

IDEAS FOR CIVIL JUSTICE REFORM FROM THE  
CLASSICAL NEPALESE LEGAL SYSTEM

by

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A THESIS SUBMITTED IN PARTIAL FULFILMENT OF  
THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

THE FACULTY OF GRADUATE STUDIES

(LAW)

THE UNIVERSITY OF BRITISH COLUMBIA

August 2005

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## ABSTRACT

An expanded role for custom and the use of a jury may help to alleviate the problem of the lack of trust in and reach of the official Nepalese legal system.

The lack of reach and trust has a number of aspects. Delay, cost, corruption, and the foreign nature of Nepal's British-style adversary system have caused many Nepalis not to seek justice in the courts. The present civil war has also limited access to justice. Once the conflict is resolved, the country will be facing a major challenge: how to ensure access to justice is readily available to all of its citizens.

Ideas for achieving that goal can be found in the roots of Nepal's justice system. Prior to 1854, Nepal had what was perhaps the last classical Hindu legal system in the world. Under the Hindu sacred literature, the established customs of tribes, groups, and families were given priority even over the sacred texts. The important role given to custom helped deal with the immense diversity of Nepal's population, a diversity which still characterizes the country today. Group decision-making was also a strong feature of Nepal's classical justice system. This was reflected in the important role of the panchayat, which might act as a private arbitration board outside the court system or as a jury within it. The panchayat also investigated, mediated, and decided disputes at the local level. According to one report, they were involved, to the general satisfaction of all concerned, in dealing with about half the judicial business of the kingdom. However, Nepal's first legal code, promulgated in 1854, did not provide that disputes could be decided by a panchayat. Custom was not to be applied unless it had been enshrined in the legal code.

An expanded role for custom could help to meet the legitimate aspirations of marginalized ethnic groups in Nepal. Such a role would need to be carefully defined so that recognised customs would not conflict with generally accepted human rights principles. The use of a jury would incorporate the deeply ingrained tradition of group decision-making in the country. It could also be used as a means of social engineering: caste distinctions and discrimination against women might be lessened if men and women from all levels of society participated together in the important task of resolving disputes.

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## PREFACE

I lived and worked in Nepal from 1992 to 1997 and, like so many foreigners who have spent time there, I fell in love with the country and its people. When I arrived from Canada with my wife and five young children in late 1992, the kingdom's future appeared full of promise. A new constitution had been promulgated on November 9, 1990, which ended the direct rule of the King, enshrined basic human rights, provided for democratic rule, and created an independent judiciary. The Nepali Congress Party was in power, having won a majority of seats in elections held on May 12, 1991. Most people felt confident that this was the beginning of a new era of peace, increased prosperity, and stability. Few predicted or anticipated that within 5 years, the country would plunge into a bitter and costly civil war which would lead to the eventual loss of over 13,000 lives.<sup>1</sup>

During my stay there, I worked as the Director of the Engineering and Industrial Development Department of the United Mission to Nepal.<sup>2</sup> At that time, its projects and companies were on the cutting edge of infrastructure development in the country, with the main focus being on hydropower.<sup>3</sup> By the end of my tenure, the Department was advocating that Nepal should look to its own financial and human resources as much as possible in the development of its infrastructure. It was felt that foreign aid and capital generally came at too high a price – grants and loans tended to foster an unhealthy dependence on that aid and foreign investors were looking for too high a return on their investment and too many concessions in various areas.

When I decided to take a sabbatical from the practice of law in 2004<sup>4</sup> and enrol in the Master of Laws program at the University of British Columbia, it was not hard to select an area of study for my thesis. Although I had become acquainted with various aspects of Nepal's legal system during my stay there, I wanted to learn more about it and its history.

Most of the changes in the country's legal system since 1951 have involved adopting western ideas and practices. For example, a British-style adversary system was

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<sup>1</sup> However, as Deepak Thapa has pointed out, at least two articles warned of the risk of this happening. See R. Andrew Nickson, "Democratisation and the Growth of Communism in Nepal: A Peruvian Scenario in the Making?" first published in (1992) 30:3 *Journal of Commonwealth and Comparative Politics* and reprinted in Deepak Thapa, ed., *Understanding the Maoist Movement of Nepal* (Kathmandu: Martin Chautari, 2003) 3; and, Stephen L. Mikesell, "The Paradoxical Support of Nepal's Left for Comrade Gonzalo" first published in (1993) 6:2 *Himal* and reprinted in *ibid* 35.

