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PROVINCIALISING *DHARMA*
STUDIES ON LEGAL ISSUES IN THE
HIMALAYA

Edited by

Florinda De Simini
Domenico Francavilla
Axel Michaels

EDIZIONI AIT – EDIZIONI ETS

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

Irma Piovano

CONTENTS

Editors' Preface	p. 9
Florinda De Simini, Domenico Francavilla, Axel Michaels <i>Provincialising Dharma: An Introduction</i>	p. 11
Fabrizia Baldissera <i>Views on Dharma in Medieval Kashmir</i>	p. 21
Astrid Zotter <i>Writing Nibandhas in Nepal</i>	p. 51
Timothy Lubin <i>Sacred Law as a Device of State-Building in Gorkhali Nepal</i>	p. 77
Axel Michaels <i>Between Love and Power: The Dharma Drama of King Rāṇa Bahādura Śāha (1775-1806)</i>	p. 101
Manik Bajracharya and Rajan Khatiwoda <i>Legitimizing Slavery through Brahmanical Norms: The Ain of 1854</i>	p. 119
Simon Cubelic <i>The Code of Tribute: Law and Political Economy in the Ain of 1854</i>	p. 141
Chiara Correndo <i>Women's Layered Identities and Property Rights: Dowry and Women's Wealth in the Ain of 1854</i>	p. 169
Ramhari Timalisina <i>The Practice of Levirate in 19th-Century Nepal and the Dharmaśāstric Discussion of Niyoga</i>	p. 201

Arik Moran and Csaba Kiss

*In the Name of Dharma: A Himalayan Prince's Response to Colonial
Oppression, Chamba 1870-74* p. 215

Domenico Francavilla

Child Marriage in Nepal: Dharmaśāstra, Customs and State Reforms ... p. 243

Marie Lecomte-Tilouine

Understandings of Dharma in Nepal After 1950 p. 269

Contributors p. 287

Editors' Preface

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

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

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

FLORINDA DE SIMINI, DOMENICO FRANCAVILLA, AXEL MICHAELS

Provincialising Dharma: An Introduction

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

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

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

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

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

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

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

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

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

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

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

² Davis 2004; Derrett 1979; Jha 1930; Kane 1968-75, vol. III.2; Lingat 1973, part 2, ch. 2; Michaels 2010; Rocher 1979; Wezler 1985.

³ Cf. van Schendel 2002; Scott 2009; Michaud 2010.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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