Introduction

(…) if we wish to enquire what are the features of the Hindú system of jurisprudence, it is in Nepál we must seek for the answer (Hodgson 1836: 94)

The Configuration of the *Ain*

The 19th century is the century of state bureaucracy and administration. The state started defining itself through the notions of 'imagined communities' (Anderson 1983), freedom and equality, public order, and by legitimation through elections, and the offering of public service and goods (schools, hospitals, traffic and telecommunication infrastructure etc.). The decline of patrimonial monarchies and nepotistic autocracies went hand in hand with the development of the idea of a (nation) state resting on the rule of law that binds even the most powerful rulers and unites people into a legal body. It is a process that culminated in the division of legislative, executive and judicial powers, independence of the judiciary, and a more or less transparent form of procedures, including a graduated court system reaching from district to provincial high court and the possibility of complaints against the state.

Most modernisation theories cannot adequately expound specific developments in smaller states and must therefore be supplemented or revised. Nepal, which belonged to the few non-European kingdoms that were not colonised and could maintain its ground against (British) India and China, is such a case. It developed forms of social coherence different from colonial or post-colonial ideas of governance. It was a state that did not define itself through the categories of modernisation packages such as common culture, common language and common economic area. On the contrary, Nepal was and is religiously, ethnically and linguistically a highly fragmented and diversified country. According to the Census of 2011, Nepal has more than 70 mutually incomprehensible languages or dialects, 126 recognised castes and 123 national languages, with Nepālī being the only official language. Its political and administrative segments—for instance, the 22 and 24 pre-unification principalities or petty states of the Karnali basin—were not consistent and firm enough to either separate into stable and strong states or jointly build a modern secular state.

It seems that the autocratic introduction of a unique Hindu civil code like the *Ain* of 1854, together with administration and jurisdiction, fostered a constant negotiation of the frames for a modern state. It also seems that this process helped to overcome the country's fragmentation and strengthened traditional social structures. Similar to the transfer of the *divānī adālat* (civil court) of Bengal into the East India Company (1765), the usurpation of executive power by the

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Rāṇā aristocracy in Nepal (1846) marked a watershed in the legal history of South Asia. Both these establishments of centralised systems of judicial administration replaced more fluid forms of legal pluralism and the dominance of religious laws with a state-led form that introduced positivistic notions of legitimacy for legal norms. The projects of codification of Hindu Law as a (religious) system of personal law initiated by the British on the basis of orientalist representations of civilisation, literate culture and religion, and the codification of Hindu customary law by Prime Minister Jaṅga Bahādura Rāṇā, not only affected demarcations between the private and the public and the formation of religious identity, but also placed legal texts centre-stage of the judicial process and thus gave trans-local and transcultural norms of the scholastic-juridical discourse precedence over local customs. The legal processes in South Asia have to be seen in these contexts and the flows within South Asia and between South Asia and Europe.

The Ains

In Nepal, the history of the written and codified law[1] can be divided into three phases:

a) the law of royal decrees (i.e. the pre-Rāṇā period before 1846 when Jaṅga Bahādura Rāṇā became Prime minister and *de facto* ruler of the country);
b) the law of the old *(Mulukī) Ain* (i.e. the Rāṇā period, 1846–1951); and
c) constitutional law, based on the Panchayat (1963–1990) or multiparty and federal republic system (since 1990).

Alongside the written law, customary laws of the castes and various ethnic groups had been, and are still, widely applied throughout the kingdom. Although some Śāha rulers, for instance, Rāma Śāha of Gorkha (r. 1606–1636) or Pṛthvīnārāyaṇa Śāha (r. 1742–1775), issued royal decrees on the behaviour of their subjects, the law had not yet been fully systematised. Except for these decrees, some edicts, inscriptions and paper documents, nearly all written legal texts can be assigned to the body of Dharmaśāstra literature. Even the extant *Nyāyavikāsinī* (14th cent.), a Nevārī commentary on the *Nāradasmṛti,* can be seen more as the translation of a Sanskrit commentary than an original work.

The *Mulukī Ain* (MA),[2] or—until 1952—simply *Āin* or *Ain*,[3] changed the legal situation dramatically. This is the Legal Code of Nepal enacted during the reign of King Surendra Vikrama Śāha (r. 1847–81) and promulgated on 6 January 1854 (the 7th day of the bright half of Pauṣa, VS 1910)[4] under the red seals of King Surendra Vikrama Śāha (r. 1847–81), crown prince Trailokya

1 For a short summary of the legal history, see Michaels forthc. a (with further references) and Khatiwoda forthc.; for the situation before the promulgation of the *Ain* of 1854, see Hodgson's summary of the 'Administration of Justice' (1836), based on his own records from 1830–31 (Cambridge mss. EUR, Hodgson/54).

2 The following is partly based on Michaels 2005: 5–9.

3 The so-called *Mulukī Ain* was called *Āin* or *Ain* until 1927 or 1952 (cf. Michaels 2005: 7). MA_1 and MA_2 mostly spell *aina*, but since this is a Persian term and the spelling in the various *Ains* is not consistent, we prefer to follow the convention of not writing the final (inherent) *a*.

4 Fezas (2000b: xxvii) dates the year of promulgation to 1853 CE. However, according to the Preamble (*lālamohora*) and calendric calculations, such as the online *pañcāṅga,* the *Ain* was promulgated on January 5 or 6, which is also supported by Adhikari (1976: 176), although the weekday (Friday) does not match.

Vikrama Śāha and the yellow seal of ex-king Rājendra Vikrama Śāha, father of Surendra. It was prepared at the initiative of Prime Minister Jaṅga Bahādura Rāṇā (r. 1846–57). Thereafter it was amended and enlarged several times. The name of this code itself reveals the influence of its ultimate sources, namely, the Persian word *ā'īn* together with the later addition of *mulukī*, 'royal' (Adhikari 1976: 106).

The significance of the *Ain* may be seen alone in the fact that it was among the first books ever printed in Nepal. It was printed (not before 1870[5]) because Jaṅga Bahādura Rāṇā, during his trip to London and Paris (15 January 1850 until 29 January 1851), came to esteem printed books with an almost magical sense as the expression of Western superiority.[6] It is said (but remains to be verified) that he took the Code Napoléon as the model for the *Ain*. Within a month after his return from Europe, he appointed a Law Council (*ain kausala*) to bring the various legal documents already existing into a homogenous form.

The Council (*kausala*) consisted of 219 members who are listed in the Preamble: Rāṇās (i.e. Jaṅga Bahādura Rāṇā's brothers, sons and nephews), royal priests (*rājaguru*) and a religious judge (*dharmādhikāra*), men of the nobility (*cautariyā*), civil and military officers, e.g. *kājīs*, captains and lieutenants, *vakilas* (Nepal's diplomatic envoys to British India and Tibet or other Asian countries and cities such as Calcutta, Patna, Lucknow and Lhasa), *subbās*, *mīra munsī* (executive head of the Foreign Office), *diṭṭhās* (judicial officers), *mukhiyās*, *subedāras, vaidyas*.[7] The Kausala worked for three years.

In the preamble of the *Ain*, it is clearly stated why this code was regarded as necessary:

> Since there have been dissimilarities in punishment imposed in [lawsuits] with the same particulars until today, therefore, in order to achieve uniformity of punishment in accordance with the crime committed, this is the *Ain* prepared (…). All officials *(kārindā)*, including the venerable prime minister, shall carry out their duties in accordance with this *Ain*.[8]

However, the text reflects a far more ambitious project. Jaṅga Bahādura Rāṇā's goal was to establish a national caste hierarchy for the multiplicity of Nepal's ethno-cultural units, to bring about homogeneous legislation as well as a uniform system of administration, and, through such legal measures, control over remote areas and separate ethnic groups, to strengthen Rāṇā rule, to reinforce Hindu law in contrast to the British influence in India, and to point out that Nepal is 'the only Hindu kingdom left in the Kali age' where cows, women and Brahmins are especially protected.[9] On an international level, the *Ain* served as a symbol that Nepal had joined ranks with the advanced nations which adopted constitutions and codified laws.

5 Fezas 2000b: xxvii.
6 Whelpton 1983: 123; Fezas 1999: 1283 and 2000b: xxiv.
7 For a list of the signatories, see the end of the Preamble.
8 *ajasamma* (read *ājasamma*) *maramāmilā garda ekai bihorāmā kasailāī kami kasailāi baḍhatā sajāya huna jānyā hudā tasartha aba uprānta* (…) *ṣata jāta māphika ekai sajāya havas* (…) *banyākā ain*. (…) *śrī prāim miniṣṭara lagāyata yasai kājakāma garnyā kāriṃdākā yasai aina bamojim kājakāma garnu* (MA_2: Preamble, p. 2, ll. 3–4, 8 and 24–25).
9 *hidūḥ rāja gohatyā nahunyā strīhatyā nahunyā brāhmahatyā nahunya* (…) *kalimā hiṃduko rāja yehī muluka mātrai cha* (§ 2.1 ll. 19–20).

The *Ain* is unique insofar 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' (Höfer 1979: 37 f., 2004: xxxvi). The 163 (MA_1) or 167 Articles (MA_2) and nearly 712 (MA_1) or 841 (MA_2) pages form a kind of constitution, a code of civil and penal regulations dealing with landownership, revenue administration, hereditary matters, marriage regulations and purity rules (particularly regarding commensality and illicit sexual intercourse), murder and killing (not only of humans, but also of cows), thievery, witchcraft, slavery etc., but also dealing with such odd acts as passing wind and spitting in public, or throwing chili into people's eyes or onto their genitals.

The *Ain* is based on a 'centralized agrarian bureaucracy' (Regmi 1976a: 225), defining a specific national caste hierarchy which places the various castes and ethnic groups into different categories. In this system, the caste status determines the individual's juridical status. However, the *Ain* was probably applied more in regions where dominant Bahun (Brahmin) and Chhetri (Kṣatriya) castes had settled than in the remote areas of the Himalaya.[10]

The *Ain* was repeatedly amended and supplemented and is still in use today, even if in a form that is totally different from the first version. It was continually revised and amended. According to the Preamble, the *Ain* was understood as a process, rather than as a fixed code:

> When it is necessary [for a portion] to be corrected or rejected by order of the Kausala and witnessed by us, it should be corrected or rejected and should be added as a new law, and all should act and render court decisions as written in this code. (…) If a law laid down in this code needs to be corrected or expanded, our prime minister shall convene with the Kausala and the *diṭṭhā* official of the Law office (*ainkhānā*) shall add, erase or correct [the regulations accordingly].[11]

Editions

Our translation is based on the two following editions:

> **MA_1**: *Śrī 5 Surendra Vikrama Śāhadevakā Śāsanakālamā baneko Mulukī Aina.* Kathmandu: Śrī 5-ko Sarakāra, Kānūna tathā Nyāya Mantrālaya, VS 2022 (1965), 712 pp. (includes amendments and additions made until VS 1922–24)[12].

MA_1 was prepared by H.M.G Nepal, Ministry of Law and Justice, under the guidance of Sūrya Bahādura Thāpā (who later became prime minister).[13] The editors were aware of a manuscript

10 However, Ramble 2018 provides an account of how the legal language of the *Ain* penetrated the local idioms, even in distant Tibetan-speaking communities in Highland Nepal, from the late 19th century onwards.

11 *kausalakā tajabījamā sacyāunā ṣāreja garnyā ṭhaharyākā sacyāi ṣāreja garī nañā bhayākā aina thapi sabaile yasai ainamā leṣiyā bamojim kājakāma nisāpha garnu*. (…) *kitābamā leṣiyākāmā ain sacyāunū thapanu pardā hāmrā prāim miniṣṭara kauṣala basi aina ṣānākā ḍiṭṭhāle thapanu meṭnu sacyāunu huṃcha* (Preamble, p. 2, ll. 10–12 and 14–16).

12 See MA_2 (Preface), p. 6.

13 An online version of MA_1 was also published by the Central Law Library in 2015: http://cll.org.np/images/muluki-ain-1910-BS.pdf (last accessed 30/03/2021).

from 1854 but they decided to base their edition on an amended manuscript copy prepared between 1865–67 (VS 1922–24):

> […] The ministry received the original copy [of the *Ain*] which was written in 1854 and another copy [of the *Ain*] which was written around 1865–67. It seems the later copy incorporated the deleted and the added provisions during that time. […] For the publication of it [the *Ain*], the later copy is considered.[14]

The main manuscript on which MA_1 is based could not be traced. Fezas (2000b: xlviii–xlix) mentions that this manuscript might belong to the C series of the NGMPP microfilms. Since this edition of the *Ain* is widely circulated, we considered it the basic text for our translation. However, we have incorporated additional articles or sections from MA_2, i.e. Jean Fezas' edition, which are missing in MA_1. Moreover, wherever the readings of MA_1 are distorted or wrong or the text was obviously left out, our translation follows the readings of MA_2 which are given in the respective footnotes.

Whenever we use 'Art.' and the §-sign without any additional siglum, it refers to our present translation. If not otherwise stated, all references and citations are from MA_1, which is called *Ain* throughout. If another *Ain* is meant, it will be specified. Since the text is predominantly written from an androcentric perspective, we use the generic masculine in most cases, except when women are explicitly referred to. Offices are written with an initial capital letter only in the case of proper nouns. The often-used numeric frame of '2–4' we did not understand literally, but as an idiomatic expression for 'a couple of days or people'.

> **MA_2**: *Le Code Népalais* (*Ain*) *de 1853*. Edited by Jean Fezas. 2 vols. Turin: Comitato per la Pubblicazione del Corpus Juris Sanscriticum, 2000.

This edition is based on the following manuscripts:[15]

- MsA: probably from VS 1912–18 (1855–1861).[16] The manuscript is kept in the National Archives Kathmandu under the Subject Number (*viṣaya na[mbara]*) Ca.La.Na. 28/17. There is no title page, but the catalogue card bears the title 'Aina'. The manuscript is written with often faded black ink in Devanāgarī script on fragile so-called Nepālī paper bound in book form (size 34 × 25.5 cm). It is numbered and starts on p. 34^{r} and ends on p. 856^{v} with a hardly readable table of contents of the different chapters. However, several pages are missing in between. There are several additions by different scribes;

14 […] *1910 mā lekhieko mūla prati sāthai tyo bhandā pachi lagabhaga 1922–24 tira lekhieko arko prati pani yo sāthai yasa mantrālayalāi prāpta bhaeko thiyo | tara yasa pratimā so avadhi bhitra thapiekā ra khāreja bhaekā sameta milāi lekhieko dekhincha | […] yasa prakāśanako lāgi pachillo pratilāi lieko cha*. (MA_1 Preface, p. 6).

15 For a description of the sources and various editions of the *Ain,* see below and Fezas' Introduction to his edition of the MA_2, as well as Fezas VS 2047 (1990), 1986a and 1986b; for an overview of editions of other *Mulukī Ains*, see also Regmi 1976b.

16 Cf. Fezas 2000b: xxxii and xxxiii.

apparently, this book was used for formulating another amended version. Each paragraph has a stamp at the beginning and the end: *Śrī jaṅga bahādura kūvar rāṇāji sadara*, from which it can be concluded that, at the time of its composition, Jaṅga Bahādura Rāṇā had not yet received the title *prāima miniṣṭara* (Prime Minister). It seems certain that this manuscript predates the manuscripts used for the edition of MA_1.

- MsB: dated ca. VS 1933 (1876).[17] The manuscript is kept in the National Archives Kathmandu under the Subject Number (*viṣaya na[mbara]*) Ca.La.Na. 28/18. This manuscript is very similar to MsA. It contains 678 pages, with an appendix of 32 pages titled Dhanakuṭā[-]aḍḍāke, 'To the *aḍḍā* (court) of Dhanakuṭā'. On its handwritten front page, it is confirmed that Yakṣa Bikrama Rāṇā (illegitimate son of Bam Bahādur Rāṇā, who was one of the brothers of Jaṅga Bahādura Rāṇā and prime minister from 1856–57) used this copy in Dhaṇakuṭā, one of the major frontiers during the Rāṇā and Śāha periods in the east of Nepal.
- A manuscript from Gorkha (NGMPP, reel number F 20/3), which Axel Michaels got microfilmed in 1983 during the first microfilming expedition of the NGMPP outside the Kathmandu Valley. Fezas, who has edited and translated it (into French), calls it the oldest recension of the *Ain* (Fezas 2001: 11). However, this manuscript has many similarities to MA_1.
- Two smaller manuscripts containing Art. 0.1–0.3: NeBhā. 618, which contains only 135 pages and begins on page 11 with the first section of the Article 'On Guṭhī Endowments', and NGMPP Reel number E 1940/3 which is kept in a private collection and contains three articles on the throne, royal affairs and ammunition.[18]

Amendments

The (*Mulukī*) *Ain* was regularly amended and expanded after its first promulgation in 1854. The following major amendments have been consulted in the present study:

MA_3: *Aghi aghikā mukhatyāra bhaibhārādāraharule* (…) *1908 sāla dekhi banāi baksyāko Āin*. Kathmandu: Nepāla Manorañjana Yantrālaya (press), VS 1927 (1870). 5 pts.: I (248 pp.), II (200 pp.), III (232 pp.), IV (426 pp.), and Addenda (132 pp.)

The *Ain* was first circulated in handwritten form before the *editio princeps* of VS 1927 (see below). A printing press, maybe the one Jaṅga Bahādura Rāṇā allegedly brought from Europe,[19] was used for this first printing of the *Ain*, which appeared 17 years after its promulgation (Fezas 1999: 1283). The edition contains a handwritten document (*lālamohora*) with the seals of the Śāha kings Rājendra (r. 1816–47), Surendra (1847–81) and Trailokya (son of Surendra who did not rule), as well as seals of Jaṅga Bahādura Rāṇā and other members of the Rāṇā clan. Each of the 31 paragraphs bears a seal (1,5 × 1 cm) of Jaṅga Bahādura Rāṇā at the beginning and end in

17 Cf. Fezas 2000b: xxxv.
18 Cf. Fezas 2000b: xxxix and xl.
19 Kumar Pradhan (1984: 45) reports that this press was called Giddhe Press, because an eagle (*giddha*) was engraved on it. It was exclusively used for government publications.

order to avoid unauthorised alterations or additions. For this edition, the *Ain* of 1854 was reorganised and shortened or paraphrased, but some changes turned out to be quite crucial. In order to safeguard parity before the law, for example, the *Ain* of 1854 had explicitly strengthened the position of judges by extending their authority to even allow them to sentence the prime minister himself to prison, were he to issue unlawful orders or indulge in nefarious activities (see § 45.3).[20] Yet, MA_3 retracted much of the authority and immunity of the judiciary by adding a new contradictory section which elevates high-ranking government officials above the law. The following section demonstrates this clearly:

> If the king, minister, general, *cautarīyā*, royal priests or colonel, *kājī*, *sardāra*, *bhāradāra* and so forth gives an order to the chief, *ḍiṭṭhā*, *bicārī*, *amālī* or *dvāre* and so forth of an *aḍḍā*, *gauḍā*, *adālata* or *ṭhānā* office to reverse the court decision (lit. to let the winner lose and to let the loser win) that is not in accord with the *Ain*, they shall request [the one who gave the order] saying: 'we have taken the oath of *dharma*, therefore we cannot do such injustice such as will lead us to hell'. If the order is given even after such a request is made to [reverse the decision], in spite of the fact that it does not follow the *Ain*, the [chief etc.] shall request [the following]: '[give the order] by issuing a *lālamohora* or *sanada*, I shall do accordingly'. If the *lālamohora* or *sanada* is issued, he shall do as written in the *sanada* [or *lālamohora*]. […] . (MA_3 § 84.2).[21]

The history of amendments of the *Mulukī Ain* is thus not to be understood as one of linear progression towards more legal security and rights, but rather as a contingent process dependent on historical configurations of power and the ideological orientation of state elites.

> **MA_4**: *aghi āīna bandā sāhrai lambāyamāna bhai ra dobharā tebharā smeta parī sajāya smeta namilyāko yakai muddā sajā <...>nāmā 2|3 mahala lāgnyā hunāle śrī 3 mahārāja bīrasaṃsera jaṅga rāṇā bāhādūra* […] *bāṭa choṭakarī tavarasaga sabaikurā pugnyā ẏekā mahalkā māmalā dośrā mahalko āina nalāgnyā garī banāibaksyāko āin*. Kathmandu: Nepāla Śrī Bīra Deva Prakāśa Yantrālaya, VS 1945 (1888). 5 Pts. (*pañjikā*): I (100 pp.), II (80 pp.), III (144 pp.), IV (95 pp.), V (144 pp.)[22]

This is one of the major amendments of the *Ain* carried out under the prime-ministership of Vīra Saṃśera (r. 1885–1901) and published in 1888. His seals are at the beginning and end of

20 For more changes in the MA_3 see Khatiwoda forthc.

21 *aḍā gauḍā adālata ṭhānākā hākima ḍiṭṭhā bicāri amāli dvāryā gaihralāi sarkāra lagāeta miniṣṭara janarala cautariyā gurū prohita karṇaila kāji sardāra bhārādāra gaihrale kasaikā jhagaḍā māmilāmā hārnyālāi jitāi jitanyālāi harāideu bhani ainamā namilnyā kurāko hukuma marjī ājñā diyā bhānyā hāmile dharma bhākyāko cha annyāe gari āphu naraka parnyā kuro hāmi garna saktauna bhani binti garnu so binti gardā ainamā nisāpha naparnyā bhayā pani esai garideu bhanyā huñcha bhanyā mohora daskhatako sanada garibaksiyosa ra sohi bamojima garuṃlā bhani binti garnu ra mohora daskhata garidiyā so sanadamā lekhyābamojima garidinu mohora daskhata nagari ainamā namilyākā annyāekā kurā garideu bhanyā āphule khāyāko mān chāḍanu kacahariko kāma nagarnu.*

22 Microfilmed by NGMPP (reel no. E 1214/3).

each paragraph. On p. 2 are also the seals of the brothers Deva (prime minister 1901), Candra (1901–29), Bhīma (1929–32), Phaṭya and Lalita Śamaśera Rāṇā. This amended version was valid until VS 2020 (1963). The amendment was undertaken owing to the fact that the older version was verbose and cumbersome to read and understand, leaving room for ambivalence in a multiplicity of instances. Many provisions of the *Ain* were not stated clearly once, but instead repeated throughout the trajectory of the work, stifling any claim to user-friendly practicability in its nascent stages. It is these very drawbacks which the MA_4 sought to correct, stating boldly on its very title page:

> With the earlier *Ain* being rather protracted, [many] of it[s provisions] having been unnecessarily reiterated twice [or even] three times, resulting in disparities of applicability of penal measures—two to three [incompatible] provisions could be implemented in the same case; [therefore] Prime minister Deva Saṃśera had [this] *Ain* issued, which, being to the point, covers all the matters [as it was in the previous *Ain*] and wherein one provision does not contradict another.

The amended version has been divided into five simplified chapters with briefer articles and a more compelling sub-structure. Semantic departures from the 1854 version, however, remain minimal, at least with regard to the section on homicide. In other instances, emendations testify to the growing experience and process in legal practice of the contemporary political culture. The notion of 'divine kingship' is a case in point. While the *Ain* of 1854 rhetorically provides the king with an important role as 'Hindu king' within the given legal framework by defining the country as the only remaining Hindu kingdom in the Kali era, which symbolizes the purity and uniqueness of the polity, the *Ain* of 1888 (MA_4) specifies the country only as the 'meritorious land which has Paśupati's [*jyotir*]*liṅga* and the venerable Guhyeśvarīpīṭha'.[23] Poignantly, the king does not wield any religiously or culturally derived legal privileges. At the same time, the prime minister's position, as delineated in the 1870 version, 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*.

MA_5: *Ain.* Kathmandu: Gorakhāpatra Press, VS 1992 (1935). 5 Pts.

In 1935, a new amendment of the MA was prepared during the prime ministership of Juddha Śamśera Rāṇā. This edition was in effect until the end of the Rāṇā regime (1950). One of the major amendments of this edition was the incorporation of the abolition of slavery. Compared to the two aforementioned editions of the MA, this edition introduced ever more practical court procedures which again separated the court from any kind of possible unlawful influence through the authorities and reinforced the autonomy of the judiciary.[24] The role of king was more strictly

23 […] *śrī pasupati liṅga guhyeśvarīpīṭha bhayāko yasto puṇyabhūmī* [...] (MA_4 § 3.1, in NGMPP reel no. E 1214/3).

24 For an overview of this see MA_5: pt. 1, pp. 1–129, in NGMPP reel no. E 1415/3.

restricted by empowering the prime minister as a court of appeals.[25] The Bintīpatraniksārī Aḍḍā, a department responsible for petitions directly under the prime minister, was given authority to evaluate petitions submitted to the prime minister.

MA$_6$: *Mulukī Ain.* Kathmandu: Kānūna tathā Nyāya Mantrālaya, VS 2022 (1965). 2 Pts.

The MA of 1963,[26] proud project of King Mahendra, was based on the first constitution of the country and eventually came to replace prior editions of the MA that had been prepared and operative during the Rāṇā regime. The new MA, which introduced the formal abolition of the caste system, child marriage or polygamy, was a landmark in the legal history of Nepal, because its main objective was to establish equality before law to all citizens, irrespective of caste, religion and colour. The repellent system of judgment based on the caste status of the litigants and defendants ended with the new MA, which 'marks the culmination of Nepal's transition into the modern world' (Kumar 1967: 11) and also ended Rāṇā rule in the field of law. Ironically, a textual tradition associated with the assertion of Brahmanical orthodoxy metamorphosed into a manifest of social emancipation. The *Mulukī Ain* revised by King Mahendra in 1963 was amended more than twelve times and completely replaced in 2017 by the new constitution of the Federal Republic of Nepal.

Translations

The *Ain* has only partly been translated, in varying quality. In Table 1 we have listed the translations of individual articles and sections known to us.

The Structure of the *Ain*

It was Jaṅga Bahādura Rāṇā, the 19th century Nepalese *de facto* ruler, who conceived of and initiated the formulation of a standardised, binding national code that was to replace the unregulated and arbitrary, locally diverse legal practices of the contemporaneous period by placing the administrative, social and legal practices within a single governing framework. The *Ain* was the textual medium by which reform was meant to be brought to the farthest corner of the kingdom and to contribute to the unification of the country. However, the composition of the *Ain* is not very clear. It is obvious that it was composed by a council and not by a single mastermind.

Brought into another structure, the topics as listed in Table 2 are dealt with in the MA$_1$.[27] The bulk of the articles concern caste and family law, which also includes laws on purity and punishments for illicit sexual relationships, with the forms of punishment such as execution, *dāmala*, branding, enslavement and so forth (§ 161.1), but a major part also deals with laws related to land disputes and labour, as well as criminal law and administrative or legal procedures.

25 See MA$_5$: pt. 1, pp. 139–45, in NGMPP reel no. E 1415/3.
26 This *Ain* came into force on the first day of the month of Bhādra in VS 2020 (MA$_5$ § 1.2).
27 For another table of contents ('table analytique'), see Fezas 2000b: l–lxiv.