<sup>2</sup> UMN is a cooperative effort of Christian church and mission organizations from several countries.

<sup>3</sup> Nepal has one of the largest hydropower potential of any country in the world, but it remains largely undeveloped. If the country is able to harness this potential and sell the surplus power to say India at a profit, Nepal could become quite prosperous. Unfortunately progress toward this goal has been painfully slow.

<sup>4</sup> I have practiced law in Cranbrook for about 20 years: from 1981 to 1992 and from 1997 to the present date. Cranbrook, with a population of about 19,000 people, is located in the southeastern corner of British Columbia, Canada. I have served a wide variety of clients in my practice over the years: from large banks and insurance companies to the poor and disadvantaged. One of the benefits of a small town practice is that you become involved in matters ranging from the simple to the complex, while representing a diverse clientele.

developed during the 1950s and 1960s. Much of Nepal's legislation is based on Western precedents. I wondered, however, if the history of its legal tradition might contain some ideas which could assist in meeting access to justice needs today. Rather than looking to the West for guidance in judicial reform, should the country look to its past for direction? One of the purposes of this study is to provide an answer to that question.

This study offers the perspective of an experienced Western legal practitioner, who has developed some acquaintance with Nepal's culture and legal system while living in the country, and who has reviewed the relevant publications, in English, of its legal history. My understanding of Nepali was not sufficient to allow me to read the literature written in that language. In order to deal with that deficiency, I consulted experienced Nepali lawyers, who could pass on any relevant insights from that literature.

The ideas presented in this study are offered with the knowledge that the legal community in Nepal is in the best position to judge and decide whether, and to what extent, they are worth pursuing and implementing. They are also put forward in the hope that, at some point, Nepalese lawyers might come and study our system and its history and offer their suggestions for judicial reform here. Our legal cultures cannot help but benefit from a mutually engaged dialogue, where we say what we see in our own and each others systems with the goal of improving access to justice in our countries.<sup>5</sup>

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<sup>5</sup> 'Say what you see and, if you are not sure about something, say so.' Professor Stephen Wexler of the Faculty of Law, UBC advocates this as one of the guides to legal scholarship. I think this is some of the best advice I received during my LL.M studies at UBC. It underlines that each of us has a unique and valuable perspective to offer – at least as far as our vision extends!

## ACKNOWLEDGMENTS

Firstly, I would like to thank Professor Ian Townsend-Gault, who very kindly agreed to supervise this thesis, in spite of his numerous other commitments. His advice and comments were helpful in many ways, including in gaining a perspective on the Asian situation as a whole, and how the Nepal experience compared to other countries in the region. I don't think this project would have even got off the ground if Professor Mira Sundara Rajan had not offered her help and encouragement from the start. In the bewildering task of shifting from a busy law practice to an academic environment, her interest and enthusiasm for my area of study renewed my determination, at a crucial time, to pursue it. Her ongoing advice and suggestions were very helpful.

The past year has been an enjoyable intellectual adventure for me, especially because of my fellow-students in the Master of Laws program, whose insights, comments, and suggestions were of great assistance. I want to especially mention Cindy Baldassi, who provided me with articles on the role of aboriginal customs in the Canadian legal context. Thanks as well to Professor Wes Pue, who led our LL.M seminar and gave generously of his time to help when needed. We were shepherded by Joanne Chung, who administered the graduate program. She was always in good humour and kept up our spirits.

When I travelled to Nepal in December, 2004, I was shown great hospitality by the President of the Nepal Bar Association, Shambhu Thapa and his executive. They very kindly allowed me to speak at one of their conferences, and gave me access to their library. Laxman Prasad Aryal, a retired justice of the Supreme Court was the lead speaker at the conference. My discussions with him on the way to and from the conference were very helpful in gaining a better understanding of my topic. I would also like to extend my thanks to the UNDP Project (see page 22, below) for providing me with some information and documentation from their project.

Madan Kumar Dangol, who has practiced law in Nepal for several years and who, like me, had returned to university to obtain a Master of Laws degree was of great assistance. I found one of his papers in the law library at Tribhuvan University in Kathmandu, and was very impressed with what I read. I was able to contact Mr. Dangol with the kind assistance of the Dean of the law faculty, Professor Kanak Bikram Thapa. Mr. Dangol helped me both with background research and a review of my draft thesis. I would also like to thank Murali Prasad Sharma, a very experienced member of the Nepali Bar, for his helpful comments on the draft. Mr. Sharma and I worked closely together during my stay in Nepal (1992-97). I also very much appreciate the comments on the draft made by my friends, Dr. K. B. Rokaya and Pat Dearden, and my sons, Stephen and Ian Kent. Last but not least, I want to thank my wife, Lorna Kent for putting up with my weekly absences over a seven month period to attend classes in Vancouver and her unfailing support and encouragement for this project.

