order to ascertain the extent of its practical application.