Table 1: Published translations of Articles[i]

MA_1, Article	**Reference**[ii]
Preamble	Fezas 1985
1. On Guṭhī Endowments	Fezas 1985 (§ 1), Regmi 1972a
2. On Land	Fezas 1985 (§§ 14, 16)
11. On Forced Labour	Regmi 1971b
14. Recovering a Loan by Seizing Standing Crops	Mühlich 2001
15. On Creditors and Debtors	Mühlich 2001
16. On the Repayment of Debts	Mühlich 2001
17. Repayment of Debt from Dowries	Fezas 1985
22. On a Father's Division of Property among Sons	Fezas 1985
23. On Partition of Property	Fezas 1983a (§§ 29–30), Fezas 1985
24. On [Conflicts between] Husband and Wife	Fezas 1985
25. On Widows' Property Rights	Fezas 1985, Regmi 1970c
26. On the Partition of [Seized Property] Returned as a Gift [by the Government]	Fezas 1985
27. Women's Personal Property and Dowries	Fezas 1985
28. On Property Passed On in the Absence of a Son as Heir	Fezas 1985, Fezas 1986b (§§ 1, 2, 19)
29. On Adoption	Fezas 1983a, Fezas 1985, Regmi 1970d (§§ 1–3)
49. On Trial by Ordeal	Regmi 1970b
51. On Serving a Prison Term in Place of Another Person	Regmi 1970b (§§ 1–2)
55. On Fights during the Siṭhi Festival	Regmi 1972b
59. On Beating between Father and Son	Fezas 1985 (§§ 1–2, 11–12)
66. Killing a Cow	Fezas 2009 (§§ 1–9, 11–12), Regmi 1969, Michaels forthc. b [1991]

Table 1: Published translations of Articles[i] (*continuation*)

MA_1, Article	**Reference**[ii]
71. On Quadrupeds	Fezas 2009 (§§ 7–13)
74. On Witchcraft	Macdonald 1976
81. On the Sale of Male and Female Slaves	Regmi 1979b
82. Enslaving or Selling a Person	Regmi 1979a
84. Selling a Wife	Fezas 1985 (§§ 1–5)
89. On the Religious Judge (*Dharmādhikāra*)	Fezas 2009 (§ 49), Gaborieau 1977 (§ 1), Michaels 2005, Regmi 1979c, Regmi 1979d, Regmi 1979e, Regmi 1979f, Regmi 1979g, Regmi 1979h, Regmi 1979i, Regmi 1980
94. On Widow Burning (*Satī*)	Michaels 1994, Regmi 1977
95. On Carrying a Corpse	Michaels 2014
97. On Observing Impurity	Fezas 1983a (§ 28), Fezas 1985 (§§ 4–6, 9), Fezas 2009 (§ 97.45)
115. On [Incest among] Jaisī Brahmins	Regmi 1970e
119. On [Incest among Water-Unacceptable but] Touchable Castes	Gaborieau 1977 (§§ 3–4, 6–9)
126. Miscellaneous Provisions Relating to Illicit Sexual Relations	Fezas 1983a (§ 3)
156. On Illicit Sexual Intercourse with Members of Untouchable Castes	Gaborieau 1977 (§§ 4, 6,13)
159. Illicit Sexual Intercourse with Water-Unacceptable but Touchable Caste Members	Gaborieau 1977 (§ 4–6, 8)
163. Sexual Intercourse with Animals	Fezas 2009 (§ 4)
164. (= MA_2 166) On Anal Sexual Intercourse	Fezas 1983b

i Some sections, which are identical with or similar to the Gorkha recension have also been translated by Jean Fezas (2001); see his synopsis on pp. 155–6.

ii If no section numbers are given after the reference, the entire Article is covered by the translation.

Table 2: Content and topics

Laws	**Topics**	**Articles**
State law	The constituting body	Preamble
	The throne	0.1 (1 in MA_2)
	Royal affairs	0.2 (2 in MA_2)
	On Madhesa	165 (167 in (MA_2)
Civil law (i.e. laws related to caste, family, kinship and purity)	Conjugal relations	24
	Adoption	29
	Drinking liquor and Untouchability	87
	Investiture by mendicants	88
	Purification and expiation by the *dharmādhikāra*	89
	Contamination in commensal relations	90
	Investiture with the sacred thread	91
	Widow burning (*satī*)	94
	Carrying corpses to the cremation ground	95
	Reporting deaths	96
	Observing impurity regulations	97
	Ritual obeisance and gifts	98
	Marriage, forced marriage, betrothal	99–103
	Divorce	24, 144
	Fornication	104–106, 126
	Molestation and rape	107, 109, 112, 132–3
	Illicit sexual intercourse	108, 110, 128, 131, 142, 145–160
	Incest	113–125
	Prostitution	127, 130
	Adultery	134–8, 141
	Elopement	138–9, 141
	Voluntary caste degradation	157
	Anal sex	164 (166 in MA_2)

Table 2: Content and topics (*continuation*)

Laws	Topics	Articles
Criminal law	Rioting against bailiffs	41
	Fights during the Siṭhi Festival	55
	Assault and physical injury or abuse	56, 57
	Verbal abuse	57
	Brawling	58
	Physical clashes between parents and children	59
	Forced feeding of human excrement, semen, etc.	60
	Farting	61
	Spitting	62
	Drawing of weapons with intent to kill	63
	Murder	64
	Manslaughter	65
	Cow slaughter	66
	Throwing chilli powder in eyes, mouth, genitals, etc.	67
	Burglary, theft, robbing, looting	50, 68
	Arson	73
	Witchcraft and sorcery	74
	Setting traps	77
	Killing the wife's paramour	140
	Infanticide	143
	Bestiality	163
Labour law	Forced labour	11
	Professions	31
	Employment of convicts in road-building	53
	Aiding the escape of slaves and bondservants	80
	Sale of slaves	81
	Enslavement and traffic in human beings	82
	Sale of slave mothers separately from their children	83
	Sale of wives	84
	Dismissal of sick servants	85
	Amālī's right over persons who are to be enslaved	86
	Keeping slave women as wives	129
	Illicit sexual intercourse with slaves or bondservants	161–162

Table 2: Content and topics (*continuation*)

Laws	Topics	Articles
Land and property rights	Guṭhī endowments	1
	Conflicts concerning land rights	2
	Conflicts between tenants and landlords	3–4
	Sale of rents	5
	Creditors & debtors, inheritance	14–20
	Insolvency	21
	Property rights, dowry	22–23, 24–28
	Confiscation of property	43
	Trusts and deposits	69
	Finding lost or ownerless property	70, 78
Public, administrative and fiscal law	On the Toṣākhānā and Mulukīkhānā offices	0.3
	Revenue collection contracts	6–8
	Remissions, defaults in payments of arrears	9–10
	Payment of cash salaries	12
	Appointment and dismissal of officials	13
	Currency and weights	30
	Felling trees	32
	Official documents	33–34
	Dispute between courts and local functionaries	46
	Medical practice	54
	Traffic regulations, especially for horses and elephants	72
	Gambling	75
	Construction of houses	76
	Cleaning of lanes and streets	79
	On poor and indigent persons	93

Table 2: Content and topics (*continuation*)

Laws	Topics	Articles
Punishments and procedural law	Deprivation of caste status and life imprisonment	42
	Judicial procedure	35
	Summoning of prisoners	36
	Confessions	37
	Guarantees	38
	Suppression of information relating to crime	39
	Aiding the escape of prisoners	40
	Collection of fees	44
	Judicial complaints	45
	Statutory time limits	47
	Punishment of judges and officials	48, 52
	Ordeal	49
	Fines and imprisonment	50, 52
	Serving a prison term in place of another person	51
	Juvenile delinquency	92

The structure of the *Ain* is by no means coherent. Quite a few articles actually could have been better subsumed under one heading (for example, Art. 3 and 4, 61 and 62, 131 and 133). There are additional laws, sometimes also called *aina*, within Articles[28] or incorrect sequences (e.g., Art. 48). Contradictions, for instance between § 59.1 and § 59.2 remain unnoticed as well as doublings (§§ 76.2 and 15–16). There are also stylistic discrepancies. Art. 1, for example, substantiates its prohibition of investment in foreign countries in an anecdotal style through cautionary tales. The vocabulary is not standardised either. For one reference object, often two terms, one derived from Sanskrit and one from Persian, are used, as in the case of 'king', interchangeably referred to as *rājā* or *sarkāra*.

The Sources of the *Ain*

'The *Ain* has been prepared in accordance with the scriptures (*śāstra*), policy (*nīti*) and customary practices (*lokakā anubhāva*)' (§ 1.1).[29] Among the three sources of law from which the *Ain* itself claims to be derived, the influence of the Dharmaśāstra on the *Ain* is not evident as far as direct quotations from the Dharmasūtra, Dharmaśāstra or Nibandha texts are concerned. Nowhere

28 §§ 1.26–27; 18.21; 23.31,35, 38; 27.14; 33.16–17; 35.34–38; 38.9–11; 50.31–35; 69.11–12, 107.9–12; 114 and 116–121; 132–133, 146–150, 160, 167.

29 Cf. Hodgson (1836: 123): 'Custom or precedent is the law in many cases; the Dharmashástra, or sacred canons, in many more; and the decision of numerous cases depends almost equally on both.'

do such texts seem to have been used as a reference. However, rules and principles from the Dharmaśāstra are indirectly applied,[30] shown, for instance, by the fact that religious matters had to be decided by (learned) Brahmins, as the institution of the *dharmādhikāra* evinces. Given the wealth of empirical cases dealt with in the *Ain*, it is also widely a codification of customary law (*ācāra*) rather than a deducted application of Hindu, Islamic or Western law. Despite the strong influence of Persian legal terms stemming from the Moghul administrative system and occasional English loan words, the legal norms, especially in the fields of private or religious law, are mainly grounded in local practices.

The question of the implementation of the Brahmanical legal scriptures in social and legal practice and its codification has long been discussed.[31] R. W. Lariviere (2004: 615) aptly points out that the Dharmaśāstra was never supposed to be codified law, but only to provide guidelines for legal practice, and Davis (2008: 317) concludes that '(s)acred texts were not normally sources of positive law, but rather of jurisprudential training'. In Nepal, too, many normative texts have been transmitted, but almost no historical material on the legal practices has survived (Michaels 2010: 61). However, certain norms from the Brahmanical legal texts have been incorporated in the *Ain*. For example, the *Ain* defines the protection of Brahmins, women and cows as directive state principles and Nepal as the only remaining Hindu kingdom in the Kali era, where Brahmins, women and cows are protected—in contrast to Hindustan, which is polluted by the British and Muslims in the eyes of the Nepalese Brahmanic orthodoxy. Moreover, following Brahmanical norms and practice, e.g. *Gautamīyadharmasūtra* (GDhS) 21.1-3, *Manusmṛti* (MDh) 11.55-9, the *Ain* exempts Brahmins, women and a certain category of ascetics from the death sentence, regardless of what crime they commit (§§ 64.1 and 3–4).[32]

A comparison between the *Ain* and the *Manusmṛti* as an example of a Dharmaśāstra text reveals similar findings for death and mourning regulations. The *Ain* focuses on the death and mourning rituals in Articles 95 'On Carrying a Corpse' (*murdā uṭhāunyā*), 96 'Reporting a Death' (*maryo bhani sunāunyā*) and 97 'On Observing Impurity' (*āsauca vārnyāko*). The rules regarding the carrying a corpse can be summarised as follows (see the Table 3).

It is obvious that the Nepalese law-givers used the *Manusmṛti* or similar texts, although they did not mention them verbatim. It appears that Manu's norms of mourning became almost completely valid in the *Ain*. These formed the models for extensive legal application of mourning rules. The principles of purity and impurity were enforced by the *Ain*, and perhaps the dharmashastric norms have never before as intensively become a real law text, i.e. codified and applied law. Thus, the principles of mourning in the *Ain* are certainly dharmashastric, but the *Ain* is much more detailed in its regulations. To mention just a few instances: the observances for the subjects after the death of a king (§§ 97.1–2); observances after the death of second wives, concubines, female slaves and maids (§ 97.3); refusal to perform the death rites (§ 97.4–5, 8, 10, 64); death of stepmothers (§ 97.21), affine relatives (§ 97.22), half sisters and half brothers (§ 97.9, 23),

30 For example, someone who unintentionally kills a cow is instructed to undergo penance in accordance with the customs and holy scriptures (*nītismṛti*) (§ 66.4).

31 See, for example, Rocher 1993, Lariviere 2004, Davis 2008 and Michaels 2010.

32 Cp. also RŚE 15 and NyāV, p. 189.

Table 3: Rules regarding mourning in *Manusṃrti* and the *Ain*

Topic	MDh, ch. 5	Ain, Art. 97
Equation of death and birth impurity	58	13–16, 34–35, 39
Mourning periods of 1, 3, or 10 days depending on kinship ties	59	22–32 *et passim*
Burial of children before name-giving ceremony (*nāmakaraṇa*)	68–70	12, 17
Impurity at the death of a guru or teacher	65, 80–82	27
Low impurity after touching the corpse at the cremation	64, 85, 87, 91	32
Difference between a death and the receipt of the news of death normally does not extend the mourning period	75	20 ff.
Additional death or birth in the mourning period does not extend the mourning period	79	36 ff.
No impurity for kings and warriors	93–98	43–45
Restrictions regarding food, bathing and sleeping on the ground during the mourning period	73	56–57, 62
Days of mourning in the case of the death of a pregnant woman	66	11
Taking food in a house affected by death impurity	101	56

wives of low caste, remarried women or wives taken after adultery (§ 97.25), family priest, fictitious kinsman (*mīta*), step-daughter or -son (§ 97.27); adopted son or foster parents (§ 97.28), slaves and bondservants (§ 97.30), and family members who have become or are renouncers (§ 97.32–33); death impurity for the king, ministers (§ 97.43), soldiers (§ 97.44) physicians and other professionals (§ 97.46); pregnant women: burial of the child (taken out of the womb) and cremation of the woman (§ 97.52 and 65); assumed death of missing persons (§ 97.53). The *Manusmṛti*, on the other hand, lists only a very few cases that are not also dealt with in the *Ain*: loss of semen (§ 5.63), miscarriage/abortion (§ 5.66), the death of a fellow student (§ 5.71), and the death of an *ācārya* or *śrotriya* (§ 5.80–82). How detailed the regulations of the *Ain* are becomes evident when one looks at the mourning periods for kin and other persons. In this regard, the *Ain* not only incorporates norms from the Dharmaśāstra tradition, but also systematically enlarges their scope to hitherto unregulated cases.

References to dharmashastric norms and institutions can be found in several other instances. The usages of the term *dharma* or *jātako dharma* (*dharma* of one's own caste) in the *Ain* are examples of of transferring established Brahmanical *varṇāśramadharma* norms into the *Ain* without directly quoting the sources involved. For example, MA_2 § 0.1.24 and § 0.1.26 regulate that a king or prime minister who deviates from his caste's *dharma* should be dismissed from his throne or post. Section 89.36 directs persons who are in householders' (*gṛhastha*)-*dharma* and belong to the Brahmin, Rajapūta, Sacred Thread-wearing or Kṣatriya castes not to hear the initiatory mantra from an ascetic. Moreover, the *Ain* encourages the subjects (§ 97.32) to collect

religious merit[33] by voluntarily carrying, disposing of or burning the dead bodies of those who die without leaving any heir or property behind. The *Ain* emphasises that such a voluntary act gives a person religious merit equivalent to that gained by performing a huge fire-sacrifice (§ 97.32). Even the daily code of conduct introduced in the *Ain*, such as paying obeisance (§ 98), is indirectly based on the shastric injunctions that a younger person should greet an elder person in the prescribed manner (cp. *Āpastambadharmasūtra* 1.13). Similarly, the food regulations extensively dealt with in the *Ain* (§ 87) reflect the *bhojyābhojya* (edible and prohibited food) concepts laid down in the Brahmanical legal scriptures (see for example, ĀpDhS 1.16 and 1.17 and MDh 4.207–17).[34] Moreover, the *Ain* (§ 51.2)—in line with the injunction of the Dharmaśāstras[35]—bans women from touching a statue of Viṣṇu.[36] The examples given suggest to us that the authors of the *Ain* consulted the Dharmaśāstra texts, without specifically referring to them, mostly the articles dealing with caste, purity and pollution.

Nevertheless, the *Ain* demonstrates that the political actor(s) who commissioned the law code thought beyond the deeply-rooted Brahmanical legal scriptures and customary practices when they drafted certain parts of the law code (especially those concerning land, taxation, civil administration, and occupational choice) in an attempt to attain a homogeneous legislation which was unanimously applicable to the subjects. For example, the *Gautamīyadharmasūtra* (GDhS) specifies certain duties for all four classes: all Twice-Born classes have to fulfil the duties of carrying out studies, sacrifices and oblations, whereas Brahmins have the additional duties of teaching the Vedas, sacrificing for others and accepting gifts (GDhS 10.1–2), and the King and Kṣatriyas should fulfil the duties of protecting all creatures, imposing punishment in order to maintain justice, and supporting Vedic Brahmins, those who are not able to work, novice students and those who are exempt from taxes (GDhS 10.7–12). MDh (3.64 and 4.11) emphasises even more that respectable families quickly lose status if they practice crafts, engage in trade and so forth, and it prohibits Brahmins from following any worldly occupation, other than the pure and upright things proper to them. Similarly, the caste reformation of King Jayasthiti Malla (r. circa 1382–1395) follows the Brahmanical *varṇa*-system described above.[37] However, the *Ain*—unlike the *varṇa*-system of assigning profession according to the caste status of a person—explicitly states:

33 For example, MDh 4.239–42 explains why it is important to collect merit (*dharma*) which is not only useful for this world but will be an 'escort in the next world'.

34 See Olivelle 2002 for a comparative study of the shastric concepts of prohibited food.

35 See for example, Nir pp. 240–1.

36 It seems that such a ban on women from touching a *śivaliṅga* and (statue of Viṣṇu) started an intense discourse in the Nepalese royal court after the *Ain* was put into effect. Since the issue possibly could not be resolved by the pundits in the royal court, it was forwarded to a *dharmasabhā* in Benares (a major hub for interpreting the Brahmanical texts at that period). A report-letter sent from one of the pundits of the Nepalese royal court who brought the issue to the *dharmasabhā*, to Prime Minister Jaṅga Bahādura Rāṇā from Benares in 1863 tells us how vigorous the debate was to give a decision on 'whether a woman can worship a *śivaliṅga* by touching it or not'. The pundits in the *dharmasabhā* could not unanimously agree on a decision thus, one group decided that a woman is allowed to worship a *śivaliṅga* by touching and the other group decided against it. At the end, the issuer of the letter recommended the prime minister not to believe the 'corrupt pundits' but to continue what has been so far practised in Nepal (this topic has been extensively dealt with in Michaels 2018: 271–92).

37 NyāV, p. 269, see parallel in NārSm 18.47.

> Occupation is not governed by caste [membership]. [The members of] all Four Varṇas and Thirty-six castes may sharpen tools, make shoes and clothing, work in mines, refine gold, fire brick kilns, pursue the potter's trade, prepare leather for *mādala* drums or do any [other] work as a profession, or earn a living by engaging in commerce. Nobody shall lose his caste status. (§ 31.7)

What is striking in the above passage is that, contrary to both shastric and customary practices, professions such as cobbling, tailoring and blacksmithing used to be carried out by Water-unacceptable and Untouchable castes in Hindu customary practice (§ 160). It shows that the *Ain* is fundamentally liberal in terms of letting people choose or change their profession at their own wish, although the profession (*jīvikā*) used to be one of the essential elements of protecting the social and religious purity of a person in the Hindu scriptural and customary context.

The changing notation of divine kinship in the *Ain*[38] suggests that the Rāṇā rulers displayed a certain openness to Western forms of polity. Jaṅga Bahādura's visit to England and Paris in 1850 shows his desire to understand Western ideas and political practices, which led not only to a certain legal reform, but also to certain administrative and economic reforms (Regmi 1988: 77–179). The *Ain* does not directly refer to any British or other western legal system, but how the idea of drafting such a code emerged in an isolated place like Nepal needs to be examined. The legislative checks and balances between the monarch, prime minister and the Kausala are clearly demarcated in the *Ain*. On the one hand, any form of executive power has been removed from the monarch; on the other hand, the prime minister can still be checked by the king in case of any deviation from the *Ain*, and the *bhāradāra*s in their turn by the prime minister (§ 0.2.21).

It can therefore be argued that one of the indirect sources for the emergence of the *Ain* was Jaṅga Bahādura Rāṇā's inspiration through the British parliamentary system, which he had looked at quite closely on his state visit to Europe. For example, in the account of Jaṅga Bahādura Rāṇā's journey to Europe,[39] it is recorded how the Nepalese delegation understood the contemporary British political institutions which resemble the provisions in the Article 'On Royal Affairs' in the *Ain* (§§ 0.2.1–2). It is clear that Jaṅga Bahādura Rāṇā did not directly borrow provisions from the British legal system for the *Ain*, but he was visibly inspired by the concept of the British rule of law in preparing its overall framing.

Another major source of the *Ain*, as declared in the Preamble, is customary practice and previous legislation.[40] One of the remarkable examples of consideration of the changes in customary practice in the *Ain* is the raising of the status of Mecyā caste from Water-unacceptable to Water-acceptable. Since the subjects of the Gorkhā realm previously did not accept water from the members of this caste, considering them Water-unacceptables, the issue was brought before, and decided by, the Kausala. The verdict of the Kausala raised the status of the Mecyā caste by referring to the following customs: (1) water from Newar, Magara, Guruṅga, Bhoṭe and Lāpacyā is also accepted in the country, although they, too, consume buffalo, pig, chicken, cow

38 See Cubelic/Khatiwoda 2017.
39 See Whelpton 1983: 177–88.
40 See also Adhikari 1976: 107, Höfer 1979: 41 (2004: 4) and Michaels 2005: 7.

and elephant meat; (2) earlier water was accepted from Mecyā caste members and their sons and daughters were brought to the palace as slaves; (3) they do not accept water from the members of the Water-unacceptable and Untouchable castes and Muslims, they respect Śiva as their God, therefore they are the caste whose path is Shaivism (§ 89.49).

Another example is the extensive inclusion in the *Ain* of the customary practices of Newars with regard to illicit sexual intercourse and divorce (Art. 144–5). And several instances allowing a guilty person to purify himself or herself or to carry out a funeral ceremony, or mourning or marriage rites of his or her kinsmen, following his or own caste's customs,[41] give a clear picture of the extent to which the *Ain* was based on the customs practiced.

Additionally, the *Ain* includes several pre-existing sets of legislation among its sources. For example, the *Ain* refers to the land measurement units and the system set up by King Jayasthiti Malla[42] as the standard (§§ 2.38 and 40). It also gives some direct references to the regulations promulgated by King Pṛthvīnārāyaṇa Śāha in 1768 (VS 1825) on treason (§ 0.2.23) and confiscation of land grants such as *sadāvarta*, *guṭhī*, *birtā* or the like, and reconfirms them (§§ 33.16–17). Similarly, it includes the regulation laid down in one of the previous *lālamohoras* in 1822 (VS 1879), through which the Magara caste group is upgraded from Enslavable status to Non-enslavable (Rājendra Śāha VS 1879).

It is probable that the administrative manual of Ujīra Siṃha, nephew of Mukhtiyāra Bhīmasena Thāpā and governor of Pālpā, of 1822, served as another source for the codification of the *Ain*. This *Ain* of Ujīra Siṃha (Uj-Ain) prepared the intellectual ground for legal codification in that it not only records local customs, but also formulates advice for the reform of the judicial system.[43] Since the regulations are formulated as recommendations without any binding legal force, the text is to be considered an administrative handbook, rather than a proper legal code (Fezas 1999: 1281–1282).[44] Many of the rules of Uj-Ain had a direct influence on the *Ain*; for example, the Uj-Ain proposed to strengthen the law of evidence during the judicial procedure and to enhance the independence of court decisions, directing the government employees to understand fact, investigate the case, let offenders confess their crimes before imposing punishments (Uj-Ain 1.3–5 and 4.1–4). In the *Ain* we find the same provisions for the interrogation of accused persons and the procedures for the imposition of punishment (§ 2.37). The drafter of the Uj-Ain, Ujīra Siṃha, explicitly indicated that he had observed the British court system before preparing his code-like legislation. This indicates that he must have been influenced by the colonial legal system.

The *Jāṅgabahādurīsthiti* (JBS) is not explicitly mentioned in the *Ain*, but it seems that its Brahmanical norms have been considered. Thus, it chiefly topicalizes rituals of initiation (*vratabandha*), marriage (*vivāha*), annual death rituals (*śrāddha*), adoption (*dharmaputra*), the reception of inheritance by a widow (*bidhuva aṃśadhana*), property partition (*aṃśabaṇḍā*),

41 § 87.17–19, 21, § 90.6, 12, 13, § 94.14, § 97.20, 40, 64, 66, § 103.1, § 104.1, 3–6, § 105.18, § 127.4, § 139.5, § 145.34, § 154.3 and § 160.7–8

42 Cf. Slusser 1998: Appendix III.

43 An edition of the Uj-Ain was prepared by D. Panta (VS 2048 [1991]). An edition and French translation can be found in Fezas 1999–2000.

44 The regulations of Uj-Ain on homicide are discussed below in the section 'Murder' under 'Criminal Law'.

penal taxonomies, purity regulations and adultery. It also regulates the act of widow burning (*satī jalāunu*) and the related annual death ritual. The JBS was drafted and actuated roughly three months before the initial publication of the *Ain* by the order of Jaṅga Bahādura Rāṇā[45] for the specific applicability of the document contents to the Mithilā migrants inhabiting the southern part of Nepal and India, who later migrated to the Kathmandu valley (Bista 1972: 21). 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 preventing unfamiliar customs gaining a foothold in the region.[46] A similar development is traceable in the *Ain*: the judges stationed at the courts in Tarai are exhorted to carry out judgement in accordance with the customs practiced in the respective places, provided that the dictum of the *Ain* is not directly contradicted (§ 165.2). The *Ain* also recognises extradition treaties concluded between the Nepalese and foreign governments as legally binding (§ 68.23). Verdicts delivered before the promulgation were still considered valid and could not be repealed on the basis of the new legal framework (§ 45.7).

State Law and State Formation

The history of modern state formation and legal codification are inextricably connected. It is through the legitimacy of legality that the state is able to constitute itself as a sovereign entity which is formally detached from the wider society (Jessop 2016: 8). The *Ain* fits into this pattern. The preamble elevates state legislation to the sole source of legal authority and mandates all government representatives, including the king and prime minister, to adhere to the political procedures enshrined in the *Ain*. On a conceptual level, this is not only a major departure from the legal cosmology of Dharmaśāstra, where royal legislation played a comparatively marginal role among the sources of law (Davis 2010: 25; Lingat 1993: 256) and law in general is considered a derivative of the residual, all-pervading category of Vedic authority (Davis 2010: 28), but also from the relations of mutual legitimation between king, deity, Brahmin and ascetic which shaped the pre-modern Nepalese polity (Burghart 1996). It is, therefore, tempting to approach the *Ain* as a decisive step in the emergence of the modern Nepalese state; an interpretation, however, which would obscure the fact that legality in the *Ain* is much more an instrument of consolidation of traditional institutions and sources of authority than one of restraining them. It is the infusion of 'legal-bureaucratic rationality', to put it in Weberian terms, into the existing

45 See the opening stanza: 'After having bowed down [my head to the feet of] both Jānakī and Rāmacandra, resemblances of clouds and lightning and the remaining Maithilī [population], I shall explain the regulations decreed with regards to them. [It is executed] in the language of the country (i.e. Nepālī) for easy understanding by the order of Jaṅga Bahādura, who is the Indra of Gorakṣeśvara (i.e. King Surendra), who has manifested as a *dharma*-statue, who is born into royalty (lit. born of prince), who is a creature of all cast-specific duties (*varṇadharma*) and who is great and excellent).'