*Dedicated to the Nepal Bar Association and  
its courageous non-violent fight for  
justice, human rights, and the rule of law*

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## CHAPTER I – INTRODUCTION

### A. Overview of this study

I invite the reader to come with me on a journey, where we will visit the ancient roots of the Nepalese legal system and see what it looked like at the end of its classical phase during the first half of the 19<sup>th</sup> century. What were some of its strengths and are they still part of the kingdom's legal system today? If not, could a consideration of those strengths lead to suggestions for improving access to justice?

What do I mean by access to justice? I would propose the following definition. In appropriate circumstances a person can have a trustworthy person or group of people apply the law to the issues in dispute in a timely way, following full and fair consideration of all relevant circumstances, with the expectation that the decision can be enforced. This, of course, is very general. How it might look in practice could vary widely from place to place and from culture to culture. What I have found in my law practice is that people are generally satisfied, even when they lose in court,<sup>1</sup> if they feel that an impartial judge or jury has carefully considered their view of the matter. Of course appropriate rights of appeal need to be part of a justice system as well, but this would fall within the boundaries of 'full and fair consideration' in the above definition.

Where to begin a study of the classical Nepalese legal tradition? First, try to picture a legal system where no laws have been made by the king, judges, or a legislative body. Add the fact that the norms which bind you are those which are an integral part of the religion of almost everyone who lives in the country. These norms are of ancient origin and have been revered and looked up to for over fifteen hundred years. They are contained in writings of great persuasive authority. However, the picture is incomplete, because these norms do not govern every aspect of life, nor are they absolute. The norms themselves provide that they must give way to custom which is well-established and part of the lives of the respected members of your tribe, group, or family. Woven into the fabric of this picture is the belief in a certain rightness to the way of life expected of you, having regard to your caste, gender, age, and station in life – your dharma.<sup>2</sup>

That brief sketch outlines some of the major features of the legal system of Nepal in its classical form, before it ended with the passing of the country's first legal code, the 'Ain'<sup>3</sup> in 1854. It may have been the last classical Hindu legal system in the world,<sup>4</sup> existing, before its demise, in a state which was virtually untouched and unaffected by Western influence.

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<sup>1</sup> Although I hate to admit it, I have lost some cases!

<sup>2</sup> I will not be italicizing 'dharma' or other Sanskrit words as is the practice in some publications. Further, I will not be including diacritics on Sanskrit words unless they appear in what is being quoted.

<sup>3</sup> 'Ain' in Nepali, literally means 'law'.

<sup>4</sup> Brian H. Hodgson, "On the Administration of Justice in Nepál" (1836) 20 Asiatic Researches 94 at 94 [1836 Article].

Why go on this journey into such distant territory? Simply put, ideas for judicial reform can be found in the roots of Nepal's justice system. It is my thesis that an expanded role for custom and the use of a jury may help to alleviate the problem of the lack of trust in and reach of the Nepalese legal system. My conclusion is based on what was working well in the country's legal system in its classical phase.

I will examine two distinctive and prominent aspects of the classical legal system of Nepal: the role of custom and the panchayat<sup>5</sup>. Following the promulgation of the Ain, their roles diminished to the point of extinction. No longer was a flexible approach available to recognize and apply the diversity of customs in Nepal. Gone was the trustworthiness of the panchayat, which functioned in a number of roles, including as an arbitration board and jury. The virtual elimination of these features may have been a factor in the descent of the country into civil war during the last ten years.

## **B. The structure of this study**

The main purpose of this introductory chapter will be to acquaint the reader with the nature of the problem which this study seeks to address, namely, the lack of trust in and reach of Nepal's official court system. To achieve this goal, I will sketch out a picture of the country and its history and then go on to describe why there is this problem of a lack of reach and trust. This will be done through an analysis of the country's legal system, how it reached its present shape, and what reform efforts are presently being made in the area of improving access to justice. I will also have a look at the Maoist movement, which has had a profound impact on the administration of justice.