46 It has been explicitly stated: 'The settlement of the Maithili Brahmins in the kingdom of Nepal constitutes an alien influx. Since there is concern that there might appear irregularities in the customs practiced by Maithili Brahmins by the adoption of the customs of the alien people […]' (JBS, colophon).

relations of caste, kinship, gender and surplus appropriation which gives the legal regulations in the *Ain* their characteristic shape. In the *Ain*, it is legal modernity that is traditionalised, and not tradition that is modernised.

Furthermore, there is a considerable hiatus between the *Ain*'s normative promises and the socio-legal realities: Jaṅga Bahādura Rāṇā's state was not a constitutional state based on a civil society. There was neither a legal citizenship nor political freedom or political parties. It was essentially a patrimonial state, in which the Rāṇās had a *de facto* private right of ownership over land and people. In this sense, Jaṅga Bahādura was not primarily concerned with its subjects, but with benefices and the increase of state income, which at the same time was essentially his income and that of his clan. Jaṅga Bahādura did not do very much for the people in his state. Despite some attempts, there was no system of social welfare supported by the state. There were neither public schools nor hospitals. The following brief analysis reads the *Ain* as the crystallisation of socio-political struggles surrounding the Rāṇā state-forming project in terms of four dimensions: the state apparatus, the population, the territory and the idea of the state as such.[47]

State Apparatus

As the embodiment of the Rāṇā state project, the *Ain* evinces two different, but interrelated strategies of state formation. On the one hand, the regulations reveal an attempt to institutionalise a highly bureaucratised and impersonal nucleus which is depicted as being separated from society and following an autonomous set of norms and interests.[48] On the other hand, outside of this 'core state', the *Ain* recognises and co-opts the authority of a wide array of social groups and actors, ranging from landowners to local judicial bodies.

The inner layer of 'autonomous' statehood is created through the following measures:

- Institutionalisation of authority: office and office holder were separated and legal boundaries drawn for both the king's and prime minister's powers. Overstepping these boundaries could be punished by being relieved of office (§ 0.1.34). Additionally, the *Ain* refers to a roll of succession for the monarch (§§ 0.1.1–11, 17) and prime minister (§ 0.1.26) which was intended to guarantee a peaceful transfer of power. Legal legitimacy, therefore, was supposed to supplement legitimation on the basis of birth rights or charisma.
- Separation of powers: the *Ain* undertakes initial steps to establish a conceptual separation between legislature, executive and judiciary. Amendments or modifications to the *Ain* required the approval of the Kausala (see Preamble). Furthermore, neither king nor prime minister was allowed to intervene in the judicial decision-making process (§ 45.2) or corrupt the judgements (§ 0.2.16). Verdicts were supposed to be based only on the authority of the *Ain*. If that was not possible, the case had to be referred to the Kausala and the *Ain* was to be amended accordingly (§§ 35.11–12).

47 These four elements are taken from Bob Jessop's theory of state, by which the following brief analysis is informed (see Jessop 2016).

48 For the Rāṇā bureaucratic system, see Edwards 1977.

- Restriction of royal powers: even after the usurpation of Jaṅga Bahādura Rāṇā, the Nepalese state remained formally a kingdom, although the king's power was considerably reduced. Throughout the *Ain*, the prime minister's position is stronger than that of the monarch; he is even entitled to dethrone the king under certain circumstances. Without the advice of the prime minister, the king is, for example, not allowed to breach agreements with British India or China. If he does so or is otherwise found guilty of seditious actions, he is to be dethroned (§ 0.1.17). The same applied when the king became mentally ill or suffered from other serious diseases (§ 0.1.24). The royal right to pardon was dependent on the consent of the Kausala (§ 0.1.20). Prime minister and *rājaguru* could even give an official reprimand to the king for inappropriate actions. (§ 0.1.21). Nonetheless, the king retained a protected position. In contrast to the prime minister, he and his family were exempted from capital punishment, whereas the prime minister could still be executed, for example for an attempt to usurp the throne (§ 0.1.31) or in the case of treason. Interestingly and in deviation from Dharmaśāstra rules, a Brahman who killed a king could be sentenced to death (§ 0.1.25).[49]
- Definition of a *raison d'état*: In terms of foreign policy, the *Ain* formulates higher state interests. Friendly relations with Great Britain and China, a necessary precondition for Nepal's survival as an independent state, became a directive of state policy (§§ 0.1.17, 0.2.10). Moreover, selling land to non-Nepalese residents, which would have endangered the country's territorial sovereignty and integrity, was highly restricted, even for the king (§ 0.1.34).
- Recognition of the exclusive territorial sovereignty of other states: the state relinquished the authority for criminal persecution in the case of homicide if it was committed by the British resident or Chinese envoy (§ 0.2.17) or else committed by anyone inside their residences (§ 0.2.18). Nepalese subjects found guilty of a crime on foreign territory were to be extradited (§§ 30.15, 68.23). It suggests that basic norms of the emerging international state system—the acknowledgment of the territorial principle of criminal persecution and the extraterritoriality of embassies—were enshrined in the *Ain*.
- Allocation of exclusive resources to the state: the *Ain* tries to establish a more secure and independent resource basis for the state. It was prohibited to convert land reserved for government officials (*jāgira*) into donations to private persons or religious endowments (§ 2.58), and the state treasury was explicitly protected from the private enrichment of the prime minister (§ 6.1). Refined bureaucratic procedures in rent and tax assessment, monitoring and collection were put into force to increase the state income (Art. 6–7). However, all these measures by no means posed a major challenge to the overall patrimonial framework controlled by the Rāṇā family.[50]
- Creation of a hierarchical, impersonal and routinised bureaucracy (see Public, Administrative and Fiscal Law): elaborated control and supervision mechanisms were established

49 The changing notion of kingship in the *Ain* is explored in more detail in Cubelic/Khatiwoda 2017.

50 For example, § 0.2.12 indicates that the members of the Rāṇā family were entitled to receive newly conquered territories at least partly *birtā* if given by the order of king.

> to prevent the misappropriation of funds. Additionally, several regulations explicitly prohibit the misuse of authority, corruption, and favouritism of state officials of all ranks and offices (§§ 8.10, 9.6–7, 37.6, 39.14, 40.13, 45.17, 48.22, 50.9, 53.1).

However, contrary to these attempts to impersonalise state power, local authorities played a vital role in the state's government strategy. *Birtā* holders and trustees enjoyed considerable judicial autonomy (§ 45.1), noble subjects were empowered to carry out state functions on the basis of *ijārā* and *ṭheka* contracts (§ 6.2), councils of elders were recognised institutions in legal proceedings (§ 35.16) or commercial transactions (§ 18.1), household heads could exercise disciplinary powers over their dependants (§§ 80.7 and 11) and family members (§ 59.1) and local community leaders were co-opted by the bureaucracy through the official appointments as *tharī*, *mukhiyā* or *nāike* and the transfer of tax collection rights and judicial competences. The state apparatus as envisioned in the *Ain* could be read as the attempt to reach an institutionalised compromise between various antagonistic internal and external socio-political forces: a weak monarch, who is nevertheless formal head of the state, a powerful prime minister who is eager to give the impression that the exercise of his broad powers is restricted by law, a feudal land-holding class which strives to put its privileges on a solid legal foundation, a political elite which tries to strengthen the state in order to guarantee Nepal's autonomy and the pressure from the hegemonic British colonial state in India for consolidated borders and Nepal's integration into the colonial state system.[51]

Population

The rise of modern state power is associated with the homogenisation of the pre-modern patchwork of communities and overlapping loyalties into monolithic nations, the production of individualised, self-regulating subjects and the neutralisation of mediating social or religious authorities which obstruct the state's comprehensive control over its subjects. Although the *Ain* as a legal code is a strong manifestation of the modern juridical power which is connected to the state's growing assertion of sovereignty, the formation of the Rāṇā state took a different path with regard to the practices of governing its population. It is not the individual as bearer of universal rights who is the target of state policies, but the person as part of his or her caste group, kinship networks and household structure. In its Preamble, the *Ain* guarantees legal certainty, but not legal universalism. Laws differ according to one's caste status, but are the same for all members of a particular caste. This unique blend of legal relativism and legal uniformity, which departs both from the context-sensitivity of the *jāti-* or *deśadharmas* of the Dharmaśāstra tradition and the formal universalism of 'Western' legal modernity, is captured in the phrase of the Four Varṇas and Thirty-six castes (e.g. §§ 1.13, 6.8, 25.5) which addresses the population as a social totality internally differentiated along caste lines.[52] This observation requires clarification in three respects:

51 On the external pressure to define state borders, see Michael 2012.

52 The structure of the caste system envisioned in the *Ain* and the social codes it rests on are presented in detail below in the section on 'Caste and family law'.

First, the validation of caste groups as legal categories does not imply that the state withers away in the face of an overly powerful society and that the legal recognition of social institutions is a concession to said society's predominance. In the *Ain*, social codes of purity serve rather as an entry point through which state power is channelled.[53] Pollution is put to work in favour of the government in several regards. The transgression of purity rules empowered the state to extract considerable fines (Rupakheti 2016: 76), to enslave people, thus supplying state authorities with cheap labour, and to subject the population under a disciplinary regime. The state also reserved the right to change the status of certain caste groups. In such cases, manipulating the caste hierarchy became a tool for the state to integrate ethnic groups or gain access to their services. A prominent example is the elevation of the Limbus to the rank of a Non-enslavable caste to ensure that they remained available for military recruitment (Höfer 1979: 182/2004: 164; Rupakheti 2017: 184).

Second, the state also reserved the right to exempt certain social practices from purity considerations, such as vocational choices (§ 31.7). In this case, its deep involvement with the internal workings of the caste structure enabled the state to redraw the boundaries between economic activity and religious or customary law.

Third, the establishment of a 'national' caste system does not imply that the norms of the Brahmanic orthodoxy were imposed on the diverse and multireligious society in every respect. Except for certain offences against Brahmanic values, such as killing cows, which were universally punishable, the *Ain* explicitly protects even the customs and beliefs of the country's religious minorities:

> All Sacred Thread-wearing castes [such as] Upādhyāya Brahmins, Rajapūta, Jaisī, Kṣatriya etc., Non-enslavable Alcohol-drinking, Enslavable Alcohol-drinking castes, as well as the European and Muslim castes, Water-unacceptable but Touchable, or Untouchable castes, [all these castes] may, in the entire Kingdom of Gorkhā, perform any act that is in accordance with their family traditions and beliefs and leads to the *dharma*, except for cow slaughter. Nobody shall be enraged about such matters. If somebody becomes enraged or quarrels and comes to complain in a *kacaharī* office about such matters, this person who is thus disturbing the religion of others shall be fined 100 rupees. If he does not pay the amount of the fine, he shall, in accordance with the *Ain*, be imprisoned. If a clash occurs, leading to the death of any person, [the culprit] shall be executed—taking life for life, provided the guilty person belongs to a caste that can be sentenced to death. If this is not the case, his share of property, in accordance with the Ain, shall be confiscated and he shall be punished by *dāmala*. (§ 89.1)

The second major institution which is validated through the *Ain* is the household with its varying legal statuses for legitimate and illegitimate wives, offspring or servants. On an ideological level, consolidating the micro-household as the societal core unit reinforced the idea

53 On the instrumentalisation of orthodox social regulations for political and fiscal ends in early modern Indic polities, see Guha 2013: 130. The legal system of 19th-century Nepal fits well into this pattern.

of the state as a macro-household, along with the socio-economic hierarchies and modes of exploitation attached to it.[54] The codification of the joint family as a property-holding unit, too, served the fiscal interests of the state, especially by defining the liability for defaults in rent payments (§§ 7.5, 7, 9; 52.35) or the state's entitlements to escheatable property (§ 28.9). Furthermore, the household was also obliged to take care of the maintenance of its members and dependents and thereby contribute to overall social cohesion, welfare and order (§§ 101.7–8 and 107.4).

The state in the *Ain* appears as an institutional ensemble which is deeply embedded in its wider social environment.[55] It is, therefore, a difficult analytical task to differentiate those constellations where social conflicts and structures translate into the state apparatus from those where the state acts as a semi-autonomous entity, appropriating or manipulating social institutions to extend its sway over society.

State Territory

The state territory in the *Ain* is envisioned as a spatiotemporal unity whose geographical extension is often expressed in the formulaic phrase 'from the east of the Mahākālī to the west of the Mecī river, in Madhesa and the hill region'. In the *Ain*, jurisdiction is claimed for even distant territories such as Madhesa or Tibet (§ 35.23). This spatial unity is clearly demarcated from other sovereign political entities. The acknowledgement of borders and thereby of the sovereignty of other states is evident in several regulations which, for example, prohibit the establishment of endowments or discourage other investments abroad (§ 1.1) or forbid land sales to foreigners. The state territory was not only integrated in a spatial, but also in a temporal sense. The time within which documents (§ 7.14) had to reach the capital was regulated in detail, which is an interesting indicator for the speed of inter-bureaucratic communication and information flows that the Rāṇā state aimed to establish.[56]

Spatiotemporal integration did not mean that there was free circulation of people or goods. A person who wanted to settle in the Tarai was required to obtain a travel permit beforehand (§ 33.14) and certain goods were only to be sold in government granaries (§ 6.17). However, the territory governed did not form a homogeneous legal and jurisdictional space. Separate regulations for the different provinces of Madhesa, Tarai (Art. 165) and Nepāla, including the cities of Kathmandu, Bhaktapur and Patan, existed. In many cases, these plural legal arrangements were an instrument of territorial integration, especially in border territories. For the Tarai, the legal differences were substantial. The judges stationed at the courts of Tarai were exhorted to carry out judgement in accordance with the established customs, provided that the provisions of the *Ain* did not directly contradict these.

54 The manipulaton of kinship ties was also instrumentalised for the consolidation of Rāṇā rule (Rupakheti 2017: 182).

55 Rupakheti (2016: 80) argues that the combination of both variables—the accommodation of local power relations and the socio-legal control exercised by the government—were crucial for the constitution and consolidation of the sovereignty of the Gorkhali state.

56 On the *Ain* as an attempt to centralise information next to other resources, see also Rupakheti 2017: 177.

However, such legal pluralism was mainly confined to minor offences. With regard to commercial and criminal law, the general regulations were enforced, even in the Tarai:

> Throughout the districts of Madhesa and Terai, east from the [river] Mahākālī and west from the [river] Mecī, legal cases concerning anyone from Madhesa or the hill region in matters relating to incest, enslavement, sexual intercourse between persons from superior and inferior castes, or in caste-related issues, or matters pertaining to contamination through cooked rice and water, shall be settled for people from Madhesa according to what has been practised from earlier times to the present day. If a legal case arises which [can neither be settled] according to [the customs] practised from earlier times, nor can it be settled according to the *Ain*, it shall be referred to [the Kausala] in writing, as shall all such cases. [The Kausala] shall investigate the [matter] of the written document and shall introduce [any required new law]. Action [regarding such a case which is referred to the Ain Kausala] shall be taken according to the instructions given [by the Kausala]. (§ 165.2)

In Surkhet or Morang, special laws for government loans, subsidies and tax exemption were enacted to attract farmers for the cultivation of these districts (§§ 2.64–65). Under certain conditions, even fugitive slaves became free once they settled there. For the cities of Kathmandu, Patan and Bhaktapur, detailed building regulations are laid down which indicates a stronger state presence and claim of governmental regulation for Kathmandu Valley than for other provinces (Art. 76). Also within the different provinces, the degree of stateness varied considerably, depending on the division of the territory into different categories of land rights, which in turn entailed varying degrees of state control. The legal recognition of *guṭhī* land can even be read as the integration of different (divine) forms of spatiality embedded in the state space. These divine spaces consisting of pilgrimage places, temples, monasteries and seats of deities were interwoven into a sacred topography which became the foundation of a religiously grounded patriotism. Even though state territory in the *Ain* is constructed as a bounded unity, it is not conceptualised as a linear, flat, uniform space, but rather modulated by different scales of stateness, pervaded by networks of alternative spatialities and fractured by the power of societal groups or divine agencies.

The Idea of the State

Even though the *Ain* reflects aspirations to create more autonomous statehood, the state as a coherent concept is only partially consolidated. The text displays semantic slippages and ambiguities between 'older' regicentric and more recent state-centred notions. The three major terms referring to the polity are *sarkāra*, *muluka* and *rāja*/*rājya*. Whereas in *rājya* the constitutive role of the monarch for the state is still expressed, the other two terms are more ambiguous in that regard. *Sarkāra* designates both king and government and it is, in many instances, difficult to decide to which of the two entities the term actually refers.[57] The same holds true for the term *muluka*, which in the Nepalese governmental discourse refers to the royal possessions

57 It is an indication that the king is meant if the honorific *śrī*-5 is prefixed to the term.

and reflects the monarch's tenurial sovereignty (Burghart 1984: 103). In the *Ain*, *muluka* is not only employed in a more general sense referring to the state territory as a unity over which the government exercises legislative powers, but appears also in combination with the first-person possessive pronoun *hāmrā*, 'mine' (majestic plural, the Royal 'we') or 'our' (§ 33.14) which adds another layer of ambiguity concerning the locus of political sovereignty. Does the pronoun refer to the ruling king or the three representatives of the royal family who enact the *Ain* in the Preamble, and does it still express royal sovereignty? Does it refer to the members of the Ain Kausala, the representative body of the state elite, and therefore implies the nobility as the true sovereign? Or does it even refer to the kingdom's people as a collective entity which would hint at an embryonic form of popular sovereignty?

There is, indeed, reason to assume that the *Ain* articulates attempts to create a more cohesive 'state population' which is bound to the government through exclusive moral ties. All inhabitants of the country, including the king, are expected to be loyal to the state and protect its higher interests, as the existence of crimes like sedition and treason suggests (§§ 0.2.5–6, 8, 10). Furthermore, a legal distinction is made between 'foreign' and 'native' subjects. For example, a person is required to live on Nepalese soil to acquire land (§ 0.1.34). Even among the Muslim minority, the legal status differs depending on whether a Muslim belongs to the native community of Curauṭe Muslims, or comes from abroad (§ 159.8). The Maithili Brahmins seem to have occupied an intermediate position between 'insiders' and 'outsiders'. Although they were perceived as a 'foreign' element, they received legal recognition through the promulgation which accommodated the Maithili Brahmins within the legal system and accommodated their cultural distinction at the same time.[58]

The *Ain* backs the Rāṇā state project not only by establishing legality as a major source of legitimation, but also by formulating a moral vision for the state's nature and purpose: the state becomes the guarantor for Nepal's special status as the only remaining Hindu kingdom in the Kali era, for the integrity of her sacred topography, for the observance of Brahmanical norms and—by overseeing the *guṭhī* system—for the country's collective spiritual and material flourishing (§ 1.1). Even though initial attempts to create a 'proto-national' state population are discernible, the moral authority for state power is established through weaving together multiple other sources, such as religious patriotism, monarchical attachments, the attainment of an earthly and other-worldly commonweal, anticolonial sentiments and the establishment of rule of law.

The absence of a codified vocabulary of statehood underlines the transitory moment the promulgation of the *Ain* represents for Nepal's political history. As an institutional compromise under the hegemony of the Rāṇā family, the *Ain* reflects a polymorphous, only partially autonomous institutional ensemble which combines bureaucratic patrimonialism, prime ministerial autocracy, monarchy and legality, and which rests on tributary-feudal economic relations, caste and kinship structures, and religious networks. The semantic ambiguities in the text are, therefore, a condensation of the political struggles, negotiations and social relations out of which the Rāṇā state emerged.

58 See JBS, colophon.

Caste and Family Law

One of the main topics of the *Ain* is to strengthen the hierarchy of the caste system.[59] Nearly one-third of its Articles deals with problems of caste and family and is concerned with (illicit) sexual relationships, legal or appropriate forms of marriage and the status of the offspring, as well as forms of acting against legitimate relations, e.g., adultery (cp. Fezas 1993), prostitution, rape, incest, sodomy, elopement, etc. Questions of purity and impurity through consuming alcohol, violating rules of commensality, death or birth impurity or misuse of the sacred thread also feature strongly in the *Ain*.

Caste Hierarchy

Nepal was a Hindu kingdom, but not entirely a Hindu society. The caste hierarchy of the *Ain* reflects the ethnic diversity of Nepal in the 19th century, that, more often than not, was different from the norms of the *varṇa* model of a caste society bound together by the Brahmanical governing notion of pure/impure. However, caste hierarchy is not the only mode of social stratification the *Ain* validates. Men who bear the right to kill their wives' paramours are super-ordinated to those not allowed to do so; 'honourable' ritually married wives to 'dishonourable' common women and prostitutes (*veśyā*)[60]; masters to slaves and other dependents, landlords to tenants, and the local nobility and other state officials to ordinary subjects. Of course, patriarchal codes of gender and age seniority were other criteria for social hierarchisation. These different modes reified each other and created intersectional forms of discrimination.

Moreover, ethnic groups have their own social distinctions and differentiations. They define themselves more in distinction to other ethnic groups than through an internal notion of hierarchy. This makes them, in principle, socially equivalent and their integration into the hierarchical caste system difficult. However, the *Ain* tried to do precisely this, although its norms were certainly not accepted by most ethnic groups.

The *Ain* considers these differences between castes and ethnic groups through the correlation of caste and status. It refers to the caste system by the phrase *cāra varṇa chattisa jāta*, 'Four Varṇas and Thirty-six castes'. As Höfer rightly remarks, '(t)he number 36 stands symbolically for the multitude of individual castes and certainly lacks empirical evidence' (Höfer 1979: 115, 2004: 88). In fact, 63 castes (without Newar castes) and circa seven ascetic groups are mentioned in the *Ain*.

This means that most ethnic groups in Nepal are not mentioned in the *Ain*. In the *Nepālika-bhūpavaṃśāvalī* and other texts of the 19th century, 64 castes are listed. In 1966, one researcher counted 26 castes among the Newar alone; in the census of 1991, 60 castes and ethnic groups

59 The structure and complexity of the *Ain*'s caste system has been dealt with by the anthropologist András Höfer in his brilliant study *The Caste Hierarchy and the State in Nepal: A Study of the Muluki Ain of* 1854 (1979, reprint 2004). For the role of the caste system in the state's strategies of population governance, see above the section on 'Population' under 'State Law and State Formation'.

60 In Nepālī, this term is used both for women who have had sexual intercourse with more than two different men and for prostitutes. Whenever the former are referred to, we have translated the term as 'common woman'.

were counted, and in 2011 it was already 125.[61] This differentiation is a result of changes in profession and migrations, as well as status demands, as Rajendra Pradhan aptly remarks:

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

Altogether, then, the country is one of ethnic diversity. Chhetri and Bahun are the largest caste group (31 percent according to the Census of 2011) followed by Magar (7.1), Tharu (6.6), Tamang (5.8), Newar (5), Kami (4.8), Muslims (4.4), Yadav (4.0) and Rai (2.3). The identity of the people of Nepal, however, is not only orientated toward caste (*jāta/jāti*), but also toward region (*deśa*), religion, and social status, even though the *Ain* was not so much interested in specifying the individual customs and laws of the various castes and ethnic groups. Instead, it brought them into five caste groups based on categories of purity and impurity:

(1) Sacred Thread-wearing castes (*tāgādhārī*): mainly Bahun and Chhetris including high Newars;
(2) Non-enslavable Alcohol-drinking castes (*namāsinyā matuvālī*): privileged ethnic groups, predominantly Magars and Gurungs, both entitled to join the army;
(3) Enslavable Alcohol-drinking castes (*māsinyā matuvālī*): ethnic groups who speak mostly a Tibeto-Burmese language such as Bhoṭe, Cepāṅga, Mājhī, Danuvāra, Hāyu, Darai, Kumāla, Paharī, etc.;
(4) Water-unacceptable but Touchable castes (*pāni nacalnyā choi chiṭo hālnuna parnyā*): castes who deal by profession with impure substances; into this category also fall Muslims and Westerners;
(5) Water-unacceptable and Untouchable castes (*pāni nacalnyā choi chiṭo hālnuparnyā*): castes who are so impure that they cannot be touched by higher castes and if accidently touched, the members of higher castes need to purify themselves through expiation or penance.

This system is based on four symbolic items determining higher and lower status: the Sacred Thread, alcohol, water (Fig. 1) and cooked rice (see below), which is a social marker within the groups.

61 Cf. Rosser 1979 [1966] and B. G. Shrestha 2007 for the counting of castes and social groups.

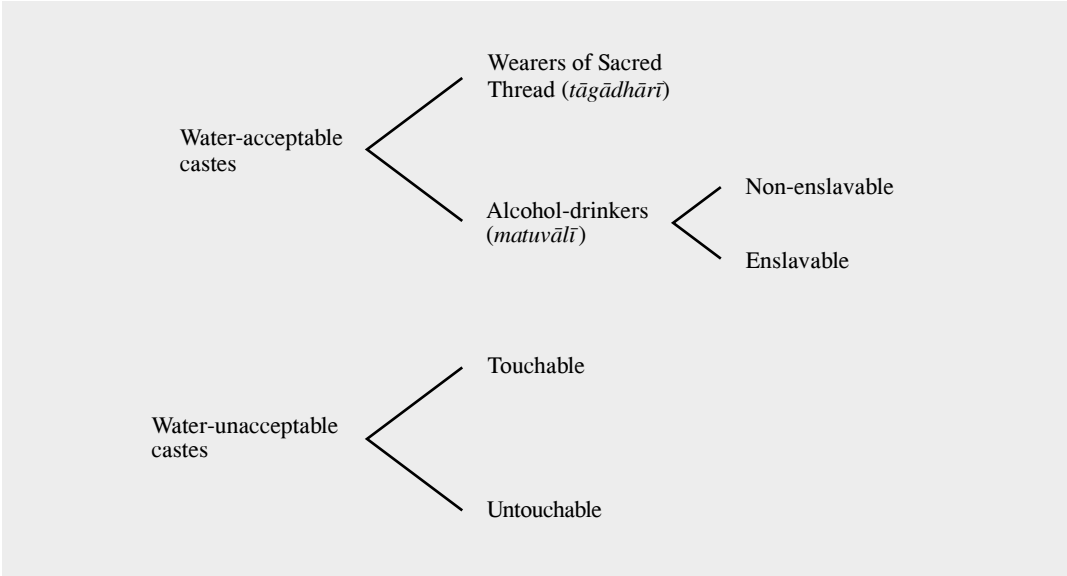

Fig. 1: Symbolic order of the caste system

On the basis of such categorical differentiations, the caste hierarchy of the *Ain* looks roughly as follows (Table 4) even though the position of some ethnic groups is not always clear.
With a few exceptions, the *Ain* does not specify which caste group (*jāta*) falls under which caste class (*varṇa*). This would have created a number of particular problems. For example, the alcohol-drinking Kṣatriyas in the western Himalayas do not fall under any caste category laid down in the *Ain*. Since they consume alcohol, they actually could not keep their caste status as Kṣatriyas wearing the Sacred Thread; nevertheless, they were still regarded as Kṣatriyas by birth in customary practice and the *Ain* is silent about this issue.

Purity / Impurity as a Status Marker

Interestingly, cooked rice (*bhāta*) is not reflected in Höfer's scheme of the caste hierarchy, although he is fully aware of the significance of this social marker:

> In principle, the following rules are applicable: 1. The groups of persons from whom Ego may take *bhāt*, on the one hand, and water, on the other, need not be identical. 2. *bhāt* can be accepted only unilaterally; water either unilaterally or reciprocally. That is, a) there are people from whom Ego accepts *bhāt* and water and who also accept them from Ego; and b) there are others from whom Ego only accepts without being allowed to give them. 3. A prohibition of acceptance may be effective either for a limited period or permanently. Only between persons belonging to the same caste can a prohibition be short-termed, f.i., in the case of a temporary defilement caused by death or childbirth. Permanent prohibitions prevail; the latter instance concerns people who exhibit a slight decline in status compared to that of other 'normal' members of their caste (Höfer 1979: 56, 2004: 21).

Table 4: The caste hierarchy[iv] (* = Ethnic group)

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

Upādhyāya Brahmin
Devabhāju (Newar Brahmins)
Brahmins of foreign kingdoms: Terhaũte Brahmin, Bhaṭṭa Brahmin, Marhaṭṭā Brahmin, Nāgara Brahmin, Gujarātī Brahmin, Mahārāṣṭrīya Brahmin, Tailaṅgī Brāhmin, Dravidian Brahmin, Brahmin of Madhesa
Asala Rājapūta, Rājapūta, Chetri/Kṣatriya ('warrior')
Asala Jaisī Brahmin, Jaisī Brāhmin, Doṭyāla Jaisī, Jumlī Jaisī, Duī-Liṅga-Jaisī, Tīna-Liṅga Jaisī
High Newar castes such as Tharaghara, Asala Śreṣṭha[i]

Hamāla
Bhāṭa/Bhāṭa Jaisī
Some ascetic sects (such as Jogī, Jaṅgama, Sannyāsī, Sebaḍā, Kanaphaṭṭā, Udāsī and Baghara, etc.)[ii]

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

* Guruṅga
* Magara
* Ghale
* Sunuvāra
* Limbu, Kirāti[iii]
* Newar castes from whose members water is acceptable

3. Caste group of the 'Enslavable Alcohol-drinkers' (*māsinyā matuvālī*)

* Bhoṭe
* Cepāṅga
* Danuvāra
* Hāyu
* Darai
* Kumāla
* Paharī
Ghartī (descendants of freed slaves), also called Pāre Ghartī
* Lāpacyā (Lepcha)[v]
* Mājhī
* Ṭhokryā
* Galahaṭyā
* Newar castes from whose members water is unacceptable

4. Water-unacceptable but Touchable castes (*pāni nacalnyā choi chiṭo hālnunaparnyā*) according to § 160.17

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)
Curauṭe (Muslim braclet sellers, mainly in the Kathmandu Valley)
Kalavāra (brewers, merchants)
* Mecyā[vi]

Table 4: The caste hierarchy[iv] (* = Ethnic group) (*continuation*)

5. Untouchable castes (*pāni nacalnyā choi chiṭo hālnuna parnyā*) according to § 160.17
Sārkī (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 Sārkī)

i The *Ain* does not extensively classify caste hierarchy amongst Newars. It puts the Hindu Newar priests (Devabhāju) and foreign (i.e. Indian) Brahmins in the same rank (§ 146.3) and presents a brief hierarchy among the other Hindu Newars (§§ 145.7, 8, 9, 10); Tharagharas and Asala Śreṣṭhas are placed at the top of the hierarchy after Devabhājus. Śreṣṭhas are classified as inferior to Tharagharas and Asala Śreṣṭhas and superior to Jyāpu, Bā̃ḍā and Udāsa. Sālami, Nakarmī, Chipā, Mālī, Khusalamusala, Ḍuī, Citrakāra and so forth are considered inferior to Jyāpu, Bā̃ḍā and Udāsa. Only Kasāī, Kusle, Kula and Ḍoma are recognised as Water-unacceptable but Touchable, whereas Poḍe (Poḍhyā) and Cyāmakhala are considered Water-unacceptable and Untouchable. The *Ain* does not deal with the Buddhist Bajrācāryas and the rest of the Buddhist Newars.

ii They are ranked equal to Tīna-Liṅga-Jaisī, Doṭyāla or Jumlī Jaisī (§ 151.1).

iii The caste status of these two groups, which are mentioned only once in the *Ain* (§ 124.5), is not very clear, as they originally seem to have been grouped as enslavable. Cp. Höfer 1979: 124 (2004: 98).

iv Cf. Höfer 1979: 45 (2004: 9), Khatiwoda forthc.; cp. § 89.17.

v The caste status of this group, only mentioned in § 89.49, is not clear.

vi The members of the Mecyā caste were upgraded to a Water-acceptable caste in 1860 (§ 89.49).

True enough, the *Ain* differentiates between edible (*bhakṣya*) and inedible (*abhakṣya*) food. Nonetheless, edible objects for the lower caste groups may be inedible for the upper caste groups. For instance, chicken is not edible for the Sacred Thread-wearers, but edible for the Water-unacceptable castes and Untouchables. Several sections deal with what can and cannot be accepted from the impure and lowest caste groups. Raw grain including rice, everything which has not been washed or mixed with water, raw fish, meat, tobacco for the hookah, perfume, spice, fruits with a sweet scent, etc. are classified as pure, even if they have been touched or kept by impure caste groups. A clay vessel is not considered impure unless it is filled up with water. Similarly, Chinese pots, bottles, glasses and pots made out of wood are pure. Liquor, chicken-meat, beef and buffalo meat are forbidden for Sacred Thread-wearers. This excludes he-goat which may be eaten by Sacred Thread-wearers in 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. Several objects are acceptable even from the Untouchable caste groups if the object has not come into contact with water.

In general, the caste status determines the individual's juridical status, and generally the rules and regulations of the *Ain* are valid for all castes within a particular caste group. Only for the Untouchable caste group is an internal caste hierarchy based on customary distinctions discernible. The following table presents the internal hierarchy among the Untouchable caste groups (Table 5).

Table 5: Internal hierarchy among impure castes[i]

Caste group and its hierarchical order	Customary reason
Kasāī	since they do not accept food from all other Untouchable castes and the high caste members accept milk from them (§ 160.11)
Kusle	since they do not accept food from the Cyāmyakhala, Poḍe, Bādi, Gāine, Damāī, Kaḍārā, Sārkī, Kāmī, Kulu and Hindu Dhobī and they clean the temple premises and courtyards of high officials (§ 160.10)
Hindu Dhobī	since they do not accept food from the Cyāmyakhala, Poḍe, Bādi, Gāine, Damāī, Kaḍārā, Sārkī, Kāmī and Kulu, and they do not wash the laundry of Untouchables (§ 160.9)
Kulu	since they do not accept food from the Cyāmyakhala, Poḍe, Bādi, Gāine, Damāī, Kaḍārā, Sārkī and Kāmī (§ 160.8)
Sārkī and Kāmī	since they do not accept food from the Kaḍārā (§ 160.7)
Kaḍārā (mixture of Sārkī man and Kamī woman)	since they do not accept food from the Damāī, but the Damāī accept food from them (§ 160.6)
Damāī	since they do not accept food from the Gāine and do not accept their offspring as their fellow caste members if they are born to a Gāine woman (§ 160.5)
Gāine	since they do not accept food from the Bādi (§ 160.4)
Bādi	since they do not accept food from the Cyāmyakhala and Poḍe (§ 160.3)
Poḍe	since they do not accept food from the Poḍe, who consume others' leftovers (§ 160.2)
Cyāmyakhala	since they accept leftovers from the high castes down to the Poḍe (§ 160.1)

i From Khatiwoda forthc.

The *Ain* is strictly hierarchical. The punishment is the greater, the higher the caste status of the victim. It does not place any caste outside the gradation of pure-impure, but the grade of impurity depends on the substance, caste status, consuming and/or touching the impure substances or the persons offering them and malice, i.e. the question of whether one has consciously or unconsciously been defiled, and more criteria. Art. 87 ('Drinking Liquor and Untouchability') is typical for these distinctions (Table 6). The basic rule is:

> If someone belonging to a Sacred Thread-wearing or a Non-enslavable Alcohol-drinking caste knowingly, by force, or for no reason (*usai*) makes a person belonging to a Sacred Thread-wearing caste consume alcohol etc. or any other forbidden substance which leads to his caste degradation, his share of property shall, in accordance with the *Ain*, be confiscated and he shall be imprisoned for 1 year. If he pays the fine in lieu of his prison term, it shall be accepted and he shall be set free. If a person belonging to an Enslavable caste has made [the victim] consume such things, his share of property shall be confiscated and he shall be enslaved. Someone who has consumed such things by deception or force shall

Table 6: Punishments for making somebody consume alcohol etc. according to Article 87[i]

Section	Culprit	Victim	Punishment
15	Sacred-Thread-wearing castes or Non-enslavable Alcohol-drinking castes	Sacred-Thread-wearing caste	confiscation of property, imprisonment for 1 year and enslavement
16	Sacred-Thread wearing castes, Non-enslavable Alcohol-drinking or Enslavable Alcohol-drinking castes	Non-enslavable Alcohol-drinking caste	50 Rs
17	Sacred-Thread-wearing, Non-enslavable Alcohol-drinking or Enslavable Alcohol-drinking castes	Enslavable Alcohol-drinking caste	25 Rs
18	Sacred-Thread-wearing, Non-enslavable Alcohol-drinking, Enslavable Alcohol-drinking or Untouchable castes	Water-Unacceptable but Touchable caste	12 ½ Rs
19	Sacred-Thread-wearing, Non-enslavable Alcohol-drinking, Enslavable Alcohol-drinking, a Water-unacceptable but Touchable or Untouchable castes	Untouchable caste	6 Rs, 1 *sukā*
20	Untouchable or Water-unacceptable castes	Sacred-Thread-wearing or Non-enslavable Alcohol-drinking castes	caste degradation and 3 years imprisonment
21	Untouchable castes	Sacred-Thread-wearing, Non-enslavable or an Enslavable Alcohol-drinking caste	caste degradation and enslavement

i Cp. Khatiwoda forthc.

> be granted expiation. If the Sacred Thread-wearing caste member has lied about his caste and consumed such things, the person who has made him consume such things without knowing [his caste status] shall not be accused. The caste status of the person who has consumed such things shall be degraded to a Non-enslavable Śūdra caste. He shall not be granted expiation. (§ 87.15)

These prohibitions are then varied according to the caste status summarised in Table 6.

These instructions show that impurity does not lie in the defilement itself, but depends on the agents and their caste status. The closer culprit and victim are in their caste status, the lesser is the punishment. The higher the caste status of the victim und the lower the caste status of the culprit, the more severe the punishment and *vice versa*. However, if expiation has been granted by any court of justice or royal order and executed by the *dharmādhikāra*, or any other judge, everybody, independent of his or her caste status, becomes pure (*śuddha*).[62]

62 Cf. Höfer 1979: 97 (2004: 69); on purification measures and rituals, see Michaels 2005.

A symbol of the highest status is the Sacred Thread. No wonder, then, that the *Ain* protects it in a special way and punishes those who rip it violently off or order it to be removed (§§ 91.5–8). According to § 91.1, it is punishable to bestow it on somebody 'who belongs to a caste whose members are not entitled to receive the Sacred Thread'.

The social hierarchy was not only based on the purity/impurity notion, but also on paying respect within the family. Art. 98 states that one should pay obeisance by putting one's head at the feet of, and lying flat on the ground before one's parents, paternal and maternal grandparents and the guru and his wife. Women had to greet persons to be respected by placing their heads at the feet of such persons.[63]

Naturally, death implied impurity, and a number of Articles of the *Ain* deal with this topic, especially the Articles on carrying a corpse (95), mourning (97) and making a death known, as well as widow burning (94). The case of *satī* is especially worth examining in a more detailed form, because it shows again how the *Ain* indirectly considers norms of the Dharmaśāstra and at the same goes far beyond them.

Nepal not only has the oldest inscription mentioning widow burning in South Asia, the Mānadeva inscription dated Śaka 386 (= 464 CE) at Cā̃gunārāyaṇa,[64] it also preserved in Article 94 of the *Ain* the most detailed regulations, far beyond what is known form Dharmaśāstra sources. Many historical documents testify that widow burning was quite widespread among the ruling clans of Nepal. These regulations can be summarised as follows (Table 7):[65]

Table 7: Satī regulations in Article 94

Satī is permitted for married women or women who have been brought into a household without marrying them ritually (§§ 1, 12), if:
1. they are over 16 years old (§§ 1–3),
2. their sons are over 16 years old (§§ 2, 3),
3. their daughters are over 5 years old (§ 3),
4. they have no other husband (§ 4),
5. they are not pregnant (§§ 6–7),
6. their decision is freely taken and immediately carried out (§§ 9–10, 12, 27), i.e., (a) no force (§§ 16, 20, 22), (b) no narcotisation (§§ 18, 20–22) or (c) persuasion (§§ 18–20, 21) is used,
7. but rather an attempt is made to change her mind (§§ 9–10, 14–15).
Moreover, *satī* is forbidden:
8. if 'only' the son has died (§ 8),
9. in the case of female slaves and servants (§ 5),
10. if the husband of a Brahmin woman has died abroad or far away (§ 11), i.e. no second pyre is allowed.
Two stages of immolation are legally pertinent in assigning punishment:
11. a ritual stage, namely the bath (*snāna*), by which *satī* is initiated, and for which an expiatory payment (*patiyā*) is necessary in cases of retraction; or the breaking of the bracelets (§ 25), by which the ritual decision to commit suicide is confirmed, and
12. a factual stage, namely the igniting of the fire (§§ 11 and 13).

63 Cp. Michaels 1997a.

64 Edited by Vajrācārya VS 2030: 9–30.

65 For a detailed analysis of the Article on *satī* and versions in other *Ains*, see Michaels 1993 and 1994 (with further references).

Table 7: Satī regulations in Article 94 (*continuation*)

Thus, in the case of an abandonment of intent it is a matter of importance when this has occurred, i.e.: 13. after the bath, but before igniting the fire (§ 14), 14. after the bath and after igniting the fire (§ 15), or 15. after the breaking of the bracelets (§ 25).
16. Further, the distinction is made between the main culprit, instigator and accomplice: the main culprit is the person who lights the fire, the instigator the one who gives permission for *satī* to be performed, and the accomplices are those who carry or merely accompany the widow to the pyre. The degree of punishment consequently depends upon the part played, and also upon nearness of kinship, age and caste status. Whether the son is punished, for example, when he allows an illicit *satī* to be performed on his mother depends upon whether he is over or under 12 years old, and whether or not he is a stepson (§§ 25 and 27).
17. The *Ain* also regulates questions of the widow's hereditary rights when she lets herself be immolated, particularly with regard to land and personal property (§ 20).
18. Interestingly, the text betrays no knowledge of the legal concept of error that serves to mitigate or cancel punishment: If a woman mistakenly supposed that her husband had died and prepared to have herself immolated, she would still, after the misunderstanding had been cleared up, be fined a penalty of 5 rupees a month or 4 months in prison (§ 29).
19. The types of punishment include: capital punishment, incarceration for life or for a limited period, fines, confiscation of property (both real estate and personal property); and expulsion from the caste. Whoever, for example, incites a mother to perform *satī* at the death of her son is given a life-term jail sentence or even the death penalty, if his status is that of a slave (§ 8). Particularly harsh punishments are meted out to those who narcotize a widow before her immolation, or use violence to force her (§§ 16, 18, 21–22), or in cases where *satī* is performed for a man who is not her husband (§ 8: death of a son).

Criminal Law

The *Ain* makes the violation of several 'universal' rights a punishable offence. To a limited extent, this holds true for the right to life and security of person as well as property. However, there are considerable exceptions: no freedom, inhuman punishments, degrading treatments, slavery, no equality before the law and much more. True, the *Ain* punished cases of murder, assaults or theft, but it did not protect the individual against despotism and humiliation.

Murder

The Śāha administrations produced a considerable amount of legal testimonies during the late post-unification period in the form of *lālamohoras*, *rukkās, sanadas*, *pūrjīs* or the like, which consequently paved the way toward the legal unification of the country. However, as these documents mostly dealt with economic and religious activities, caste and family issues, and social order and customs, it is hard to undertake a comprehensive study of law on homicide for that time. A more extensive document which records legal regulations of homicide during the post-unification period is the Uj-Ain, prepared in 1822. The criminal section of Uj-Ain (5.1–10) basically deals with 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 Uj-Ain played a trick to alter the ancient and pre-MA practice of exemption of capital punishment for Brahmins and women. The first section of Article 5 of the regulation reads:

> 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 force or a martial instrument. If a Brahmin and so forth[66] or a woman—[both of] whom may not be executed by force of a martial instrument due to the sinfulness of killing them—has committed the grievous sin [of manslaughter], they shall be enchained [and left to perish] or, if they have to be executed promptly, they shall be sent [to an area] where Malaria epidemics are prevalent during the rainy season or shall be sent to the northern borderland (Bhoṭa)[67] during wintertime and [the authorities] shall not let them free before they die. (Uj-Ain 5.1)

Such pre-existing documents certainly served as a basis for preparing law on homicide in the *Ain*,[68] which lists three different rubrics on homicide: 1. on taking out of weapons for murdering, 2. on a murderer and 3. on unintentional homicide. Broadly speaking, the *Ain* divides homicides into the following major categories:

1) Accidental homicide: a) if a person who is past the age of 12 dies by one or two hand blows on the back or cheek, but not on sensitive body parts (§ 64.1), b) upon falling into traps set up in or around a redoubt, path, fortress or fort closed down earlier by a royal decree or set up with prior notice for certain animals (§§ 77.5, 6), c) because of a human error or accident (§ 65.12), d) during lawful interrogation (§§ 68.1, 2) and e) in lawful captivity (§ 50.15),
2) Lawful homicide: a) killing for the protection of sovereignty of the kingdom (§ 0.1.33), b) in self-defence (§ 63.4), c) while protecting private property (§§ 68.5, 6, 10, 22), d) while guarding government property or while patrolling by royal decree or other authorised command (§ 64.27), and e) while exercising the right of killing a spouse's paramour (§ 135.7)
3) Excusable homicide: killing by a minor (§ 92.9)
4) Attempted homicide: a) capturing or holding captive without authorisation with the intent to kill (§ 64.18), b) assaulting a sentry with a weapon, such as a bow and arrow (§ 64.24)
5) Unlawful homicide: killing by one or more person(s) with the intent to do so, out of greed for property or out of any other form of envy, is defined as unlawful murder (§§ 64.8–12).
6) Infanticide and abortion: killing a newborn child or casting it out with the intention of killing it constitutes homicide, thus is punishable by execution (or *dāmala* if the perpetrator cannot be sentenced to death) (§§ 143.1–2), and concealing the infanticide results in a fine of 30 rupees (§§ 143.1–2). Abortion is not permitted by the *Ain* and therefore, whoever aborts a foetus or contributes to such an act is to be punished (§ 143.3).

66 This indicates various categories of Brahmins and also some sects of ascetics who may not be executed, such as Jaisī Brahmins, Newar Brahmins or non-household ascetics.

67 Lit. 'Tibet', however, this does not mean Tibet in the strict sense, but any uninhabited snowy region along the Tibetan border.

68 This topic has been dealt with in Khatiwoda forthc.

7) Homicide during the ritual process of self-immolation (*satī*): the forced immolation of a woman is a murder. A woman who first decides to self-immolate, but during the process of burning reconsiders and leaves the funeral pyre should neither be killed nor be brought back to the funeral pyre and immolated. The ones who gave the order to kill her, the ones who captured the woman and those who struck her with the intention of killing her are all to be held accountable for committing murder (§§ 94.15–16).
8) Homicide by quadrupeds: murderers include animals which kill their owners or others: 'If a cow or an ox kills its owner's family members or its own herdsman by attacking him, trampling or crushing him, such a cow or ox is a murderer (*jyā*). It shall not be kept at the village.' (§ 71.7) There are special rules for sacrifices, especially that no female four-footed animals may be killed (§§ 71.15–20).
9) Killing a cow:[69] the law is particularly harsh if somebody hurts or kills a cow, as this can be treated on a par with murder, thus is punishable by *dāmala* (§ 166.1) and anyone killing the killer of a cow at the scene is not held accountable (§ 166.7).
10) Regulations regarding the killing of foreign envoys and diplomats. The *Ain* foresaw that the Chinese and English envoys did not fall under domestic regulations on homicide if charged with murder. Not only were foreign envoys exempted from the domestic regulations on homicide, but also their residences in Nepal were granted the status of special zones of immunity, in effect recognised as their autonomous territory (§ 0.2.17).

The *Ain* mainly refers to offenders by *kāṭinyā jāta* and *nakāṭinyā jāta* (those who may be executed and those who may not be executed). The Brahmins, the king, certain groups of ascetics, women, and persons of unsound mind fall under the categories that may not be executed. The overall caste representations and the punishments dealt in consequence of the law on homicide are presented in Table 8.[70]

A king, a prince listed on the roll of succession, Brahmins, certain groups of ascetics, and women cannot be executed, but are to be punished by *dāmala*. The *Ain* recognizes the king as one of the state agents and accords him the position of a ritual focal point; for example, incest results in a *rājakhata*, thus, it is theoretically punishable by the king (§ 122.6). However, if the king commits homicide, he has to be imprisoned for his lifetime. This shows that the *Ain* attempts to establish equality before the law on the basis of the policy of 'sin and crime should be punished', irrespective of the position or rank of the culprit. By such provisions, the *Ain* distances itself from the shastric practice in which the king is considered to be an embodiment of Viṣṇu, and no worldly agency can hold a king accountable for any crime he commits, since his sins will be avenged by the laws of karmic retribution. At the same time, the *Ain* partially elevates the position of the king and 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 with life imprisonment. Similarly, Brahmins, ascetics, and women are also exempted from the death penalty, but should be punished by *dāmala*. Everyone else, however, can be sentenced to death if

69 This topic has been extensively dealt with in Michaels 1997b.
70 Cp. Khatiwoda forthc.

Table 8: Punishment for homicide

Punishment	Not applicable to		Applicable to
Death penalty	rank	the king	the rest, and also to Brahmins if charged with regicide
	caste	all categories of Brahmins	
	group	certain ascetics	
	gender	women	
	health	insane or dull persons	
	age	anyone below the age of 12	
Confiscation	rank	king	the rest
	gender	women	
	group	slaves	
dāmala			all
Imprisonment			all
Imprisonment in Golaghara			women
Fine			all
Fine in lieu of imprisonment			only women

guilty of murder. The exemption from capital punishment of the above-mentioned groups is in accordance with normative ideas based on Dharmaśāstra (cp. Fezas 2000a). However, *dāmala*, too, refers to a form of death sentence, which replaces the physical death of a culprit. Although the punishment of branding, which was adopted from the dharmashastric practice, avoids physical killing of them, it is equivalent to death, because those who are branded are considered to be socially and morally dead.[71] Moreover, the *Ain* recognises the natural law of self-defence. In such cases it is permissible even to kill Brahmins and women. For example, following shastric practice, the emphasis on not killing Brahmins and women (§ 64.1) is not applicable to cases of self-defence. Irrespective of caste status, rank and position of an attacker, one is allowed to kill him in self-defence. This does not result in punishment. This also shows the alteration of shastric ideals and a growing awareness of the positive nature of law on homicide.

Physical Injuries

Physical injuries—such as tearing off the nose or ear, twisting fingers, biting, breaking limbs, inflicting bleeding wounds—are punished according to their severity. An exception is formed by corporal punishment by a father, which are tolerated if the children are beaten ‘in such a way that

71 See RŚE 15.

their hands or legs have not been sprained, the body has not received any bruises and no blood has been drawn' (§ 59.1). The next section in this Article, however, says:

> No father or mother shall beat their sons or daughters. If [the son or daughter] has made a mistake or does not obey and, thus, has to be punished, [the son or daughter] shall be locked in a dark room or shall be verbally threatened. No other punishment shall be given. (§ 59.2)

Conversely, children must not physically attack or verbally abuse their parents, grandparents or gurus. Violations may result in imprisonment, depending on the nature of the injury. This holds true for servants, bondservants and slaves, too.

Another exception is torture performed by officials to convict a suspect. For example, if the suspect is suspected of theft, he may be beaten or flogged in such a way that he does not die (§ 68.1). If the culprit dies as a result of his injuries in the event of a repeat offence, the officers are not threatened with any punishment (§ 68.2). 'Then the case has been settled by force majeure' (§ 68.4). Moreover, the pre-MA barbarian forms of punishment, such as mutilating the hands, fingers, noses or ears of a culprit is not accepted by the *Ain* (§ 68.65).

Assaults resulting in death lead to the death penalty (§ 62.16) of the offender. Drawing a weapon with the intention of killing is likewise punishable (Art. 63). As causes of bodily injuries are mentioned brawling (Art. 58), clashes at festivals (Art. 55), family disputes, land disputes or riots against civil servants (Art. 41).

Violent conflicts within a family could even lead to the death of a family member. This is especially mentioned with regard to women:

> Amongst the women from a single household, if a wife beats her co-wife, or the mother beats her daughter or the daughter beats her mother, or the elder sister beats her younger sister or the younger sister beats her elder sister, and if the person who is beaten becomes ill and dies… (§ 39.4).

Not all physical attacks were regarded as a criminal offence liable to public prosecution; only cases where someone beats a person in such a way that the victim becomes 'maimed, lame, mute or mentally deficient, or [the attacker] draws blood from a person, or breaks his limbs, or verbally abuses him' (§ 46.8).

Thievery

Besides homicide and physical injuries, theft is a major crime that is especially dealt with in the 79 sections of Art. 68 ('On Theft'). It is impossible to summarise here all the details, but in general the following can be said.

Minor forms of theft in a house could exempt one from punishment (§§ 68.32–33). Degrees of theft are also mentioned in §§ 50.31–32. In the case of recidivists, the Article differentiates between a) a first time or single thief who was not to be punished at all if he returned the stolen goods, and b) a recidivist who had to compensate the owner for the stolen goods and was to be

punished with imprisonment of up to 12 years, depending on how often he had committed the offence (§§ 68.9, 13), and with branding after the seventh case. In some cases, the thief could even be executed (§ 68.67). If the thief could not compensate the owner for the stolen goods, he was imprisoned. Dealing in stolen goods (§§ 68.7, 41) was punished by the obligation to compensate the owner for the items.

The *Ain* considers the factual circumstances. If the thievery entailed physical injuries, the thief was sentenced to 6 years' imprisonment, while in the case of recurrence he was treated like a murderer (§ 68.11). It also mattered whether the burglary was carried out by breaking into a house by force (§ 68.17), during the day or night, inside or outside, and especially the stolen goods:

> If a thief past the age of 16 does not even break in, bursting through a wall, picking locks or using keys, also does not enter through a window and does not enter the house during a day or night either, but steals cash or goods [worth] less than 20 rupees from the roadside or cowshed, or steals clothes kept outside or hung out to dry, or steals birds and animals like sheep, goats, ducks, chicken or the like, or steals the quadrupeds which are brought to pasture for grazing, then a first-time thief shall be made to pay damages for the stolen goods and be fined an amount equal to the damages. (§ 68.13)

Aggravating circumstances were the theft of 'an idol of any deity, effigy or a statue established by the government or anyone else' (§ 68.53), weapons (§ 68.64), or inscriptions or documents (§§ 68.57–58, 63). A minor case was the theft of flowers (§ 68.69). Embezzlements (§§ 68.25–29) or theft of government property (§§ 60–61, 71–76) was also severely punished. Kidnapping led to the confiscation of property and imprisonment or enslavement, depending on the culprit's caste status and gender (§ 68.39). As a finder's reward, 20 % were fixed (§ 68.45), or 10 % in the case of lost animals (Art. 70). If the owner did not answer, the finder could keep what he found. Special cases were false accusation (§ 68.35), failure to render assistance (§ 37) and self-defence in cases of thievery (§ 68.6), the latter of which was not punished even if the thief died.