In Chapter II, I will discuss the challenges which a researcher faces when dealing with a different culture in a distant time. I will add a twist to the analysis by comparing what scholars have said about such a task with how a decision is reached during the course of a trial in a British-style justice system like the one in British Columbia, Canada. The chapter concludes with a description of the literature I have reviewed for the purposes of this study, what I have found to be of particular assistance, and where this study fits within the flow of ideas in those publications.

Having described the problem of the lack of reach and trust in Chapter I, and put my study in its broader context in Chapter II, my focus will shift, in Chapters III, IV, and V to an analysis of the role of custom and the panchayat in Nepal's classical legal system.

Chapter III deals with the classical Hindu legal tradition, because one needs at least some knowledge of that tradition to properly understand Nepal's classical system, which was

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<sup>5</sup> 'Panch' literally means 'five' in Nepali, although in Nepal's classical legal system a panchayat generally was composed of a larger number of people. The panchayat performed a number of functions, depending on the circumstances. It might investigate a dispute, even on the spot. In the dispute resolution process, it might act as a mediator and, if the mediation was unsuccessful, adjudicate the matter. The word 'panchayat' has a negative connotation to it these days in Nepal because of the monarchy's failed attempt to govern the country under a panchayat form of government from 1962 to 1990. However, I will not be dealing with the administrative role of the panchayat in Nepal's history, just its role in the country's justice system.

very much a part of it. In that chapter, I will describe the nature of the relevant sacred literature, what it said about the administration of justice and the role of the king, and comment on its dominant feature – the importance of adhering to one's dharma.

The next step will be to have a look, in Chapter IV, at the sources available which describe Nepal's legal system during the first half of the 19<sup>th</sup> Century. The main source is the writings of Brian Hodgson, who worked at the British residency in Kathmandu for over 20 years, and who took a keen interest in various aspects of life in Nepal, including how disputes were resolved. Because of the importance of his writings, a critical analysis will be made as to the extent we can rely on what he wrote and published. An overview will also be provided as to how the administration of justice was carried out during Hodgson's day.

By the end of Chapter IV, the reader will be familiar with the relevant Hindu sacred literature, the sources which describe Nepal's dispute resolution processes during the first half of the 19<sup>th</sup> Century, and how they were functioning at that time. I will then narrow my focus, and describe, in the first part of Chapter V, the role of custom and the panchayat in the classical Hindu legal tradition because, as is pointed out later in that chapter, their role in Nepal's classical legal system very much mirrored that tradition. Chapter V will also describe how the Ain contributed to the marginalization, if not elimination of these aspects of the administration of justice.

Chapter VI analyses why an expanded role of custom and the use of the panchayat-as-jury could help to improve access to justice in Nepal today. An expanded role for custom within a principled framework could alleviate some of the alienation and marginalization experienced by some groups in the country and give effect to their legitimate aspirations. The panchayat-as-jury might be an effective tool of social engineering, where people who would not otherwise associate with each other, would work together in the important task of achieving a just result in a dispute. Such steps could also harness the powerful flow of Hindu tradition, which is still a strong force in Nepalese society, by drawing on its strengths, for the greater good of all.

Let us begin our journey.

## **C. An introduction to Nepal**

### **(1) Geography and population**

Nepal is a landlocked country, having a geographical area of 147,181 square kilometers (about one-seventh the size of the province of British Columbia). In 2001 its population stood at 23,151,423,<sup>6</sup> approximately 85% of whom live in the rural areas.<sup>7</sup> India borders Nepal to the south, east and west, while to the north lies Tibet (China). Nepal has been

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<sup>6</sup> His Majesty's Government of Nepal, *Statistical Year Book of Nepal 2003*, (Kathmandu: Central Bureau of Statistics, 2003) at I [*Statistical Year Book*].

<sup>7</sup> *Ibid.* at IV.



divided into 75 political districts. Kathmandu, which has an area population of 1,081,845<sup>8</sup> is its capital.