Insults and Lewd Behaviour

Insults (Art. 57), lewd behaviour such as showing the genitals (§§ 57.2–7) and other forms of non-physical attacks are also dealt with in detail. An insult is, for example, when someone untruthfully says: 'You are from a low caste' (§ 56.5), 'You are a freed slave' (§ 56.6) or 'If your hair above the lips is a moustache, go on; if not, it's pubic hair and you cannot go on' (§ 57.1). A drastic form of injury and a severe form of making someone impure is the forced feeding of human excrement, urine or semen or putting one's penis into somebody's mouth (Art. 60).

Criminal law can hardly be separated from customary law and the underlying purity laws. Flatulence (Art. 61), spitting (Art. 62) or throwing chilli powder in the eyes, mouth, or on the genitals (Art. 67) are not only bodily injuries, but also the infliction of impurity associated with the substances.

Again, the pollution is dependent on the status of the offender and the victim. As Table 9 shows, in the case of intentionally passing wind in the face of another, who is then temporarily rendered impure by this, the punishment is the greater, the higher the caste status of the victim.

Table 9: The punishment for public flatulence according to Article 62

§	Offender	Victim	Rupees	Fee for expiation in *ānā* (16 *ānā* = 1 Rupee)
1	Every caste (*jāta*)	Same or lower caste	5	4
2	Rajapūta, Sacred Thread-wearers	Higher caste	7,5	4
3	Non-enslavable alcohol-drinker	Sacred Thread-wearers	10	8
4	Enslavable castes	Sacred Thread-wearers	15	1
5	Enslavable castes	Non-enslavable alcohol-drinker	5	4
6	Impure, but touchable or untouchable castes	Higher castes from whom water can be accepted	20	1,5
7	Untouchable castes	Impure, but touchable castes	5	4

Compulsory Labour and Slavery

In contradistinction to Dharmaśāstra rules, the *Ain* allows the free choosing of one's profession (§ 37.1). It allows members of all Four Varṇas and Thirty-six castes to refine 'gold and silver' (§ 31.1) as well as gunpowder (§ 31.2), to trade whatever they like or to plough by yoking 'castrated bulls, he-buffaloes or horses to the plough in order to earn a livelihood' (§ 31.5)

This freedom in the choice of profession is, however, severely restricted in everyday practice. If an orphan is found, the officials should first carefully identify the caste from which the child comes and then have him or her trained in the respective caste profession. If no relatives can be found, the child is to become member of the Khāna Khavāsa caste (§ 31.11). This shows that people were still more or less bound to their traditional caste profession.

The main reason for enslavement was cheap labour.[72] This was accompanied by a sophisticated system of impoverishment and indebtedness of the peasantry. From an economic point of view, however, the benefits of slavery were doubtful, for the state could easily resort to labourers and day labourers through a system of forced labour (*jhārā, beṭhī, begārī*) and then did not have to provide for the front workers for life, and the enslavement of peasants led in large part to a lack of harvest yields and thus to tax losses.

Article 11 legitimises and regulates this forced labour, by which tenants and peasants were widely used to cultivate land or work as porters. They were paid for this work, and in cases where a landlord did not pay the fixed sum—generally 4 *ānās* per day—, he was punished.

72 The following section is partly based on Michaels forthc. a. For a more elaborate treatment of this topic, see M. Bajracharya forthc. with further references.

Apparently, this custom was widely abused, because the *Ain* explicitly mentions a number of officials who were not entitled to demand such labourers, among them 'generals, colonels, *cautarīyās*, *kājīs*, *sardāras*, *bhāradāras*, [royal] gurus or priests' (§ 11.3).

Forced labour in parts of Nepal resulted in farmers leaving their land to find a new livelihood elsewhere in the country or abroad. These people were among the first migrant workers in Nepal. In 1872 Nepalis already formed the majority of the population in Darjeeling, at the end of the 19th century also in Sikkim, not to mention the countless Nepalese workers in India or the Gorkha soldiers recruited during the First and Second World Wars. It is well known that the problem of such migrant workers has spread, as it is estimated that in 2019 more than seven percent of the population worked abroad as migrant workers, mainly in India and the Gulf States.

Slavery and unfree or bonded labour laws in the *Ain* (Art. 80–86) are an attempt to unify and clarify various existing customs and regulations as well as to limit the abuse of this widespread form of exploitation. Enslavement was one of the usual forms of punishment in cases of adultery or illicit sexual contacts. The fact that the *Ain* differentiates between Enslavable and Non-enslavable castes speaks for itself.

The fate of the slaves in Nepal was indeed full of regrettable circumstances. Female slaves were often sexually abused, small children, even babies were snatched from their parents and sold, the use of violence was often the order of the day, accommodation and care were reduced to a minimum. How far the humiliation of slaves could go is illustrated by the following regulation:

> If a master has put human excrement into the mouth of his male or female slave, the master shall not be entitled to get such a slave back. An *adālata*, *ṭhānā* or *amāla* office shall emancipate such a slave and set him or her free after taking 10 rupees from him. (...) If [the master] has put human excrement on other body parts except the mouth, he shall not be accused and held accountable. (§ 60.4)

Slaves had to work around the clock, till the land, herd animals and fetch water or firewood. However, they had some basic protections; for example, if a sick slave was abandoned without care (§§ 85.1, 3), and if the slave survived under these conditions, he or she was to be freed (§ 85.1). Even a servant who worked only for daily food was not allowed to be abandoned when ill (§ 85.3). Servants had it a little better, but the boundaries between these categories blurred in everyday practice. In principle, the *Ain* differentiates between several forms of slaves and bonded labourers (Table 10).

Enslavement meant social death. Even though the former caste still played a role in the imposition of punishment and residues of caste could not be eradicated, the slaves were alienated from their families and home towns, and lost their ritual status and became underage 'children' of their master. It was not so much the loss of freedom that was the dramatic aspect as the loss of kinship. Although slaves could be inherited and thus become part of a family, especially if they were married to a slave and had children, and although, in exceptional cases, slave women could become part of the family through marriage with the master, this was no substitute for the loss of their families of origin. And yet the status of a slave integrated into the family was 'better' than, for example, the status of a pure labour slave who was more or less treated as a commodity—on a par with four-footed animals, together with which slaves are often mentioned (cf. §§ 81.1–2).

Table 10: Types of slaves and bonded labourers

cākara (servant)	A generic term for a servant attached to the master's household, probably on a long-term basis. There are two different types of *cākara* to be distinguished, those working for wages (*darmahādāra cākara*) and those working only for their maintenance (§ 97.30). The rarely used term *batuvā* (a servant working only for food) seems to be a low category of the latter (§ 85.3). In contradistinction to a bondservant (*bā̃dhā*) and slave (*kamāro*), a *cākara* can neither be pledged nor sold and their subordination to the master is of a contractual nature.
keṭī (maid)	Often understood as a synonym for a female slave (see e.g. Hamilton 1819: 23). However, in the *Ain*, this term without any qualification seems rather to be a generic term for any kind of female servant or maid. Thus, if the slavehood of a maiden is to be expressed, the term *kamārī keṭī* is used (§ 97.30). The otherwise frequently used term *keṭī* occurs only in a few instances in the *Ain*, which indicates that the legally more precise term *kamārī* was preferred.
bā̃dhā, *badhetyānī* (bondservant)	A servant who comes under the possession of his creditor on the basis of a loan contract. There are two forms of bond servanthood: the first results from a non-usufructuary mortgage agreement (*dṛṣṭi-bandhaka*), according to which a pledged person enters only into the employment of the creditor as soon as the debtor fails to pay back the loan. The second results from a usufructuary mortgage agreement according to which the pledged person has to work off the credit amount or interest. A bondservant can be redeemed by paying off the debt. He or she can be pledged by the creditor, but not sold.
kamāro, *kamārī* (slave)	A 'full' slave who is treated as a commodity and can be bought, sold, or otherwise commercially disposed of. There are only a few ways for a slave to become emancipated (*amalekha*) or a free person (*ajāputra*): either being freed at the will of the master or, for a slave woman, giving birth to the offspring of the master or any other free person.
khavāsa	There seem to be two definitions of this term. First, a Khavāsa is the illegitimate offspring of a slave woman and a man from a noble family, and is either technically still considered a slave, or freed, i.e. one is born as a Khavāsa. Second, Khavāsa is a social group formed out of slaves in noble households or the illegitimate children from the union of slave women and the masters of such households, i.e. one could also become a Khavāsa; Khavāsa would then be similar to Pāre Ghartī (emancipated slaves), a heterogeneous social category of people who have a slave background.

Article 83 deals with the question of how to treat minors or children born of slaves. Thus, for example, in the case of an inheritance division among brothers, it was not possible to separate the children of a slave from the mother, as long as they were under 11 years old. A minimum age for serfdom had also been established. Anyone who took or offered slaves under the age of 16 had to pay 10 rupees each. Another section prohibited the sale of children under the age of 11 and separating them from their mother (§ 83.4); until that age one was considered a minor.

The *Ain* legislates on slavery to the extent that a person, if he belongs to an Enslavable caste, could only become a slave as a state-imposed punishment. Otherwise it was actually forbidden. In a private context you became a bondservant (*bā̃dhā*). The reasons for enslavement in this broader sense were manifold. One of the most frequent causes was the failure to repay debts, but also pledges, which led to debt bondage and serfdom. Non-payment of debt 'only' resulted in bondservanthood, which was, at least from the legal point of view, a better status. However,

according to the *Ain*, the word 'body' (*jyū*, *jīū*) was often used for the human pledge, i.e. the slave (§§ 19.1–2). In addition, there were offences against morality, in particular sexual offences, for example incest. In such cases, the ones punished had to belong to the Enslavable castes. This punishment was severe, corresponding approximately to capital punishment, and indeed sometimes explicitly imposed as a substitute when capital punishment did not come into question. Equally, under certain circumstances the offering of alcohol could lead to enslavement (§ 87.16), whereas the consumption of alcohol would lead to caste degradation:

> If someone makes a Sacred Thread-wearing caste member consume an alcoholic drink, knowing that he is from such a caste, his share of property shall be confiscated and he shall be enslaved. If he does so unwittingly, having been deceived into letting [the other] consume [the drink], [that is,] if the Sacred Thread-wearing caste member has lied about his caste status [in order to] consume it, the one who let him consume shall not be held accountable. The one who consumed shall be degraded into an Alcohol-drinking Śūdra caste. (§ 31.9)

In individual cases, people were taken into slavery through coercion or tricks, for example as prisoners of war or rebels, but also by exploiting evil machinations. The most frequent reason, however, was as a punishment for offences and crimes. These rules are preserved in remarkable detail in the Articles 60, 87, 110 and 111.

The *Ain* deals with how to treat sick and disabled slaves (Art. 85), with those who have run away and are returned (5 rupees finder's fee was then due, § 80.3), or with those who help them to escape. If a slave ran away and hired himself out elsewhere without the new master knowing his history, no compensation had to be paid to the previous owner, but the slave had to be returned to the actual master (§ 80.5) But if a slave was sold, even though he did not belong to the seller, the seller had to pay compensation and penalties (§ 80.6).

The state also took care to recover slaves who ran away (§ 80.3). It established the inheritance rights of slaves and the sexual relations between the slaves and their masters. Thus, children who were born after sex with a slave received the caste status of the master, provided the slave belonged to the pure castes (§ 91.2).

The state played an important role in the internal slave market (Art. 86), e.g., by regulating the slave traffic (Art. 80) or fixing prices for slaves when slave-related legal disputes arose (§ 82.4). The sale of slaves and the payment modalities for serfdom are also given precisely in the *Ain*. Thus, it was determined that the price for a male slave between 12 and 40 years of age was 100 rupees and for a female slave 120 rupees. The prices for child slaves were as such:

> Concerning a dispute [on the price] of a male or female slave, if an *adālata*, *ṭhānā* or *amāla* orders someone to pay the price [for a male or female slave], it shall be determined as follows: [1] 20 rupees for a slave boy below the age of 3 years, [2] 25 rupees for a slave girl [of the same age], [3] 30 rupees for a male slave from 3 to 6 years of age, [4] 35 rupees for a female slave [of the same age], [5] 50 rupees for a male slave from 6 to 12 years of age, [6] 55 rupees for a female slave [of the same age], [7] 100 rupees for a male slave from 12 to 40 years of age, [8] 120 rupees for a female slave [of the

> same age], [9] 60 rupees for a male or female slave from 40 to 50 years of age, and [10] 50 rupees [for a male or female slave] from 50 to 60 years of age. (§ 82.4)

If the work performance of a slave or bondservant had to be compensated, it was calculated per day at 1 *ānā* (1⁄16 rupee). Food expenses for a slave were calculated at 1 *ānā* per day (§ 80.10).

The state guaranteed, with such regulations, a legal security of the slave owner and the slave. It prescribed penalties for the officials of the various magistrates and district offices if they unlawfully tolerated or even practised enslavement (§ 82.1). It was also forbidden for anyone to manipulate the caste status in order to make enslavement possible. Even the distinction between Enslavable and Non-enslavable castes in the *Ain* caste hierarchy was an instrument of oppression and exploitation mainly of the peasantry and the impure castes or caste-less.

In some cases, slaves could be liberated by sporadic acts of pardon by different kings and prime ministers,[73] by liberating slaves for merit, which often happened in front of temples or deities,[74] or by a personal liberation through the master during his/her lifetime or after death.[75] In some of these cases, the slave took a traditional basket (*ḍoko*) on his back and fastened it with a rope stretched over his forehead (*nāmlo*). As soon as the master cut it, the slave was free.[76]

Land and Property Rights

The political-economic system of 19th-century Nepal was predominately determined by the coercive appropriation, distribution and consumption of agrarian surplus in the form of tax or rent.[77] It seems as if the drafters of the code were aware of the central role of land for the political, economic and social order and put the respective Articles (Art. 1–10) right at the beginning of the *Ain*, immediately after propounding the basic constitutional principles of the state. The access to and control over the agrarian surplus was dispersed among a complex network consisting of the crown, state and military elite, feudal nobility, priestly class and fiscal intermediaries, though in reality these different socio-economic roles often overlapped in a single person. The *Ain* gives us a detailed insight into the manifold judicial and institutional forms through which these tributary relations of production were reconfigured. The different legal categories of land—distinguished by the degree to which ownership rights or entitlements to its agricultural produce were transferred to its holder—were the cornerstone of the economic regime. These land categories can be classified according to the extent to which the state maintained control over the agrarian surplus appropriation, the duration for which possessory titles were granted to beneficiaries, and (to a lesser degree) whether they served an extractive or rather a redistributive function. Among these categories, the following types are especially noteworthy.

73 See, for example, Document ‘Girvāṇayuddha VS 1858 (1813 CE)’.
74 See Document ‘Sundara Giri and his wife VS 1869 (1813 CE)’.
75 See Document ‘Rājakumāri Pāḍenī VS 1887 (1943 CE)’.
76 See, for example, the above-mentioned copperplate inscription from 1813.
77 The following account is informed by John Haldon’s theoretical elaborations on the tributary mode of production (see Haldon 1993, 2013, 2015).

Raikara Land (State-owned Land)

Land within this category remained in the possession of the state. Peasants cultivating such plots entered tenure contracts and submitted their payments directly to the state. Common tenurial arrangements were the *adhiyã̃*,[78] *kuta*[79] or *tihāu*[80] systems (§ 8.20). However, the government not only assigned the task of rent and tax collection for such land to salaried revenue officials (*amānata*), but relied also on non-governmental fiscal intermediaries on a contractual basis (*ṭhekadāras* and *ijārādāras*) for that task. These contractors had to be solvent and of good reputation, and it was desirable that they should have their households, wives and children in Nepal (§ 6.2) to reduce the risk of any default in payment. The contracts were awarded after a competitive tender process (§ 6.7) from which the prime minister and his close family members were excluded (§ 0.2.15), probably meant to give the impression that the Rāṇās were hindered from enriching themselves at the expense of the state treasury. These revenue-farming arrangements also seem to have been an attractive object of capital investment, since the *Ain* even addresses issues of commercial partnerships for that purpose (§ 6.9). However, to make revenue collection a profitable enterprise for both state and the intermediaries, the financial burden was necessarily passed on the peasants. *Ṭheka* and *ijārā* contracts were not only granted for land, but also for monopolies, such as the revenue generated from mines, mints, tolls, customs, trading posts or the exclusive trading rights for certain goods (§ 6.8, 8.20–21). This underlines the fact that the *Ain* consolidates rent-seeking as the dominant economic mode in the spheres of manufacturing and commerce, too. At least, peasant communities were provided with the opportunity to prevent the appointment of a *ṭheka* or *ijārā* holder for the collection of their rent payment as long as they agreed to pay the same amount as offered by the highest bidder. Such tenurial arrangements between communities and the state were called *lokābhāra* contracts (§ 6.3). It seems that tenants on *raikara* land benefitted from stronger safeguards with respect to the continuation of their tenure or eviction from the land they tilled (§ 3.15) in comparison with those tenants farming land in the possession of feudal landlords (§ 3.1). A subtype of *raikara* land was *serā* land (royal demesne). These plots were mainly reserved for the provision of services for the royal household, but also for the government in general. Tenants received *serā* land for their subsistence as revenue assignments (*rakama*) in exchange for their labour as couriers, gardeners, gunpowder factory workers, lumbermen, grass cutters or charcoal burners (§ 2.57). Distributing *serā* land was a method for the state to gain access to labour resources in the context of a less-monetised economy.

Jāgira (Prebendal Estates)

Jāgira is the temporary assignment of revenue for specified plots as an emolument for state service. Under the *jāgira* system, the state temporarily yielded land-taxation rights to office holders in lieu of salaries for the duration of their tenure. By taking recourse to this method of in-kind

78 A system of share-cropping in the central hill region, under which the cultivator paid half of the rice-crop as rent.

79 A system of tenancy under which a cultivator paid a fixed quantity of produce or a fixed amount of money as rent to the owner of the field.

80 A system of tenancy under which a cultivator paid one-third of the produce as rent to the owner of the field.

payment instead of payments in cash, the state avoided the logistic and administrative difficulties which a centrally organised collection, storage and distribution of the agricultural rent would have entailed (Regmi 1971a: 39). *Jāgiras* were assigned to both civil and military personnel (§ 12.1). As proof of a *jāgiradāra*'s right to collect the rent from his tenants, a specific authorisation letter called *tirjā* or *purjā* was issued by the local land registration office (*daphadara*) (§ 34.10), in which the amount of rent the *jāgiradāra* was entitled to receive was specified (§ 4.5). A *jāgiradāra* was also allowed to sell his rent collection rights, put them up as collateral in loan agreements (§§ 5.1 and 5.5) or exchange them with another *jāgiradāra*. The mention of grain speculators (*dhokryā*) in this context (§ 5.3) hints at the existence of an entrepreneurial class who acquired such rent collection certificates and sold the agrarian produce with profit at the market.[81]

Nevertheless, the *Ain* also puts restrictions on the commercialisation of these rights. For example, a *jāgiradāra*'s private loans were not allowed to be recovered from the rent assigned to him (§ 14.1), probably to ensure that the *jāgiradāra* was always equipped with the means of subsistence necessary to carry out his government assignment. The state also tried to assert its supremacy vis-à-vis the *jāgiradāra* class itself. The *jāgira* assignments were only given on an annual basis, which allowed the government to discontinue the service of unreliable *jāgiradāras* or to transfer them regularly in order to keep potential centrifugal aspirations in check. Additionally, the *Ain* subjected the *jāgiradāras* to a tight bureaucratic control to prevent the misappropriation of government resources: their assignments, for example, were centrally registered (§ 33.2), the execution of the rent collection certificates had to be witnessed (§ 12.2) to guarantee their authenticity and conformity with the government provisions, their assignments were regularly audited (§ 3.26), and the rent they were entitled to collect was exactly recorded (§ 4.5), they were not allowed to demand forced labour from their tenants for private purposes (§ 11.3) and a *jāgiradāra* convicted of the embezzlement of government revenue was immediately dismissed and fined (§ 8.19). A special type of *jāgira* was the *nānakāra* assignment, which was handed out to *caudharīs*, *guraus* or *kānugois* in the Tarai districts as allowance for their service.

Birtā ('Feudal' Estates)

In contradistinction to *jāgira* assignments, where the state transferred specified taxation rights only for a limited period of time, in the case of *birtā* holdings the state relinquished most, if not all such rights on a long-term or even permanent basis. Grants of this type usually were given for life; sometimes they were even inheritable. Additionally, the beneficiaries were often empowered to exercise sovereign rights in the fields of jurisdiction and the utilisation of unfree labour. Except for certain heinous criminal offences which had to be forwarded to a state court (§ 36.6), *birtā* holders were granted judicial authority over their land (§ 45.1) and entitled to collect court fees or fines resulting from litigation (§ 46.7). Even offenders punished by enslavement became property of the *birtā* holder (§ 86.2). In addition to such slave labour, they could also take recourse to compulsory labour services from their tenants as far as contractually agreed upon

81 Maybe a phenomenon comparable to the 'portfolio capitalists' described by Subrahmanyam/Bayly 1988, a socio-economic class doing business at the intersection of state and market (Ludden 1999: 159).

(§ 11.1). Under certain conditions, a *birtā* holder was also entitled to the escheats incurring on his land (§ 28.17). The property rights attached to a *birtā* grant were especially favourable to its recipient. Unlike *jāgira* assignments, *birtā* grants could not be re-alloted or seized, unless the holder committed a serious crime (§ 33. 17). If *birtā* land was required for infrastructural or military purposes, its holder had to be adequately compensated (§ 2.6). A *birtā* holder was also allowed to sell (§ 2.14) or mortgage (§ 2.24) his land and evict tenants from there if he wanted to use the land for private purposes (§ 3.1), which implies that *birtā* land was considered its owner's private property. Section 2.57 explicitly protects the property rights of *birtā* holders from any state incursion. However, all these measures might have been not only an attempt to secure the privileges of the feudal class at the expense of the central authority, but also a strategy to support the creation of a market in secure land rights and thereby to increase the country's agricultural productivity. That *birtā* grants were also perceived as a threat to the fiscal status of the state can be inferred from § 2.58, which orders that only state-owned land, unclaimed land, and reserve land shall be handed out as *birtā* and under no circumstances land reserved for *jāgira* assignments, which would diminish the state's ability to pay government servants. Interestingly, private property rights of the *birtā* type do not only emerge through a government grant, but also through labour. The cultivator of barren land received part of the land he made arable as *birtā* (§ 2.3); similarly, the erection of a house could vest *birtā* rights to the building and the building plot with the owner (§§ 76.1–2). Therefore, *birtā* rights as exclusive, alienable property rights did not solely serve as a legalisation of feudal land holdings, but, to a lesser extent, also provided incentives for activities increasing productive economic activities. The following *birtā* types, which are not always clearly distinguishable from each other, are mentioned in the *Ain* (Table 11).

Many economic, social and political privileges were attached to a *birtā* grant. Yet, the *Ain* remains silent on the social profile of the *birtā* holders. M. C. Regmi argues that in the pre-Rāṇā period, *birtā* land was partly given to the members of the leading families of the Gorkhali kingdom to create a loyal feudal nobility (Regmi 1971a: 38), partly to Brahmins, priests and members of religious groups (Regmi 1971a: 29). Whereas in the first case the grants served the accommodation of (potentially rival) elite groups, in the second case they allowed the Gorkhali state to integrate alternative (divine) centres of sovereignty (Burghart 1996) into the polity and to draw on networks of spiritual patronage and legitimation. With the emergence of Rāṇā rule, *birtā* holdings became increasingly subjected to state control, and the judicial autonomy and political significance of the *birtā* holding class were successively reduced (Regmi 1976a: 36–37). In later times, *birtā* estates served as a major source of enrichment for the Rāṇā oligarchy (ibid.). The regulations in the *Ain* concerning *birtā* grants support this interpretation. Every *birtā* grant had to be approved by the prime minister (and thus by a member of the Rāṇā family) (§ 33.18), which institutionalised the Rāṇā family's sway over the most important economic and political resources of the country, that is land. On the other hand, however, the *Ain* contains sections which, at least on paper, ought to have hindered the members of the Rāṇā family in using this authority for their personal benefit. Section 33.18 directs that all *birtā* grants for the prime minister or his family required the consent of the *kājīs* or *bhāradāras*. If the prime minister, his brothers and sons accepted a *birtā* grant made by the king out of favouritism, it was even

Table 11: Types of *birtā* grants.

bekha	an inheritable *birtā* grant
birtābitalapa	an often tax-exempted land grant made by the state instead of pay or wages
chāpa	land granted by the state to individuals on a life-time basis in return for service
kuśabirtā	land grant made to Brahmins with regard to the usage of *kuśa* grass out of religious motives
marauṭa	land grant endowed to the family of a person who lost his life for the welfare of the kingdom, especially in a war
mānācāmala	land grant given to a *bhāradāra* or a high-ranking officer in order to provide him with daily supplies of food, under the condition that the plot turns into state-owned (*raikara*) land upon his death
mayāyu	land grant to a person out of affection or love
peṭiyākharca	a category of governmental land grant endowed for maintaining the recipient's livelihood
pharmāisī	a *birtā* grant to members of the royal or Rāṇā family, valid only during the lifetime of the recipient
phikadāra	inheritable *birtā* grant made to persons lower in status than the Brahmin castes in appreciation of services for which the *lālamohora* bore the mark of betel juice spat by the king
sevābirtā	a category of *birtā* grants made to individuals for the performance of specified services, especially in the Kathmandu Valley
sunābirtā	*raikara* land bought by a private person which was liable to the *potā* tax

considered treason (§ 0.2.11). It seems, then, that these regulations were designed to maintain the illusion that there was still a clear demarcation between government resources and the dynastic patrimony of the Rāṇā clan.

Guṭhī (Religious, Charitable and Public Endowments)

The Art. 'On Guṭhī Endowments' is one of the beginning chapters of the *Ain* which underlines the importance attributed to *guṭhīs* for the maintenance of the socio-religious order and the spiritual infrastructure of the country. In the *Ain*, a flourishing *guṭhī* system is not only envisioned as the guarantor for earthly and otherworldly prosperity, but the government is also directed to expand the resource basis of the system by donating uncultivated state-owned land to these endowments (§ 1.1). Just as *jāgira* land was assigned for the performance of state functions, *guṭhī* land formed the economic basis for temples, shrines and ritual associations, but also for charitable activities and even the maintenance of public facilities. In the *Ain*, the following three purposes are highlighted: religious and ritual purposes, such as the maintenance of Śiva temples, pilgrim's refuges (*dharmaśālā*) and the performance of compulsory, occasional or annul worship of deities (*nitya-* and *naimittika-pūjā*) (§ 1.1); welfare purposes, such as the daily distribution of meals to orphans, elderly people without family or disabled persons (§ 93.6) or the arrangement of funeral ceremonies (§ 95.5); and, finally, the

maintenance of public facilities, such as wayside shelters, fountains, bridges, *ghāṭas*, wells, ponds, paths, resting places or gardens (§ 76.9). The welfare-oriented *guṭhīs* were also designated *sadāvartas*. Similar to *birtā* grants, *guṭhī* land was endowed on a permanent basis and the state transferred its taxation rights on that plot to the *guṭhī* trust. Consequently, in many cases the same regulations apply to *birtā* and *guṭhī* land and the trustees in possession of *guṭhī* land enjoyed in many respects privileges comparable to that of *birtā* holders, as for example in terms of judicial autonomy. However, the trustee's property rights on the endowed land were far more limited than in case of a *birtā*. The trustees were not allowed to sell or mortgage *guṭhī* land (§ 1.10) and their possessory rights depended on their ability to fulfil the mission of the endowment (§ 1.4). The endowment was under state supervision and monitored by a special accounts office, the Guṭhī Jā̃ca Aḍḍā, and a special court, the Guṭhī Kacaharī (§ 93.6). Since the property rights lay with the trust and not the trustees, the *guṭhī* was, in contrast to a *birtā* grant, protected from state confiscation, even if the trustees were found guilty of capital crimes (§ 1.2). In such cases, the trustees were dismissed, but the trust itself was preserved and given into the hands of other trustees. *Guṭhī* endowments were considered sacred institutions and committing crimes against them were severe offences. Thus, a king or minister who laid a hand on *guṭhī* property was threatened with damnation (§ 1.1), and stealing the charter of a *guṭhī* was punishable by imprisonment (§§ 68.57–58). In the *Ain*, *guṭhīs* are classified into two categories, *rājā-guṭhīs* (royal *guṭhīs*) and *duniyā̃-guṭhīs* (commoner's *guṭhīs*). Royal *guṭhīs* are those trusts set up by a reigning king or queen of Gorkhā following the performance of a *saṃkalpa* (§ 1.5). They were managed through the Guṭhī Kacaharī (§ 8.21). It seems that land endowed as a royal *guṭhī* still remained to a certain degree at the disposal of the state, since § 2.57 empowers the government to give such land out under *rakama* contracts. Commoner's *guṭhīs* were founded by private persons through the dedication of *birtā* land in their ownership. They thereby became trustees (*guṭhīyāra*) of the *guṭhī* who were obliged to use the endowment fund to carry out the mission of the *guṭhī* and to maintain its facilities. In return, they were entitled to the enjoyment of the surplus of the income from the *guṭhī* land (§ 1.3). Trusteeship for a *guṭhī* was inheritable on the condition that the customary obligations of the *guṭhī* were continued and the heirs showed reputable behaviour (§ 1.10).

Regulating and supporting the *guṭhī* system had two advantages for the Rāṇā government. First, by investing in and administering the dense endowment network, the state was embedded into a ritual system which bestowed it with divine support and the legitimacy of righteous rulership. Secondly, the *guṭhī* system functioned as a decentralised framework through which crucial political and social tasks in the areas of welfare and infrastructure could be accomplished without direct state involvement. Through the combined promise of soteriological reward, material compensation and social prestige, the subjects were activated to allocate resources for local needs themselves. Therefore, *guṭhī* endowments differ from the land categories hitherto presented in that they were not only a mechanism to appropriate agrarian surplus from their actual producers (the peasants) and to channel this into the hands of ritual specialists, priests and trustees, but that, to a limited extent, this surplus was also redistributed to the lower classes in the form of public goods, welfare provisions and regular assignments for ritual service castes.

Kipaṭa (Communal Land Tenure)

Originally, *kipaṭa* represented a communal land tenure system which restricted access to land by the membership to a certain ethnic group, such as the Rāi and Limbus (Regmi 1971a: 27 and Adhikari 1984: 14). However, in the course of the Gorkhali conquest, the state steadily brought land being held under this form of tenancy under its control. Headmen of communities with a *kipaṭa* landholding system were selected as representatives to whom property titles on *kipaṭa* land were granted (Regmi 1971a: 49–50). The regulations in the *Ain* concerning *kipaṭa* land support this characterisation. According to § 2.23, tenants cultivating *kipaṭa* land were not allowed to mortgage their land, which shows that they had no ownership rights to it. Their tenancy rights were also dependent on tax payment. If they defaulted in payment, their land was redistributed by *amālīs*, *dvāres*, *tharīs*, *mijhāras* or *gauruṅs*. Especially the latter three posts clearly refer to local elites which were co-opted by the state for the sake of land administration and tax collection.

In many of the regulations concerning landownership, the conflict between the central authority on the one side and the various political, social and religious elite groups on the other side becomes evident. Though the state resigned taxation rights, judicial sovereignty or landownership in order to pay government officials, win over local elites, organize tax collection, maintain infrastructure, provide welfare to subjects or support temples and monasteries, the *Ain* also establishes a set of institutions and bureaucratic mechanisms to keep the state in control of the resource flow to elites and intermediaries on whom the state had to rely so as to function.

Landlords and Tenant Farmers

But the *Ain* not only regulates the antagonisms among the surplus-dependent classes, but also those between these classes and the surplus producers, that is the peasants. Considering the dependency of the state and all elite groups on agrarian rents, it does not come as a surprise that the *Ain* enforces rent and taxation rights with draconian measures. Irrespective of the land category for which a tenurial agreement exists, a default in payment of rent, levies or taxes was not only a reason to discontinue the contract with a tenant and to evict him from the land (§ 3.15); in such a case it was even legitimate to seize all his belongings as compensation for the outstanding rent or to incarcerate him (§ 4.9). The pressure on peasants was even further increased by instigating competition among them. If another peasant was ready to pay higher rent for a plot than the current tenant, the land could always be reassigned to the newcomer with the better offer (§ 3.12), except when the current tenant managed to increase the amount of cultivatable land during his tenancy (§ 3.19). Even in the case of natural calamities, it was first the tenant who had to bear the damage: for a loss up to one-fourth of the total crop yield, the tenant was not entitled to any waiver on the payable rent (§ 4.7). In addition to rent and tax payment, tenants were also compelled to carry out government works on request, but were protected from serving office holders for their private purposes (§§ 11.2–3). Tenancy contracts with private landlords demanding compulsory labour services, however, were permissible (§ 11.1). Nevertheless, the *Ain* provided peasants also with a few safeguards. Most importantly, it was not allowed to evict peasants within the planting and harvest seasons (§ 3.1), probably to guarantee that they were

not deprived of the fruits of their work. Furthermore, tenancy agreements with orphaned children or widows of government servants who died on duty could not be cancelled, albeit only on the condition that the regular rent and taxes were paid (§§ 3.20–21). Peasants might also have benefitted from the larger state policy to expand agricultural production, especially in the Tarai region. Subjects who made barren or forest land arable were entitled to permanent ownership (*birtā*) of a certain portion of that land, which provided a legal foundation for independent peasant landholding (§ 2.3). No one could force a tenant to expand his farmland by declaring it a precondition for the prolongation of tenure agreements (§ 3.17).

To sum up, the *Ain* is not only the expression of the tributary economic relations within Nepalese society, but tries to shape them by defining legitimate modes of surplus appropriation through different forms of landownership, by channelling the (re-)distribution and investment of the agrarian surplus, and by regulating the inherent social antagonisms emerging from the struggle over that surplus.

Property

Besides land (*jagā*, *jamin*), the *Ain* mainly distinguishes between substantial property (*jinsī*), monetary property (*nagada*), livestock (*caupāya*) and human chattel (*kamāra*) as the major forms of property (e.g. § 2.17). Among these categories, land and slaves as the foundational forms of societal wealth and value remained under state control and transactions involving them required special documentation and registration at government offices (§§ 15.12 and 82.1). The nature of landownership with its varying degrees of entitlement to agrarian produce reveals a more general pattern of the *Ain*'s property concept. Property is not constituted through an individual's absolute ownership over on object, but determined through tiered and partly overlapping claims of enjoyment (*bhoga*) shared among kinsmen, contract partners, tax collectors, the king and even deities.[82] In that regard, property in the *Ain* is closely related to the premodern Indic concept of property, though in a codified form.[83] Although property remained embedded within social, ritual and religious structures, the *Ain* also attempts to create a more standardised and formalised property regime based on contractual notions, especially by regulating the property relations and liabilities within the joint family. This served several purposes. First, it facilitated the expropriation of rents, taxes and dues to the state, government officials and the land-owning classes. In these cases, the joint family was unconditionally liable for restitution with their entire property (§ 16.1). A family was considered as undivided as long as its members shared the kitchen and formed a commensal community (§ 23.17). The state also profited handsomely from court fees which both the winning and the losing party in a court case had to pay in relation to the amount in dispute (e.g. § 15.2). The extraction of these fees was only possible because ownership was legally defined and mechanisms for determining the value of possessions were put into practice (§ 43.5). There also existed several offences which were punishable by confiscation of property (Art. 43). To guarantee an orderly implementation

82 For example, trustees are only entitled to the surplus that remains after the offerings to the deity were properly made (§ 1.26).

83 For the overlapping entitlements in the dharmashastric concept of property, see, for example, Derrett (1962: 9) or Sontheimer (1977: 121).

of such punishments, detailed legal specifications of the perpetrator's latent claims on the joint family property were required.

Second, it allowed the state to regulate potential conflicts from loan agreements or other commercial transactions. Debts were a continuous source of socio-economic instability. Defaulting debtors were exposed to the threats of impoverishment, violence, abuse or enslavement. On the other hand, creditors ran the risk of their debtors absconding before repayment or it being impossible for them to recover their loans owing to ill-defined possessory rights within the debtor's family or potential claims by other creditors. The *Ain* tried to mitigate such frictions by defining elaborate criteria for the documentation and validation of loan agreements, collaterals or sureties (Art. 15–20). Although the satisfaction of creditor claims was given priority in the *Ain* and entire families could be held accountable for the debts incurred by individual family members (§ 15.4), there were still a few safeguards for debtors. Indebtedness could no longer lead to slavery (§ 82.1), ceilings on the maximum payable interest were defined (§ 15.13), and excessive loan recovery practices by creditors were declared illegal and punishable (§ 18.3). Moreover, parents were not liable for loans taken by their sons without their consent (§ 16.3), and a son could avert the liability for his parents' debts by relinquishing his right to inheritance (§ 16.2). Despite the pervasive nature of caste structures throughout the whole text, the caste hierarchy or Brahmanical theological concerns influence the contract law in the *Ain* only marginally. In contradistinction to the Dharmaśāstra tradition, interest rates, for example, were not considered dependent on caste status and no direct reference to the soteriological importance of debt clearance can be found.[84] The contract law in the *Ain* is predominately articulated in a secularised idiom. However, in one important respect caste status still played a role for loan agreements. Members of higher castes were not allowed to offer themselves as collateral (§§ 82.7 and 129.10). This was meant to protect such persons from the degradation to the status of bondservants, which would have subverted the hierarchical caste order.

Third, the property relations of the household, next to the caste system the second major pillar of the social order, required regulation for the maintenance of overall socio-ritual cohesion and the reproduction of patriarchal dominance. The latter was achieved by vesting the full rights to enter into contracts and dispose over the joint property only in free men who had reached the age of maturity (§§ 15.1 and 5). Without the consent from her husband or son, a woman was neither allowed to sell family property nor take any loans secured by it. If she had entered any such agreement, she was liable only with her dowry or personal property (§ 18.12). The varying statuses for ritually married wives, co-wives, concubines, mistresses, slave girls and the legitimate and illegitimate offspring born from them inevitably elicited familial conflicts concerning the entitlement to inheritance, maintenance or relationship between the personal property of women and coparceners and the joint family property. The *Ain* grants illegitimate sons a diminished right to the inheritance of their father's estate (§§ 23.5–6). Abandoned illegitimate wives (§ 24.2) and children (§ 23.29), too, were entitled to a share of the joint estate. The individual property received as dowry upon their marriage

84 For the role of debt in Brahmanical thought, see especially Malamoud 1983.

was removed from the access of the male family members, including the husband, and from any claims laid by the state or creditors (§ 17.1), the only exception being that it was required for the maintenance of the family in times of distress (§ 17.2). A son who was given into bondservanthood to work off family debts and who redeemed himself from his personal property, was no longer liable for any family loans (§ 82.15). In the context of inheritance law, the nexus between ritual obligations and inheritance is still visible. An heir was obliged to clear the deceased person's debts and to cover his or her funeral expenses (§ 28.5). In the Newar community, it was permissible to abstain from the mourning obligations for distant relatives upon the payment of a fee, but this entailed the loss of all claims on the inheritance (§ 28.33).

Fourth, the property regime in the *Ain* was not exclusively an instrument to increase state income, but was supposed to bring private ownership under state protection. The violation and restitution of private property rights are a major concern throughout the text. Separate Articles are devoted to deposits and pledges (Art. 69), the illegal appropriation of lost animals (Art. 70) and especially theft (Art. 68). However, the theft of government property was considered a more serious offence than stealing from private persons. In some instances, the perpetrators were even sentenced to death (§§ 68.25–26). Private property was not only protected from thieves, but also from unlawful state incursion: Art. 0.2.22, for example, prohibits any arbitrary confiscation of property. Ownerless items were assigned to the possession of their finder and not to the government (§ 78.1).

The property regime in the *Ain* did not entirely serve the interests of the state treasury and the property-owning classes, but also made a few concessions to ameliorate the situation of the debt-ridden lower classes and to disenfranchised members of the household. Through the process of codification, sacred notions of debt, intergenerational liability and ritual obligations became increasingly articulated through the more secular idiom of law and contractuality.

Public, Administrative and Fiscal Law

The state apparatus of Jaṅga Bahādura Rāṇā could only be developed and maintained through a network of subordinate civilian and military authorities with their respective officials and orderly written procedures. This apparatus was responsible for collecting taxes, maintaining public order and organising some kind of social welfare. The *Ain* mentions in the Preamble to whom the legal code was addressed:

> To the *bhāradāras* and *kāmadāras* stationed in the capital or provinces of our entire realm, the *hākimas* of all *gauḍā*, *adālata* or *ṭhānā* offices, the Kausī or Kumārīcoka office, the religious court (*dharmādhikāra* office), Mulukīkhānā, the Sadaradaphadara, the record offices of the *kampu*, *palṭana*, *kampanī* or the like and all *kacaharī* offices, to the *kāmadāras*, *amālīs*, *dvāres*, *ijārā* and *ṭheka* holders, the holders of *guṭhī* land exempted from all taxes, *birtā* holders, the heads of monasteries (*maṭha*), the virtuous *mahantas*,

mukhiyās, *jimmāvālās*, *chaudharīs*, *tharīs*, village headmen (*mahatau*), *mijhāras*, peasants or the like.

This passage shows that the state not only relied on bureaucrats and security forces, but rested on a wide network consisting equally of local or religious elites. There was no standardised nation-wide designation of posts, but local variations were preserved within the state structure.

Government Authorities and Officials

Four offices are usually addressed in the *Ain*: *aḍḍā, adālata*, *ṭhānā*, and *amāla*, and this seems to be a hierarchical order, because *adālata* and *ṭhānā* were superior to the *amāla*. *Aḍḍā*, too, was a kind of appeal court, sometimes, and later, even called this: *apīla aḍḍā* (Kumar 1967: 164). The supreme authority was the Kausala (cp. §§ 35.11 and 23). However, it is not always possible to see the different duties of the offices, because they are often jointly mentioned without different tasks being distinguished. They were certainly all central institutions for judicial administration, but were also responsible for other tasks relevant to public order. Apart from this, the *adālata* was a court of justice superior to the other offices. There were two categories of *adālatas*: (1) *gauḍā-adālatas* (or just *gaudā*) situated in the frontier areas, Dhankuta in the east and Palpa and Doti in the west, and (2) *jillā-adālatas*, which were located in the various administrative regions. The *aḍḍā* was any governmental post or station, a *ṭhānā*[85] was a kind of police office or headquarters, and an *amāla* was a village-level revenue collection office with semi-judicial functions (Adhikari 1984: 344). Besides these, there were a number of offices with more specific tasks (cp. Sever 1993: App. 5):

Juridical offices (*courts)*:[86] Under Jaṅga Bahādura Rāṇā, the Kausala developed into a committee for legal affairs. It was responsible for formulating, emending and supplementing laws, especially the *Ain* of 1854, functioning as the supreme court, with the absolute power of investigating and overruling the court decisions in civil and criminal cases. The Kausala was usually presided over by the prime minister; its members consisted of high-ranking Rāṇā, the royal priest (*rājaguru*), the religious judge (*dharmādhikāra*), and various high officials and military. The Kausala for the *Ain* of 1854 was made up of 38 Brahmins, 34 Kũvara-Rāṇā, 94 Chhetri and 52 other caste members, among them 13 Newars. In the pre-Rāṇā period, there were also councils consisting of members from noble or high-ranking families (*tharaghara*, *cautariyā*). The Preamble of the *Ain* also mentions an Ainkhānā, which should regularly 'add, erase or correct' the regulations. The central district courts were called Iṭācapali, responsible for all cases involving loss of life or limb or the confiscation of entire properties (Hodgson 1836: 98), Koṭiliṅga or Koṭasiṃha (the supreme civil court), Ṭaksāra, and Dhanasāra. *Kacaharī* seems to be a 'term invariably used to refer to an office or a court of justice' (Adhikari 1984: 350). The Mulukī Aḍḍā was the office for interior and legal matters and was placed directly under

85 The supplementary code of the main (*baḍā*) MA codified in VS 1935 (1878 CE) and promulgated in VS 1936 (1879 CE) defines that an office (*aḍḍā*) which is headed by a *subedāra* is called a *ṭhānā* (RSR-Ain of 1879, section 1, see in NGMPP reel no. A 1375/5).

86 For the many central and local courts before the promulgation of the *Ain*, see Hodgson 1836: 105–9.

the orders of the prime minister. It published the laws and regulations, processed petitions and analysed the reports of the district administrations. It was also responsible for tax collection. The Ainakhānā, introduced by Jaṅga Bahādura Rāṇā, was active in a supporting role in similar activities.

Land and property registries: The Sadaradaphadara(-khānā) or the Cyāṅgrākausī were a kind of central land and property registration office, in which state land was registered and administered. Here were kept the land donation documents, the lists of the land users (*jāgiradāra*), here the land use permits were issued, cash payments received from the tenants of *raikara* land, and new tenants assigned. It was led by a jurist (*ḍiṭṭhā*). Similar offices, e.g. the Kampu Daphadara, dealt with land belonging to members of the army (*kampu*, *palṭana*, *kampanī*). Chebhaḍela was a government institution responsible for building and renovating state houses and properties and for the settlement of all disputes relating to houses and so forth, which did not possess criminal jurisdiction (§ 76.7). It was also the responsibility of this office to measure land granted by the government to state functionaries or private persons (cf. Adhikari 1984: 83).

Finance offices: The Kumāricoka was a kind of Office of Finances and Controlling, directly subject to the prime minister, that did the complete state accounting and bookkeeping. The tax and duty statements of the districts were sent in to this institution at least once annually, with a deadline of 35 days from receipt according to the *Ain*. It accepted the cash payments from the districts, and it was like a tax office in that it had certain legal competencies. For example, it could dismiss unreliable officials or tenants. It sometimes paid the members of the military. The Kumārīcoka was led by a colonel, assisted by further officials (*subbā*, *mukhiyā*) and scribes. It consisted of sub-departments (Kumārī Coka Śreṣṭā Adālata, Kumārī Coka Gośvārā Aḍḍā), which were occasionally responsible for certain districts or tasks. The treasury, which received state income and paid salaries to the civil servants, was called Kausītoṣākhānā (abbr. Kausī, also called Tahabila). Jaṅga Bahādura Rāṇā created, in addition, a Mulukīkhānā, which took over the tasks of the Kausī and received others too. Thus, it received one hundred thousand rupees annually for bridge-building and other public tasks, administered the royal household and that of the prime minister, and kept the blank decrees (*lālamohora*) of the king, gifts for foreign representatives and the official clothing (*khillat*).

Police and jails: Until VS 1910 there was no police force in Nepal; such tasks had been taken on by the military or other forms of state security personnel, such as sentries, watch guards, bailiffs etc. Prisoners were kept in the local offices or, in severe cases, brought to the central jail in Kathmandu (cp. § 35.13). In cases of cruel murders, for example that of one's own child or husband, or of robbers, the prisoners were brought to a cage-shaped house called Golaghara (lit. 'round house', § 64.7) in the central jail (in Kathmandu) where they were kept in isolation from other prisoners and visitors. In charge of the jails were various officials (*ḍiṭṭhā*, *rāiṭara*, *huddā*, *sipāhī* or *mahāne*, § 50.28), who had to record the prisoners' attendance register. The prisoners had to work—mostly excavating or building roads (Art. 53). If they did not work, they were fettered. Pregnant women were released in the sixth month of their pregnancy and imprisoned again 6 months after the delivery. The Toṣakhānā office would pay for the expenses. Prisoners had the right to receive a simple meal (§ 53.3) but they also had to work 'irrespective of whether

he is of high or low rank' (§ 53.6), for instance, on 'road excavation'. Prisoners who had been sentenced to life imprisonment with branding, or to execution or other serious punishments were to be shackled (§§ 50.20–21). If prisoners fled and were captured again, their penalty was increased or doubled (§§ 39.8–9). Officials who did not handle a case or allowed bribery to happen or unlawfully released a prisoner were, in some cases, to be severely punished (§§ 40.13–17, 50.30, 53.4).

Porterage service (rakama) and post office (hulāka): The porter service was a part of the work duties (*jhārā*) owed by mostly male persons, or whole villages, with the exception of Brahmins, old and sick people, and some others. In the *Ain*, the postal service (mail running) was not arranged through forced labour, but the mail runners were assigned land (§§ 4.4, 7). The *hulāka* system, as it was called from 1791 onwards, was a system of mail runners, bearers or porters (*halkārā*), which, in the beginning, was based on compulsory labour. It included the transport of weapons and ammunition, for the most part. The *Ain* mentions that the government documents from various places had to be delivered through the mail runners (§ 7.14). Especially in the west of Nepal, it was a *mukhiyā* in a fixed network and had fixed routes, so that the porters each had only to manage the distance between their village area and the next, where they could pass on the loads. In this manner, a fast, twenty-four-hour service could be set up, which was one of the reasons for the military strength of the Gorkhali.

Government Officials

As with the offices, officials (*kārindā*) are often named in groups in the *Ain*, e.g.:

> If they have issued and signed the statement of confession, each *mukhiyā, tharī, jimmāvāla, mijhāra, gauruṅ, chaudharī, mahatau, ṭheka* or *ijārā* holder, *thāni* or *tharī* shall be fined 100 rupees after the amount of the bribe has been confiscated. (§ 89.61)

> If venerable ministers, generals, colonels, senior captains, *kājīs*, chamberlains (*kapardāra*), treasurers, *sardāras*, captains, lieutenants, *subbās*, *subedāras*, *ḍiṭṭhās*, *khardāras*, *jamādāras*, managers of the elephant stables (*dāroga*), the majors of the *koṭas*, adjutants or the like, subjects and nobles are house owners, they shall arrange for the cleaning of the premises of their houses. (§ 79.2)

Often the precise tasks of such officials are not clear. In general, they had following responsibilities (Table 12).[87]

Correspondence and Files

At the latest with the appearance of the *Ain*, the Rāṇā started to register the country and to bring everything to paper. The rapid growth in issuing documents is shown by the fact that the Nepal-German Manuscript Preservation Project (NGMPP) has microfilmed more than one hundred thousand such documents, of which the project 'Documents on the History of Religion and

87 The table lists only the officials mentioned in the *Ain*; for more officials, see Hodgson 1836: 99–104.

Table 12: Administrative and judicial posts

amālī	Chief of an *amāla* office, a revenue functionary of a regional administrative unit with judicial powers
bajira	(Prime) Minister
bhāradāra	A generic term for a member of the royal family or high-level state functionaries
bicārī	A royal land grant with far-reaching privileges in terms of tax-exemption, revenue collection and judicial authority
chaudharī	A headman or landlord vested with revenue collection rights, especially in the Tarai
cautariyā	A high-ranking title with no specific functions attached, granted to several male descendants of the Śāha kings at a time
dharmādhikāra (*dharmādhikārin*)	Chief judge in a religious jurisdiction whose main duties are to grant expiation and rehabilitation to polluted individuals. The term is exclusively used for Brahmins
ḍiṭṭhā	A civil servant serving in courts or account offices; he is ranked above a *mukhiyā* and lower than a *subbā*
dvāre	A local revenue collection official with minor police and judicial powers
gauruṅ	Village agent
huddā	A low-ranking military or police functionary who could also be assigned to civilian offices
insāyena	A junior military officer (from Engl. ‘ensign’)
ijārādāra	Holder of an *ijārā* (a revenue collection contract), a tax collector
jamādāra	A low-ranking commissioned officer in the army who could also be assigned to civil offices
janarala	‘General’, responsible in the provinces
jeṭhā-buḍhā	A village headman responsible for local affairs, such as the maintenance of law and order
jimmāvāla	A revenue collection functionary in the hill districts
kājī	An official of ministerial rank in the civil and military administration
kāmadāra	Steward, manager, agent
kapardāra	Chief of the royal household, chamberlain
kharadāra	Writer, secretary, official scribe
koṭavāla, koṭapāla	Chief police officer of a town or a district
mahāne	A local revenue functionary in the Kathmandu Valley
mijhāra	A headman of ethnic groups of low caste status; responsible for the collection of levies, fines or escheats from the families falling under his jurisdiction
mukaddama	Headman of a village, caste or corporation, usually charged with the realisation of revenue
mukhiyā	A village headman
mukhtiyāra	In the pre-Rāṇā period: prime minister; in the Rāṇā period: prime minister and *Kamāṇḍara-ina-cīpha* (Commander-in-Chief), also the title of a regent

Table 12: Administrative and judicial posts (*continuation*)

munsī	Translator, teacher and scribe in the Munsīkhānā or Jaisīkoṭhā. Munsīs were responsible in particular for translating documents and texts in Persian, English and Chinese; *Mīra Munsī* was the head of the *munsīs*.
nāyaba	Regent
pradhāna	A low-ranking local state functionary or community headman
prāima miniṣṭara	Prime minister, from Jaṅga Bahādura Rāṇā onward the prime minister also took the title *Śrī Mahārāja* (of Kaski and Lamjung)
rājaguru, rājapurohita	Royal priest and councellor, functioned also as *dharmādhikārin*; usually a hereditary post of a Brahmin
sardāra	A top-ranking official next in the hierarchy to a *kājī*
sipāhi	A soldier or a non-combatant person employed as a policeman or office attendant
śrestā(dāra)	An accountant, registrar
subbā	Governor or chief administrative officer of a province or district
subedāra	A military official, incharge of a *ṭhānā*
tahabiladāra	Government treasurer, cashier
ṭahaluvā	Aide, guard
tharaghara	1) A member of one of the six ruling clans of Nepal (the Pā̃ḍes, Panthas, Aryjālas, Khanālas, Rāṇāa, and Bohorās); 2) Nev. Syasyaḥ, the highest group among the Śreṣṭha castes
tharī, thāni	A clan elder or headman functioning as tax collector
ṭhekadāra	Contractor, tax collector, farmer who rents his land
umarāu, umarāva	High-ranking (military) official
vaidya	Physician, naturopath, usually on an ayurvedic basis
vakila	Envoy in the rank of a *kājī* or *sardāra*

Law of Pre-modern Nepal' of the Heidelberg Academy of Sciences and Humanities is currently preparing a detailed online catalogue (https://www.hadw-bw.de/nepal/). Primarily, the *Ain* deals with the following categories of documents (cp. Table 13): Orders and edicts of the king which bear a red seal (*lālamohora*), missives signed by the prime minister (*daskhata*, *daskata*), order or authorisation letters from the king or a high-ranking government official such as the prime minister (*pramāṅgī*), other orders (*sanada*, *rukkā*), mostly from the prime minister, which often bear a sword symbol (*khaḍganisāna*), land grants or land sales (*bhūmidānapatra*, *bhūmikrayapatra*, *vikrayapatra*, *dastābeja*), other donations and deeds of beneficiary foundations (*dānapatra*), pawn obligations (*bhogabandha*), debt obligations (*bharpāi*), balance sheets and information lists (*bahi*, *vyaya*, *sucīpatra*), contracts and receipts (*tamasuka*) or lease-deeds (*paṭṭā*), travel documents, passports (*gacchampatra*, *rāhadāni*, *bahirpatra*), for instance, for women on pilgrimage (§ 33.13), letters and petitions (*patra*, *bintīpatra*, *nivedana*, *arji*), writs (of rehabilitation) (*pūrjī*), certificates or letters of authorisation (*tirjā*, *sirabandī*), exoneration (*jitāpatra*) or

Table 13: List of document types

ahada	(international) treaty
akarna(-nāmā)	evidence report
akrāra	written acknowledgement of rights
alipatra	deed of relinquishment of title
āmadānīkā syāhā	income ledger
āvarje	abstract account
bahī, bahīpatra	account, balance sheet
dānapatra	deed of gift; founding charter of charitable endowments
daskhata	missive signed by the prime minister
dastābeja	legal document, producible in evidence
dhapoṭ	personal account entries
dharmapatra	religiously solemnised document or deed
dharmaputrako kāgaja	deed of adoption
dharoṭa syāhā	deposit ledger
hukuma	order, especially of the king or members of the Rāṇā family
istihāra	public proclamation
jabānabandī	written statement of the acceptance of a court decision
jamānipatra	declaration of suretyship
jitāpatra	certificate of court victory, certificate of exoneration
kabuliyata	written agreement, contract or consent
kāgaja	document, file, record
kapāli tamasuka	deed for an unsecured loan agreement
kāyelanāmā	written confession
khātā	account book, ledger, especially of a creditor
lagata	register
lekhata	document, written statement
(lāla-)mohora	royal order or decree bearing a red seal
liphā	blank documents bearing a client's signature, thumbprint or seal
marjī	(prime ministerial) order
mañjuranāmā	letter of consent
milāpatra	deed of settlement
mohoratāmrapatra	royal copperplate deed
muculkā	report, witnessed written declaration

Table 13: List of document types (*continuation*)

paraṃbhaṭṭā	a deed, prepared by the seller, formalizing the sale of a slave
patiyāpurjī	certificate of expiation
patra	letter, document
paṭṭā	deed of lease
phārakha	written receipt or acquittance
phārakatī	quitclaim deed
phārchyāpatra	quitclaim deed
pramāṅgī	order or authorisation letter from the king, prime minister or a high-ranking government official
purjā	rent collection receipt
pūrjī	writ, a written notice
rāhādāni	travel permit, passport
rājīnāmā	deed of relinquishment of rights; declaration of will
rasīda	receipt
rola	role of succession (for the royal and prime ministerial family)
rukkā	missive of the prime minister
sādhaka	written verdict
sāhipāṭā (var. *sāhipatra)*	marriage contract
sanada	grant, charter, appointment, endorsements, often signed by a ruling authority
savāla	ordinances, a set of directives issued especially for administrative purposes
silāpatra	stone inscription
sirabandī	written authorisation
sirako banda	compilation of account headings
śrestā	account book, ledger
syāhā	account book, ledger
tamasuka	loan agreement
tārapatra	palm-leaf deed
tirjā	rent collection certificate
ujarāta	suspense account
urdī	official written order
vaṃśāvalī	chronicle
vāsila bāki	collections and balances, total account
yādadāsta	memorandum

acquittance (*phāraka*), blank documents bearing a client's signature, thumbprint or seal (*liphā*), and verdicts or letters of acceptance of a legal decision (*jabānabandī*).

The *Ain* also mentions a number of registers and lists, for instance, of government employees (§ 33.2) or prisoners (§§ 39.9, 50.28), but mainly for taxes, levies and land, and rarely records of ordinary court cases. Everything had to be written down in account books or ledgers (*syāhā*), which had to be submitted to the treasury. Government employees needed a written confirmation of employment (§ 33.3), which had to be renewed and recorded in lists, a process called *pajanī*. If government employees were not registered, the registrar had to be severely punished:

> The registrar responsible for the preparation of the register of government employees shall report accordingly to the *mukhtiyāra* and record their names in the register. If the registrar who is responsible for the preparation of the register of the government employees does not record their names in the register, the authorised person responsible for recording [the assignments] in the register shall be made to compensate [the income from] the crop yield [which the *jāgira* holder had lost because his land assignment was not registered] to this *jāgira* holder. (§ 33.2)

Land transactions, too, had to be recorded in writing, passing through different hands, in the case of *mukhtiyāras* and their close relatives, through the hands of *kājīs* or *bhāradāras*, for example. Otherwise such a document was invalid (§ 33.18). The same holds true for most financial transactions. If it was, for instance, proven that some payments, including fees and fines, had been enjoyed by the person responsible, he or she was fined the same amount as was owed to the government (§ 8.20). Similarly, the officials had to register court exhibits and governmental property (§ 35.18).

The *Ain* takes care that misuse of such documents is reduced to a minimum. If a document was issued that could harm the state and some clerk reported it to an authority, he was not to be blamed, whereas the chief of such a document was held accountable and fined (§ 33.4). Almost all documents had to be affixed with a seal or stamped by various offices, or both, otherwise they were not valid. The theft of documents was severely punished and the thief had to pay compensation for the damage (§ 86.57).

Likewise, forgery or alteration of documents or seals was severely punished (Art. 34). Here, too, the principle of 'an eye for an eye' was often applied. Thus, the punishment or the corresponding detention time was often equal to the sum which was demanded with the falsified document. If a *lālamohora* of the king or *daskhata* of the prime minister was forged, almost the entire property of the forger could be confiscated; in addition, he was punished by *dāmala*, in severe cases even executed (§§ 33.19–21).

Most of the documents were kept in certain offices, such as 'government treasuries, in the Tahabīla, in the Toṣākhānā, Mulukīkhānā, in the Sadaradaphadara, *daphadara*, Kumārīcoka, Iṭācapali where account or treasury records are stored, and in the *aḍḍā* or *gauḍā* offices where treasury records and other documents are stored' (§ 73.1). In these offices, oil lamps were only allowed to be used with caution.

Public Order

According to the *Ain*, the state was not a surveillance state, even if it ruled in questions of family law right down to the bedroom. With regard to public order, it regulated only a few areas: traffic, street cleaning, and, in one case, avoiding brawls. Cutting or felling trees, or laying out traps was also partly punishable. The use of alcohol or the carrying of corpses and the impurities associated with this, are also separate Articles for the *Ain*, as is the abuse of witchcraft. The state took care of the welfare of the sick, the elderly, the orphans and the poor people only to a limited extent.

The regulation of traffic was mainly concerned with the question of compensation for accidents involving caravans of elephants, horses or pack animals. It was also necessary to clarify who would clear the way. Thus, a rider of low rank must clear the way for the rider of higher rank, and both must do so, if they meet a carriage (§ 72.7). As a rule the carriages had the right of way (§ 72.12). If a person died of injuries incurred from a carriage horse, the victim's family was to be paid for the cremation (§§ 72.8–9). There were also penalties for reckless or high-spirited riders.

The *Ain* also regulated the cleanliness of the streets and alleys (Art. 79). It was forbidden to cut down the trees along the roads (§ 32.2). Cutting down trees in the forest to build houses or stables only was allowed (§ 32.3). Anyone who defecated in front of the house of another had to pay the home-owner 2 *ānās* penalty. If an official did not ensure the cleanliness of his home and the surrounding area, the door or stairs were to be removed and thrown in the dirt. If the official did not clean the door or stairs, he must pay a fine. It was forbidden to throw water or indeed urine or faeces out of the window. The streets had not only to be kept free from dirt and refuse, but also from impurity. Therefore, the carrying of corpses also had to be regulated.

The construction of houses (Art. 76) was promoted by the fact that the builder received the land as *birtā* if it was barren *chāpa* or *raikara* land. This was confirmed by Sadaradaphadarakhānā in writing. If it was to be built on cultivated land, a corresponding area of the land had to be surrendered. There was also a kind of urban concept, at least for Kathmandu, Patan or Bhaktapur. Thus, if houses collapsed, they had to be rebuilt within four months, excluding the rainy season. If the owner could not rebuild the house by that date, his neighbours could be ordered to rebuild the house, with a 35-day deadline. If the neighbours, too, could not rebuild it by the deadline, anybody could rebuild it by permission of the concerned office (§ 76.2, cf. §§ 76.15–16).

Article 76 also regulates the sale of houses, conflicts between neighbours and compensation for wilful destruction including arson (Art. 73). Special mention is made of the construction of a 'wayside public shelter, fountain, rest house, resting place, water fountain, well, plank bridge, road bridge, or track' (§ 76.9), which had to be rebuilt by *guṭhīs* or the persons who built it. Interestingly, one could take the material (bricks and timber) and rebuild at another place in the same city, but one could not take it to another city (§ 76.11). Prior to the *Ain*, it was not allowed to erect a hut with tiled roofs without permission of the government, but § 76.13 then continues: 'From now onwards, to erect such a hut with a tiled roof, one neither needs permission from the government nor is one required to pay any fee.'

Gambling

The *Ain* regulates deviant behaviour such as gambling (Art. 75).[88] Historical sources suggest that the widespread gambling habits within Nepalese society plunged many families into poverty and indebtedness (Tevārī VS 2031: 216). However, gambling was also a vital part of Nepal's ritual life, especially during the Tihar festival. Therefore, the laws of the *Ain* strike a compromise. On the one hand, the ritual importance of gambling during certain festivals is recognised, on the other hand social discipline is maintained as far as possible. The individual regulations of the Article mirror this balancing act. Gambling was prohibited except for the five days of the Yamapañcaka festival (§ 75.7), a few other regular festive occasions (§§ 75.11, 15) and after public announcements (§ 75.4). Selling valuables (§ 75.4), advancing loans (§ 75.5) or borrowing money (§ 75.8), oral wagers (§ 75.3) and minors as gamblers (§ 75.6) were prohibited at gambling venues. Only money at the disposal of the gambler at the gambling venue could be used to bet (§ 75.9). This excluded immovable property, but also credit and other stakes secured by sureties. The rationale for these rules was to prevent the financial ruin of gamblers and their families—especially important in contexts of shared property and collective liability—and the outbreak of violence between gamblers and the licensees of gambling venues (Cubelic 2018: 297).

Social Welfare and the Health System

Jaṅga Bahādura Rāṇā Rāṇā's state was not a welfare state, yet initial efforts were made to care for the poor and needy, the sick and the disabled. The state school system also dates back to this time, but is not mentioned in the *Ain*.

When a child was abandoned, the entire property of the parents, if they could be found, was confiscated and handed over to the foster parents and the child was later handed over to someone from his or her caste (§ 93.1). In the case of orphans, the entire assets of the deceased parents were held in trust until they reached the age of majority (§ 93.2). In the case of orphaned girls, the responsible office was even supposed to pay for the costs of the marriage (§ 93.3). In the case of infants, the costs for a nurse were paid (§ 93.7).

Lepers were not allowed to enter the city, but were cared for by the state, as were the handicapped (lame people are expressly mentioned) or the destitute, when no one could be found to care for them. A trust (*sadāvarta*) was set up specifically for this purpose. The same applied to those who fell ill with cholera, Āṭhyā fever, emaciation or smallpox (§ 93.8).

The health system was not supported by the state, but there were separate rules for medical treatment and doctors (*vaidya*) (Art. 54). They risked their property being confiscated if they 'killed' a patient by treating him improperly. Worse still, if the patient died after being administered certain substances without first being purified, the doctor had to swallow the same medicine. If he died, this was considered an indication that he was acting out of malice. But if someone died after the necessary amputation of limbs, the doctor was not to blame.

88 A case study of how legal regulations concerning gambling played out at the market square of Asan at the beginning of the 20th century is provided by Cubelic 2018.

Witchcraft, a kind of indigenous healing system (cf. Macdonald 1976), was forbidden for the most part by the *Ain*. Article 74 makes clear that the wrong accusation of someone being a witch (*boksī*) was often made in connection with disputes over land or money. Such accusations were punished:

> If [two parties] abuse each other verbally in a dispute over land, cash or commodities, and if one comes to complain that the other called her a witch, the person who called her a witch shall be fined 5 rupees. If they first abuse [each other] verbally and later one person calls the other a witch, he or she shall be fined 2½ rupees. If the amount of the fine is not paid, he or she shall, in accordance with the *Ain*, be imprisoned. (§ 74.1)

It is not denied that witches exist, for only unjust accusation is punished. At the same time, certain tests are laid down in the *Ain* for recognising a witch: for example, when a shaman manages to make a a witch dance with a mantra, or when he brands the witch instead of the patient and when, after this, the patient dies, the witch is to be driven from the village:

> If, while a patient is being branded, [instead of the patient] the witch is branded, or if [the witch] dances when she is made to dance through a mantra, or if, while the head of a patient is being shaved, [instead] the witch's head is shaved, such a witch shall be exiled and chased away from the village. Persons who exile such a witch shall not be held accountable. (§ 74.3)

Procedural Law and Punishments

Conflicts that led to criminal acts are listed in § 50.13 (and repeated in subsequent sections): 'disputes concerning gold, silver, utensils, cash, commodities, kinds, jewellery, land, cattle, male or female slaves, illicit sexual intercourse, caste-related issues, contamination through cooked rice, or real property or trade'. As seen in the previous sections, there were many more offences, which had to be punished through various legal measures such as the confiscation of property, imprisonment, caste degradation, enslavement and, in some cases, capital punishment, fines and fees (Art. 50) but also through forms of expiation and purification, mainly through the *dharmādhikāra* (Michaels 2005).

This list of punishments (Table 14) is complemented by a number of religious obligations and punishments. Broadly speaking, a religious punishment is usually a kind of imposed atonement, for example, a vow or commitment (*vrata*) to fast, a pilgrimage, prayers, or various gifts. In contrast, a secular punishment usually takes the form of prison, fines, confiscations, and so forth. Expiations involve absolutions and the relation of the sinner to god and society; punishments involve public order and the rights of others. Atonement involves another life, the next life; punishment mostly this life. Atonement is voluntary up to a point; punishments are not.

Table 14: Forms of punishment

Capital punishment: execution (if the sentence of death is allowed) or *dāmala* (if the sentence of death is not allowed)
Imprisonment (*kaida garnu*), life imprisonment (*dāmala*)
Branding on the left cheek with the initial letter of the name of a lower caste with the member of which one has had illicit sexual intercourse or to which one has been degraded to.
Whipping: § 68.1
Caste degradation (*tallo jātamā milāunu*) by shaving and branding: Art. 42
Enslavement (*masi dinu*)
Confiscation of property (*aṃsa sarvasva garnu*): Art. 43
Exile (*deśa nikālā garnu*)
Penances and purifications:
• *patiyā:* Penalty through which one keeps or regains one's caste status; *bhor-ko patiyā* is a sanction for purification from unwitting contamination (Art. 89)
• *prāyaścit(ta):* Ritual of penance undertaken by a polluted person for absolution
• Cow offering ritual (*godāna*) to the *dharmādhikāra* (Art. 89)
• Cow offering ritual for purification to a Brahmin (*prāyaścitta godāna*)
• Ordinary bath (*nityasnāna*)
• Performing a purification ritual according to the tradition of one's own caste (*jātako rīta gari śuddha*)
• Rice defilement (*bhātabāheka*)
Fines and fees (cp. Hodgson 1836: 115–7)—the generic term is *daṇḍa*(*kuṇḍa*)—to be paid to the government including compensation depending on the damage caused (*bigo barābara jarivāna*), and which are:
• *baksāunī* fee: A government fee for settling a case between two parties; a fee charged for granting a permission
• *bisauda:* A court fee of 20 percent of the amount involved in litigation, mostly to be paid by the losing party of a lawsuit
• *chaiṭī:* A court fee of 6 percent of the amount involved in litigation (§ 50.8)
• *dasauda:* A court fee of 10 percent of the amount involved in litigation, mostly to be paid by the wining party of a lawsuit
• *jitaurī:* A fee to be paid by the winning party in a legal *casepānaphula*: A small fee (lit. for *pāna*, i.e. paan, a preparation combining betel leaf with areca nut) offered in compensation (§§ 50.5-6)
• *patiyā*: Also an expiatory fine (Art. 89)
• *pyāja khāni* (lit. '[a fee] in order to consume onion'): A fee to be paid to the soldiers or bailiffs who are deployed to arrest the defendant (§§ 41.6-7)

Atonement and Punishment

But the *Ain* hardly distinguishes between atonement and punishment.[89] Both were prescribed in certain cases. Caste degradation or the exclusion from the community meal both had social consequences. And yet there were cases in which the *Ain* says *khata lagdaina*, 'no punishment is to be imposed', even though certain measures of expiation were foreseen: for example, rehabilitation (*patiyā*, *prāyaścit*[*ta*]); fines of atonement (*dastura*, *godāna*), that generally had to be paid to the *dharmādhikāra*; monetary fines (*daṇḍa*) paid to the government; pardons (*taksīra māpha*) or certificates of indulgence (*pūrjī*). But in truth, such a certificate could only be issued if previously there had been a punishment imposed (imprisonment, confiscation of property, branding), especially in

89 The following is partly based on Michaels 2005: 35–51.

cases of illegitimate sexual intercourse or offences against the food rules, i.e. eating together with casteless or impure persons. Atonements (*patiyā*) could then be required in full or in part. If they had been imposed for cooked rice and water, then this signified a full re-integration into the caste. If they had been imposed only for water, then this meant that the guilty party was partly re-integrated into the caste, so that he or she is forbidden to share cooked rice with his or her fellow commensals.

The Nepālī word *patiyā* derives from Skt. *prāyaścit(ta)*, which, in traditional law, comprised expiatory measures, such as sacrificing, praying, ritual bathing, the cleansing use of bovine products, fasting, going on pilgrimage, or chastity. In the *Ain*, the word *prāyaścit* also refers to the expiatory aspects of rehabilitation, while the word *patiyā* usually refers to the social aspects of the rehabilitation. Briefly put, *patiyā* means social cleansing, and *prāyaścit* means religious cleansing. *Patiyā* is intended to soothe or eliminate the consequences of a misdoing; *prāyaścit* is intended to do this for the consequences of evil—including those in the next life. *Prāyaścit* was, then, a sort of voluntary supplement to the *patiyā* ordered by the state.

The re-integration into a caste can best be explained by referring to a certificate of indulgence (*purjī*). It was issued by the Dharmādhikāra Kuvalaya Rāja Paṇḍita in the year 1900 and carries his seal.

> (Seal:) Śrī (venerable) *dharmādhikāra* Śrī Kuvalayarāja Paṇḍita-jyū. Year 1951 B.S.
>
> By order of the venerable king of Gorkhā in congruence with the *smṛti(s)*. Perform the following *prāyaścitta* which is a remedy to wipe away (your) sin:
>
> Having shaved your head, having smeared (your body) with mud (and) ashes (and having taken) pañcagavya (five holy products of the cow), take a bath on the first day. On the same day, eat 15 handfuls of *haviṣya*; eat in the night of the second day twelve handfuls. On the third day, eat without asking; if anybody offers (you) something to eat, eat 24 handfuls. On the fourth day, fast. On the fifth day, eat *pañcagavya* (and) give *sīdhā* (1 leaf plate of raw vegetables, lentils, etc.) as well as *dakṣiṇā* (sacrificial fee) to the Brahmins.
>
> (By doing this) the house of Naradeva Paṃta shall be pure from the simple (type of) contamination (caused by contact with) a man who had committed the crime of having had sexual contact with women from castes such as Kulu (makers of musical instuments, like drums), Dhobi (washer-men), Sārkī (shoe makers), Damāī (musicians) and also women who had committed the crime of having had sexual contact with men from castes like Kasāī (butcher), Musalman (Muslims), Kāmī and Sārkī.
>
> (Vikrama) Saṃvat, the 9th day of the bright half of the lunar month of Bhādra, Monday. Hail! (ed. Michaels 2005: 41)

The punishments were partly based on the *abbala*, *doyama*, *sima* and *cahāra* categories of land, which, however, were also used to differentiate degrees of crimes (§ 68.20) or culprits according to their degree of purity, physical strength, financial status, qualities, productions and other circumstances (see, for example, §§ 64.21, 65.2 and 89.7).

The most severe crimes were certainly homicide, theft or illicit sexual intercourse. Heinous crimes (*rājakhata*) such as the killing of a Brahmin (cf. § 67.5) or incest (cf. §§ 141.23 and 25) could be considered a crime against, or punishable by, the king.

If a convict could not pay the fine to which he had been sentenced, he had to be imprisoned 'at the rate of one month for every 9 rupees of the due amount', but not longer than 12 years (§ 50.37). Likewise, it was possible to give a guarantee for a convict, which could be 'cash, male or female slaves, cattle or the like' sufficient to cover the total amount of the fine or debt to the government (§ 38.1).

The *Ain* also uses the legal principle *ne bis in idem* ('Not twice with regard to one and the same (crime)', i.e. the prohibition of double jeopardy (see §§ 35.2 and 68.23).

Complicity and Abetment

The *Ain* does not treat complicity or abetment in separate Articles, but it devotes itself to this question, especially in Art. 68 on theft. Accordingly, accomplices are liable collectively. Thus, if, in the case of a joint theft, a perpetrator kills a resident of the house which the perpetrators had broken into, all the accomplices are to be executed; on the other hand, those who were not involved in the murder will be punished more mildly (§ 68.19). Joint murder is regulated in §§ 64.8–10, multiple perpetrator rape is regulated in Art. 133. Abetment is only dealt with in the case of somebody helping prisoners (Art. 40) or bondservants to escape (§ 80.1).

Penalty-reducing Circumstances and Mitigation

Suspects were punished only when they had criminal responsibility and acted with intent. Offenders therefore had to be categorised: (a) one who knowingly, deceitfully and forcefully commits a crime, (b) one who deceives himself and commits a crime, (c) one who commits a crime while intoxicated, (d) one who commits a crime by mistake or under some compulsion and (e) one who commits a crime because of certain circumstances. This means that suspects should not have been 'intoxicated, ignorant [of the details of the transaction], mentally retarded, minor and also not lunatic' (§ 33.25) during their criminal acts. This also holds true for witnesses and officials:

> If the signatures were obtained through an intervention [from the *kacaharī*] or [the signatories] were ignorant, mentally retarded, minor or lunatic, and if a signatory lodges a complaint within 4 months after giving his signature, or others come to lodge a complaint claiming that the signature of such a [non-eligible] person has been obtained, the case shall be investigated and decided according to the *Ain*. (§ 33.25)

The age of majority was 12 years. 'No punishment or imprisonment shall be required for children below the age of 12', declares the *Ain* with respect to theft (§ 68.7). However, for written loan agreements the child must have been 16 (§ 92.2). And there were different ages of majority for boys and girls:

> If a minor boy below the age of 11 and a girl who is past the age of 10 from a Sacred Thread-wearing caste have illicit sexual intercourse, the girl shall not be granted expiation. She is excluded from her caste. The boy requires neither royal punishment (*rājadaṇḍa*) nor a fine. (§ 92.8)

The *Ain* also declares an 'age of having [real] sexual intercourse':

> If a boy below the age of 11 and a girl below the age of 10 have sexual intercourse, it shall not be considered that the hymen is ruptured, because they have not reached the age of having [real] sexual intercourse. They retain their caste status and they do not need to undergo penance. Such a boy and girl shall be scolded and be let off. Neither a fine nor a fee is required. (§ 92.10)

According to Article 51 it was possible to serve a prison term in place of female culprits. However, this was only possible when the woman had not been accused of a crime punishable by *dāmala*.

In cases of homicide and theft, self-defence was permitted even if the attacker died in the process (§ 68.6). No expiation ritual or fee was necessary.

Judges

Except for crimes that mandated the death sentence or, in case of Brahmins, who were exempted from capital punishment, the shaving of the head (Art. 42), *dāmala*, life imprisonment, caste degradation, and the removal of the Sacred Thread, all cases were tried at the central and regional offices (§ 42.4), but as there were almost no written laws before the *Ain*, judges versed or educated in jurisdiction or jurisprudence were the rare exception, as were professional prosecutors and lawyers. It mainly was a decision by elders or noblemen. With the *Ain*, however, certain officials also became judges. The text mainly mentions *ḍiṭṭhā* and *bicārī* for the local level, *bhāradāra* for appeal courts and the *dharmādhikāra* for cases of impurity. Naturally, the *mukhtiyāra* or prime minister also had the right to decide cases. The king, however, was only involved in signing verdicts in severe cases, such as those mandating execution (§ 42.4).

Except for the *dharmādhikāra*, who was to have been a learned person and knowledgeable in the Dharmaśāstra, the only required qualification for these 'judges' was that they could read:

> When persons are being appointed as a *ḍiṭṭhā* or *bicārī* at an *adālata*, someone who is not able to read out the text of the *Ain* shall not be appointed as either. Someone who appoints a person who is not able to recognise letters or read out the text of the *Ain* shall be fined 20 rupees. (§ 35.15)

Even though the *Ain* became the final authority in deciding cases, the rule of law was not always in practice. But it gave considerable authority to the judges. No officer had henceforth to consult the Kausala 'as long as the matter is regulated in the *Ain*' (§ 35.11). If the case was not regulated in the *Ain*, he, however, had to consult the Kausala.

In land disputes, officers could only act when they had received an official letter of authorisation (*pramāṅgī*, § 35.16) from a higher office. If a chief officer had to summon an official higher in rank than himself, he was to place him at the right side of his seat.

> If he is of the same or a lower rank, he shall place him to his left and discuss what needs to be discussed. If it is ascertained that [the official summoned] has carried out his tasks in an excellent manner, say, 'You did a great job!' If it is ascertained that [the official summoned] has carried out his tasks in an improper manner, say, 'This matter needs to be clarified.' (§ 35.23)

Except for crimes pertaining to homicide, punishable by *dāmala*, pertaining to illicit sexual intercourse or cooked rice and water, high-level functionaries (*bhāradāra*) could authorise somebody else to represent them in court, giving that person the power of attorney in writing. The *bhāradāra* was then not allowed to revoke the representative's decision: 'Whatever is decided in accordance with the *Ain*, I will accept. I will not lodge a complaint.' (§ 35.24).

Judges and officials who did not follow the rules prescribed in the *Ain* had to be punished: '(…) if it happens that a *hākima* has so done out of favouritism, bias, or after accepting bribes, he shall be fined an amount equal to the amount in question of the case, having obtained a declaration of consent [for his sentence] from him.' (§ 48.22). In many instances, the *Ain* makes clear that officials or judges are not above the written law.

Court Instances

A widespread form of punishment was in the form of vigilante justice, that happened quite often and not seldom in a cruel way, as is evident from § 50.13, which prescribes punishments for those who in such cases pour [boiling] ghee, oil, vegetable stock, water, beeswax, milk, liquor over a person or throw burning wood, embers or ashes on the body of the other party. Vigilante detention was tolerated under certain circumstances (§ 50.15).

The legal responsibilities and procedures of the various official courts and offices (see above p. 58–62) are mentioned at different places in the *Ain*. For the trial of homicide, for example, the following procedure was prescribed:

> A *lālamohora* ordering a death sentence for homicide shall not be dispatched if it has not passed through the hands or was attested by the following four officials: The venerable chief judge of the *adālata* (*adālatkā mālika śrījaj*), the venerable guru *dharmādhikāra*, the *mālika* of the Kausī office, and the state treasurer (*khajāncī*). If the chief of the Kausī and the state treasurer are not available, [the *lālamohora*] shall be dispatched to the places where it is necessary, receiving [the confirmation on its reverse] that it has passed through the hands of the *kājī* and colonels. (§ 33.8)

To what extent cases had to go through such official channels or instances was perhaps clear in severe crimes such as 'cases concerning homicide, or a crime punishable by *dāmala*, or concerning illicit sexual intercourse, or concerning the crime of contaminating a person through cooked rice or water, or concerning theft, or concerning the crime of accepting bribes or concerning the crime of hiding governmental revenues' (§ 46.4), but many other cases could be decided by the parties, i.e. plaintiff and defendant, even after they had been brought to an office. If they failed to find an agreement and returned to an office, they had to be punished or fined (§ 46.6).

In cases connected to the death penalty, *dāmala* and degradation of caste, and crimes connected to defilement through cooked rice (*bhāta*) and water after committing a sexual crime with a member of the Water-unacceptable castes by a member of the Water-acceptable castes, the local administrative offices were not to hear them, but to forward them together with the letter of confession of the offender and other documents to the higher court of justice (§ 36.6).

In minor cases, the court of the first instance was the *amāla*, where the *amālī* or land holder decided. Legal disputes concerning *jāgira* land, for example, could be investigated and decided by the holder of the *jāgira* land. Complaints on unjust decisions by the *dvāre* of the *jāgira* land holder could be forwarded to an *adālata* or *ṭhānā* office, which then had to bring the *dvāre* and tenant together to decide the case (§ 46.1). These courts could also refer the case back to the *amāla* (§ 46.3). The court of the next instance was generally the *aḍḍā* or the central courts of justice, Iṭācapali, Koṭiliṅga, Ṭaksāra, and Dhanasāra. The higher court, which decided only on severe cases, was the *kacaharī* or, as the highest instance, the Kausala. Cases could not be brought to different courts; if this happened, the higher court could appropriate the procedure (§ 46.5).

Court Procedures

Courts, which according to Hodgson (1836: 98) were always sitting and had neither vacations nor terms, could summon suspects or offenders at any time. Even in cases punishable by life imprisonment or caste degradation, the regional courts had to have the minister sign the document first, and then summon the culprits, arranging that they could not 'escape on the way' (§ 36.1).

Normally the defendants were confronted with their accusers in criminal cases, and the judges tried to reconcile the parties. In higher courts, cases were often decided without the culprit being present. If then the court decided that the culprit was to be punished by death, confiscation of property, life imprisonment or caste degradation, the master of the court had to write an authorised letter to the local office concerned, telling it to take the necessary action (§ 36.4).

The main form of evidence was witnesses and documents in civil law cases (§ 35.25). Oaths (§§ 2.33–35, 21.3) were apparently less often used, often in the form of an 'oath on the dharma' (§ 35.34) and only when no other form of evidence was possible. For Hindus, an oath on the *Harivaṃśa* was taken (§ 82.5), for Buddhists on the *Pañcatakṣa* and for Muslims the Quran (Hodgson 1836: 118). Within Dharmaśāstra literature, according to Richard Lariviere, the oath during which the *Harivaṃśapurāṇa* is put on the oath taker's head is only mentioned in the *Smṛticintāmaṇi*. He observes that 'this ordeal was devised particularly for settlement of boundary disputes. It involved the threat of the loss of offspring and the end of the family if the swearer was untruthful' (Lariviere 1981: 52). Hodgson gives a description of an oath being taken on the *Harivaṃśa*:

> The *Bichári* of the court, having caused a spot of the ground of the court to be smeared with cow dung, and spread over with *pípal* leaves, and a necklace of *tulsi* beads to be placed on the neck of the witness, places the witness on the purified spot of ground, and causes him to repeat a *sloka* of which the meaning is 'whoso gives false evidence destroys

> his children and ancestors both body and soul, and his own proseprity', holding the *Hari Vansa* all the while on his head, and thus prepared he deposes. (Hodgson 1836: 118)

Verdicts could be reached by 'considering the documents and actors mentioned therein, endorsements, witnesses, testimonies and rights (*bhoga*)' (§ 49.2) or forcing the suspect otherwise to confess (Art. 37). If the suspect was beaten to death, the official himself could be killed, 'taking life for life' (§ 37.7). The *Ain* clearly forbids ordeals, which previously had been practiced (Hodgson 1836: 120–1):

> It has been brought to attention that, in some places, trial by ordeal is carried out upon someone's request, by putting [the defendant] into a jute bag (*dhokro*) and plunging him under water. From now on, no such trial by ordeal in violation of the *Ain* shall be carried out. If [the defendant] who has been plunged under water dies, [the official] who ordered such a trial by ordeal—irrespective of whether he is a *ḍiṭṭhā*, *bicārī*, *amālī* or *jimmāvāla*—shall be put into a jute bag and plunged under water. The trial by ordeal shall be nullified. (§ 49.1)

Persons who concealed information relating to a crime could be punished, in severe cases, by confiscating their property or imprisonment or both, or, if the man belonged to an Enslavable caste, by enslavement (§§ 39.1-2). If a wife did not reveal such crimes of her husband, she was not blamed and let off (§ 49.3).

Confessions were made by letting the offender touch a holy stone (§§ 35.6, 44.1), the procedure of which is described by Hodgson (1836: 126):

> When a cause is decided the *Bichári* orders a stone (any one) to be brought, and upon it a few blades of *Dúb* [*dubo*] grass to be put. He then commands the loser of the cause to put a rupee and four dams on the stone and to touch it, observing to him 'you have committed an offence against the *Mahárája* as well as the other party: that stone is the symbol of the Rája's feet, touch it, thereby acknowledging your offence, and be freed.' The rupee put on the stone is the *Bíchari*'s prerequisite, and the four dams, that of the *Mahániah*. This usage is not observed in every cause decided, but only when it is held that sin (*páp*) is necessarily attached to the losing party, and never in cases of ordeal. Others say that the stone has the 'charan' or foot mark of the God Vishnu graved on it, (the *Saligrám*) and this account is more in harmony, with the usage of making atonement by an offering to it, than if it represented the sovereign of the state.

Often the offender was also asked to write down what he confessed. Hodgson (1836: 96) even regards 'compelling the convicted criminal to confess' a feature in which Nepal differs from Europe.

There was also a hierarchy of pending cases, stating that first the cases of children, elderly people and women should be decided, then those of poor and weak people (§ 35.17). There were a number of deadlines—generally within 35 days—for making complaints at the court (§Art. 47).

Verdicts

Strangely, only a very few court verdicts from the 19th century have so far come to light. Given the fact that verdicts in severe cases required the written form, one would expect a great number of this document type. The *Ain* clearly prescribes a written verdict in most cases:

> When a written verdict for the victorious party to a case is issued, it shall be issued by the *ḍiṭṭhā* or *bicārī* of an *adālata*, *ṭhānā* or *amāla* office, or by the owner of a *birtābitalapa*, *guṭhī*, *phikadāra* or *mānācāmala* land, if the written verdict involves an amount of less than 500 [rupees]. If the written verdict involves an amount of more than 500 rupees, the written verdict shall be issued by putting the stamp of the *mukhtiyāra* or the *mālika* of the *adālata* or *ṭhānā* on it. (§ 35.1)

It also states that the *Ain* should be mentioned in the verdicts: 'This was done in accordance with such and such a section of such and such an Article of the *Ain.*' (§ 35.19). In the case of a death sentence, for instance, '(T)he *mālika* of the Iṭācapali shall relate the written confession of the person to be executed with [the respective regulations of] the *Ain* and inform the Kausala. If an official at the Kausala ascertains, upon his own deliberation, that the person is to be executed, he shall have a *lālamohora* issued ordering the execution and shall forward it [to the authority concerned]. When an execution is to be carried out, no one shall be executed in any *aḍḍā* or *gauḍā* from east to west without [the sanction of] a *lālamohora*.' (§ 36.2). The following is such a verdict from 1880 in the case of a homicide:[90]

> (…) Regarding the trial of Hari Goḍīyā, residing in the maujye of Bajhahī, Pallāpura, Baharāīca, Mogalānā: On Thursday, the 7th of the dark fortnight of Phālguna in the [Vikrama] era year [19]35 (1879), [the accused] confessed his guilt in writing at the Aminī, Adālata and Kacahari [courts], stating: 'It is true that on Sunday, the 1st of the bright fortnight of Śrāvaṇa in the [Vikrama] era year [19]34 (1877) I, a member of the Goḍīyā caste, killed Vadala Siṃ Thāpā, residing in Sīmala Ṭola, Pāhāḍapokharā, during the night while he was sleeping by stabbing [him in] the throat twice with a *khukurī* and then fled with 1 *tolā* of gold and [East India] Company Rs. 40 which he had at his waist.' On Saturday, the 30th of the dark fortnight of Śrāvaṇa in the [Vikrama] era year [19]36 (1879), Lieutenant (text: *lephṭen*) Bālanarasiṃ Svā̃ra Chetrī and Bicārī Kāśinātha [...]ri of the Kailali Aminī, [in] the new territory, submitted the following report through the Iṭācapalī Court [to the king]: 'Since Hari Goḍīyā, out of greed for property, killed Vadala Siṃ Thāpā at his place of residence by stabbing [him in] the throat twice during the night while he was sleeping, we have determined to sentence him to death: to take him to the grounds called Pāhāḍapokharā where the public can witness his beheading—of taking life for life—at the hand of a local Untouchable caste member in accordance with the following law: "[1] Section 9 of [the article] on homicide: If a person kills another person out of greed for property or for any other reason by striking or stabbing him with a weapon

90 Document 'Surendra Śāha VS 1937 (1880 CE)' (edited in Khatiwoda 2018: 255–261).

or the like, the offender—if he is a man from a caste whose members cannot be put to death—shall, in accordance with the *Ain*, have all his property confiscated and undergo the *dāmala* punishment; whilst if the offender is a woman, she shall undergo the *dāmala* punishment, but without having her property confiscated; whilst if the offender is a man from a caste whose members can be put to death, he shall be executed." [2] Section 7 on "Shaving and Dāmala": 'When the law calls for putting an offender guilty of homicide to death, from now on a *lālamohora* shall be issued stating that such and such a person who has committed the crime shall be executed by beheading or hanging in such and such place, [the place] where he took [the other's] life. The offender shall be taken to the place mentioned in the *lālamohora* and executed by beheading or hanging at the hands of a local Untouchable caste member.'

[Then] Subbā Paṇḍita Candrakānta Arjyāla (text: Caṃdrakāṃta) on behalf of the Iṭācapalī Court submitted a request to ---1--- (i.e., Prime minister and Commander-in-Chief Raṇoddīpa Siṃha) and Venerable Prince born of a prince and Commander-in-Chief Dhīra Śamśera Jaṅ Rāṇā Bahādura, stating: '[The above-mentioned] report has been approved by order [of the king], so that we have decided that a *lālamohora* shall be issued to the chief of the Māla [Aḍḍā], Captain (text: *kaptāna*) Mvāna Siṃ Svā̃ra Chetrī, and to send it off. Whatever you wish, [please] order.' [Deciding upon the request submitted,] they too have ordered as follows: 'Regarding the trial which has come to our attention [through the request sent by the [Iṭācapalī Court], we have given 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 Kailali district and to the grounds called Pāhāḍapokharā and [there] to behead him at the hands of a local Untouchable caste member in accordance with Sections 9 on homicide and 9 [*sic*] and 11 on "Shaving and Dāmala" – Hari Goḍīyā, who out of greed for property killed [Vadala Siṃ Thāpā] unlawfully during the night while he was sleeping by stabbing him twice in the throat with a *khukurī*.'

The Application of the *Ain*

Scholars of the *Ain* have always asked whether the text was really ever made the basis of legal practice. It has often been argued that the *Ain* did not bring any fundamental change to the courts of law of 19th century Nepal owing to the Rāṇā aristocracy ignoring whatever court procedures were written down in this text. Thus, H. N. Agrawal (1976: 12) argues that the Kausala was used only once in 1847 by Jaṅga Bahādura to declare 'the abdication of King Rajendra Bikram Shah'. 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 as above the law. (Regmi 2002: 4)

Such arguments are made by the scholars without paying enough attention to the large corpora of documents available in private and public institutions of Kathmandu valley and beyond. These mostly unstudied documents are a basis for the still largely unexplored history of the practice of the *Ain* in Nepalese jurisprudence of the mid- and late 19th century.[91] Thus, the following document edited by T. R. Manandhar (VS 2056 [1999]: 27) records the carrying out of punishments by the Criminal Court (Iṭācapali) on seven criminals in 1861—two of them sentenced to death for committing homicide:

> Lachimanyā Jiryāla, living in Listi Kokarthali,[92] was sentenced to death in accordance with [section] 15 of [the Article] 'On Homicide' after he confessed [his crime] and wrote a note of confession saying: 'On Tuesday, when the 20th day of the month Maṅsira in the year [VS 19]18 had passed, I was at [my] cowshed in Japhebyāṃsi. In the morning, I had started doing [my] work in the cowshed after I freed the cattle (lit. cows and buffalo) [for grazing]. It became apparent that the cattle ate [grain or grass] from the *kunyũ*[93] [made] on the rice field. The son of Naina Siṃha Basnyāta, [born] to [his] Bhoṭe wife, chased the cattle and scolded me. Keeping in mind that he had scolded me, I pushed him away and he fell down. When he struck me twice with a stalk of maize, I became angry and struck him, who is named Meher Siṃha Basnyāta, on his head with a stick of *kholamyā* wood. He fell down on the spot (*tāhi*) and could not stand up. He even could not even gulp down water, also did not speak and did not stand on his feet either. I beat him up on Tuesday when 3 or 4 *ghaḍīs* of the day had passed. It is true that he, Meher Siṃha Basnyāta, died on Thursday night when 10 or 11 *ghaḍīs* of the day had passed by [the effect] of my strike by the stick'.

As stated in the document, the murderer Lachimanyā Jiryāla was executed after the pertaining section and Article of the MA had been referred to:

> If somebody strikes a person either with his foot, a stick, or a stone, and that person falls sick, becomes unable to walk and dies from the pain [resulting from the injury] within 22 days, it is understood that the person who struck has killed the victim. The murderer shall be executed… (§ 64.15)

The victim, Meher Siṃha Basnyāta, died of the injury within two days after he was struck with a stick by Lachimanyā, therefore it was considered in accordance with the *Ain* that the offender had killed the vicitm, even if he had no such intention. If the victim had died after twenty-two days, the offender would have been only fined 60 rupees instead of suffering death penalty.

91 Some documented evidence relating to the implementation of the MA in mid-19th-century Nepal is provided by Khatiwoda 2018.
92 This probably is a village in Sindhupalchok District in the Bagmati Zone of central Nepal.
93 The terms designate a large heap of grain or straw, stack of hay.

Similarly, Gaja Keśara Ṭhakuri, too, was excuted after the pertaining Art. 64 and section 12 of the respective Article, which had been referred to (§§ 64.2 and 12). Section 2 allows the authority to impose the death punishment on a member of royal descent, saying: '… If a Rajapūta kills a person, he shall be executed' (§ 64.2). This ensured that the offender Gaja Keśara Ṭhakuri, who belonged to a Rajapūta caste, could be put to death when found guilty of homicide. Section 64.12 allowed the authority to impose the death penalty, since the accused had killed a person with the intention to kill. Even if the victim had not died, he would have been punished with the death penalty in accordance with the same section of the *Ain* regulating attempted murder.

Further, a letter from Jagat Śaṃśera to the *dvāres* of Aṭhāra Saya Kholā on the Nepal-Tibet border[94] and the above-mentioned royal order (*rukkā*)[95] issued by King Surendra to Captain Mvāna Siṃha Svā̃ra Kṣatrī in the western Madhesa stand as exemplary documents which tell us that the *Ain* was circulated not only in the capital city, but also in far distant territories. Jagat's letter directs the *dvāres* not to bother the subjects with the same issue again, which had already been resolved. If they do not comply with the order, they will be punished according to the *Ain*. Surendra's above mentioned *rukkā* lays out the formal procedures for carrying out the death penalty on Hari Goḍīyā, who had been found guilty of committing a homicide. The offender, Hari Goḍīyā, a resident of Maujye Bajhahī Pallāpura, Baharāica, Mogalānā, killed Vadala Siṃha Thāpā and then fled. After more than a year, he was arrested and brought before a court, where he confessed his guilt in writing at the *aminī*, *adālata* and *kacaharī* courts that he, a member of the Goḍiyā caste, had killed Vadala Siṃha Thāpā, at night while he was asleep, and then had fled with gold and money which he had carried around his waist. Half a year passed, and on Saturday, the 30th of the dark fortnight of Śrāvaṇa in VS 1936 (1879), Lephṭena Bāla Narasiṃha Svā̃ra Kṣatrī and Bicārī Kāśināṭha of the local *aminī* court submitted a report to a higher court, the Iṭācapali, that Hari Goḍiyā, out of greed for the property, had killed Vadala Siṃha Thāpā at his place of residence by stabbing him in the throat twice during the night. Therefore, it was ruled that 'he has to be sentenced to death; by taking him to the ground called Pāhāra Pokhara and beheading him at the hands of a local untouchable caste member—the taking of life for a life—according to the § 9 on "Homicide" and § 7 on "Shaving and Dāmala".'

Moreover, a *lālamohora* issued by King Surendra in VS 1927 (1870)[96] testifies that the *Ain* was consulted not only on criminal cases, but also on civil matters. This *lālamohora* gives final approval to the decision made by the Kausala regarding a court case. The court case is between Kāsīdāsa and Bāladāsa about the succession of Mahanta Mohanadāsa of the Basahiyā Monastery in the Muhattari (Mohattari) district of Madhesa after his death, and about the property of that monastery. As stated in the document, Mohanadāsa had ritually and lawfully granted the succession and the property of the monastery to Kāsīdāsa in 1863 (VS 1920), which was witnessed by the village notables and his four disciples: Bālādāsa, Sukharāmadāsa, Jīvanadāsa and Prāṇadāsa. However, Bālādāsa took over the succession in the monastery by force one year later in 1864 (VS 1921), accusing Kāśīdāsa of having acquired the succession on the basis of

94 See Document 'Jagat Śamśera VS 1912 (1855 CE)'.
95 See Document 'Surendra Śāha VS 1937 (1880 CE)'.
96 Edited in Khatiwoda forthc.

forged documents. The *lālamohora* recounts the procedures required for a court decision. The local court first investigates the lawsuit and a decision is made only after careful consultation of the pertinent sections and Articles of the *Ain*. This decision is afterwards sent to the Kausala by the court, which investigates anew the decision of the court on whether the matter conforms to the regulations of the *Ain* and adds its own observations. It is then approved by the Kausala and forwarded to the commander-in-chief and prime minister, who issued a *rukkā*. Afterwards, it is sent to the king and a red-seal document (*lālamohora*) is issued by him to the winner of the lawsuit, i.e., to Rūpalāladāsa in the present document.

Not only the court verdicts, but also the supplementary legislation to the main *Ain* of 1854 are worth discussing so as to understand the growing necessity of more precise laws for better applicability. For example, one such supplementary legal document promulgated by Raṇoddīpa Siṃha Rāṇā in VS 1936 (RSR-Ain) and intended to help train judicial officials not only defines what criminal and civil cases are, but also clearly explains the hierarchy of the judicial offices and officials, something which is not clear in the *Ain* of 1854. RSR-Ain §§ 6 and 7 read:

> … an *aḍḍā* office headed by a *lephṭena*, *subedāra* or *jamādāra* or *havaldāra* is to be called *aminī kacaharī*, *ṭhānā* or *cauki*, respectively. The officials of such offices who have been given the right to decide legal cases are to be called *hākima* and the rest are to be called clerks (*kārindā*).

Moreover, this legislation also introduces, probably for the first time in pre-modern Nepalese administration, uniformity in the script of the legal documents. It directs the officials to send the reports and documents to the prime minister only in Devanāgarī script (RSR-Ain § 3). It further prescribes how to write legal documents, such as a litigant's application to file a court case, documents for accepting bail or surety, letters of witnesses, confessions, the written format of taking an oath on dharma and the like.

These documents tell us that the *Ain* was not simply a theoretical and scholarly work, like the Dharmaśāstra or -nibandha texts, but was indeed down to earth and reflected current realities. The MA is thus not simply a rewriting of Brahmanical moral values. It has a stronger conceptual leaning towards positive law than the Sanskrit legal tomes of this period.

Conclusion

> Since there have been dissimilarities in punishment imposed in [lawsuits] with the same particulars until today, therefore, in order to achieve uniformity of punishment in accordance with the crime committed, this is the *Ain* prepared in response to the following order to the thrice venerable Mahārāja Jaṅga Bahādura Rāṇā (…). (Preamble)

These words from King Surendra's *lālamohora*, functioning as a kind of preamble, promise legal security and uniformity. The *Ain* thus shows decisive improvements in the rights of the people: for example, the cutting off of the nose, ears and other parts of the body (Hodgson 1936: 126),

which had apparently been customary before, no longer appears. There was a separation of political powers. Offices and office holders were separated and legal boundaries were drawn for the powers of both the king and the prime minister. Exceeding these limits could be punished by removal from office (§ 0.1.34). The rules for the role of succession for the monarch and the prime minister also ensure a peaceful transfer of power. Legal legitimation therefore complemented legitimation, based on birthright or charisma. Moreover, the *Ain* is taking the first steps to establish a conceptual separation between the legislative, executive and judicial branches. Additions or amendments to the *Ain* required the approval of the Kausala, and neither the king nor the prime minister was allowed to interfere in the judicial decision-making process (§ 45.2) or to corrupt the judgments (§ 0.2.16). The judgments were to be based solely on the authority of the *Ain*. If this was not possible, the case had to be referred to the Kausala and the *Ain* had to be amended accordingly (§§ 35.11–12). The usurpation of the throne by the prime minister (§ 0.1.31) or in cases of treason would lead to capital punishment. And the state treasury was explicitly protected from the private enrichment of the prime minister.

In reality, however, Jaṅga Bahādura Rāṇā's *Ain* cemented the social order as a basis of a 'centralised agrarian bureaucracy' (Regmi 1976a: 225) and fortified the privileges of the aristocracy and other state-bearing elites (cf. Höfer 1979: 39 and 2004: 2). In doing so, the *Ain* presented a complex caste system in order to internally hinduise society, subsuming all ethnic and mostly non-Hindu groups. The same cannot easily be found in India, as B. H. Hodgson, British Resident in Nepal during the years 1829–31 and 1833–1843 had already noted by introducing his article 'On the Administration of Justice in Nepal' in this way:

> This subject is one that possesses much interest whether for the legislator, the historian, or the philosopher. In Hindustán we look in vain for any traces of Hindú legislation or government. The Moslem conquerors have everywhere swept them away, and substituted their own practices and doctrines for those conquered. Even in Rájpútána, it may be doubted whether we have the pure and unmixed practices of Hindu legislators and judges, or whether their necessary connection and intercourse with Muhammedan governments have not more or less modified their notions on the subjects, and introduced changes more or less considerable. But in Népal at least we may be sure that nothing of this kind has occurred. Separated till very recently from any intercourse with Hindustán, shut up within their mountain fastnesses, the Népalese have been enabled to preserve their institutions in all their Hindú purity.... (Hodgson 1836: 94; the passage ends with the motto that we have placed at the beginning of our present book.)

This is, of course, an exaggeration, a neglect of other legal cultures in Nepal and the declaration of Nepal as a Hindu Shangri La—an image that Nepal has cultivated up to the recent present by declaring herself the last Hindu kingdom in the world (cp. Michaels forthc. a). Nevertheless, its core statement is true, because the policies of the Śāhas and Rāṇās were based to a large extent on the Hinduisation of Nepal and the *Ain* was a major part of this.

The legitimacy in the *Ain*, based on a shared collective (Hindu) identity which established strong moral-affective ties between the state territory and subjects, became subsequently

a milestone for the further development of the succeeding *Ains*. Therefore, the *Ain* cannot simply be taken as strengthening the dictatorial power of the Rāṇā regime. On the contrary, it was the institutionalisation of the new political culture under Jaṅga Bahādura Rāṇā, who had been provided with the executive power by restricting the political influences of other domestic institutions, such as the monarchy.

Despite the significant changes, substantial reforms and, to a certain extent, the approaches to legal security for the population, law in Nepal, as it is presented in the *Ain*, differs considerably from Western or Roman law—especially in the fact that the individual can hardly be separated from his or her social group. This is particularly true in cases of ritual impurity, but equally so for the liability of the joint family in property cases. Whoever makes him- or herself impure, for example, through illegitimate sexual intercourse, can be forbidden to have sexual intercourse or a meal with his own wife and other family members. In addition, these persons, too, are affected by impurity.

Equally, the legal foundation of subjectivity in offences, for instance the motive for a deed, counts for less than the objective consequences of the deed. This has its effects on legal criteria such as intention, guilt, responsibility, reduction of sentence, or aiding and abetting. But, above all, the law of the *Ain* is not founded on natural law, i.e. law not based on consent, but on universal principles. It is above all the (Brahmanical) law of castes. What for one was punishable, was not necessarily so for another. Law and morals were not distinguished, either. With the dominance of Hindu dharmashastric norms, the *Ain* remained religious law (as distinct from customary and state law).

The *Ain* further strengthened the caste system in its function of enabling and legitimising the economic exploitation and political marginalisation of lower caste groups, through taxation, compulsory labour obligations, lack of participation in the administration, unfavourable tenure policies and money-lending.

In contrast to many law texts commissioned by the British in India, the *Ain* cannot simply be understood as a restoration of Brahmanic moral law. On the contrary, the text seems to be more 'modern' than the 18th-century Sanskrit law texts in India. The juridical situation in India was in, fact, split between British Law and the traditional Dharmaśāstra. In Nepal, however, though not directly influenced by the British, the emergence of constitutional ideas is evident, even though not clearly visible. It seems that there are hidden transcultural flows.

In other words, the introduction of a written law such as the *Ain* worked to cement traditional society through 'modern' methods that would additionally claim for this small nation a place in the community of modern states. It thus was a strategy of 'traditionalising modernity' rather than 'modernising tradition'. The modernisation process in Nepal, then, was neither adaptive of nor an alternative to the modernisation process in India. It included an advanced homogenisation of law practice, which, however, did not transform Nepalese society comprehensively into a form of 'Western' modernity.