## (2) Constitution

A constitution, based on the Westminster model, was promulgated by King Birendra on November 9, 1990.<sup>9</sup> It provides that the sovereignty of Nepal is vested in the Nepalese people and describes the country as a “multiethnic, multilingual, democratic, independent, indivisible, sovereign, Hindu and Constitutional Monarchical Kingdom.”<sup>10</sup> The Nepali language is the official language, although all of “the languages spoken as the mother tongue in the various parts of Nepal are the national languages of Nepal.”<sup>11</sup>

The 1990 Constitution sets out certain fundamental rights such as the right to equality, privacy, and the freedom of opinion and expression. However, people are only free to practice the religion handed down by their ancestors. Further: “no person shall be entitled to convert another person from one religion to another.” There are also certain defined rights in relation to criminal prosecutions, such as the right not to be prosecuted or punished for the same offence more than once, the right against self-incrimination, and the right to counsel.<sup>12</sup>

The Parliament consists of the King, the House of Representatives, and the National Assembly.<sup>13</sup> Elections determine the make-up of the two houses, apart from 10 members of the 60 member National Assembly who are appointed by the King.<sup>14</sup>

The 1990 Constitution contemplates a judiciary independent of the executive and legislative arms of the government. It calls for three tiers of courts: the District Court, the Appellate Court, and the highest court, the Supreme Court. Other tribunals and courts can be set up for hearing special types of cases.<sup>15</sup>

Nepal has also adopted many international treaties in the environmental, human rights, and other spheres including the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child.<sup>16</sup> The *Treaty Act*, 1991 provides that when there is a conflict between the provisions of a treaty and the laws of Nepal, the treaty provisions take precedence. However, unless a treaty

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<sup>8</sup> *Ibid.* at 9.

<sup>9</sup> *The Constitution of The Kingdom of Nepal*, 2047 (1990).

<sup>10</sup> *Ibid.* Article 4(1).

<sup>11</sup> *Ibid.* Article 6.

<sup>12</sup> References in this paragraph are to Articles in Part 3 of the Constitution.

<sup>13</sup> *Ibid.* Article 44.

<sup>14</sup> *Ibid.* Article 46(a).

<sup>15</sup> *Ibid.* Part 11.

<sup>16</sup> Sebastian Dumortier, “International Instruments of Human Rights and Humanitarian Law to which Nepal is a party”, an unpublished document of the HMG/UNDP Strengthening the Rule of Law Programme dated October 15, 2003.

provision has become part of the domestic law of Nepal, it would be difficult to enforce.<sup>17</sup> Further, treaty provisions would not override the provisions of the Constitution of Nepal.<sup>18</sup>

The country also has a comprehensive legal code which is now known as the Muluki Ain, which literally means 'law of the land'.<sup>19</sup> First promulgated in 1854, it has seen several amendments over the years, including major changes in 1963.

### (3) Diversity

One of the most significant characteristics of Nepal is the diversity of its geography and people.

In the northern third of the country is the mighty sweep of the Himalayan mountains, containing the world's highest peak, Mt Everest, as well as 8 of the 14 peaks whose summits tower above 8,000 meters. Settlements in this region can be found even above 3,600 meters, although few live in the harsh climate of this elevation. Nevertheless, the Sherpa people and other groups, who are mainly of Tibeto-Burman descent, raise cattle and crops in some parts of this forbidding territory. Tourism is a significant industry in a number of these areas.

The middle third of the country, where approximately 44% of the people live<sup>20</sup> is an area characterized by a jumble of hills and valleys, where the population outside the urban centres live off what they can produce from small terraced plots of land and from income earned by family members working in the cities or outside the country. Transportation in these areas can be extremely difficult, as many of the slopes are steep and unstable. The monsoon season almost inevitably brings tragedy from homes and fields being swept away by landslides and flooding. Roads are few and many villages are more than a day's walk from the nearest road.

If you visit Nepal, you might choose to trek through the Kali Gandaki valley, which is reputed to have the deepest gorge in the world. You eventually arrive at a place where you are flanked by the summits of Dhaulagiri (8167 meters) to the west and Annapurna (8091 meters) to east, which are within 40 kilometers of each other and tower over 5,800 meters above you. To arrive at this point you may have walked through an area containing the remains of ancient cave settlements as well as one of the Hindu's holiest shrines, Muktinath. You may have encountered a pilgrim from India along the trail, who has walked for weeks to see its holy flame.

Within a relatively short distance, only about 100 kilometers directly south of where you stood, you would find yourself in the southern third of the country. It is a flat plains area,

<sup>17</sup> Email communication from M. P. Sharma dated June 9, 2005.

<sup>18</sup> *C. Gyawali v. Cabinet Secretary and others*, 2058 Nepal Law Reporter, decision no. 7044, page 615 (Email communication from M. K. Dangol dated June 5, 2005).

<sup>19</sup> When it was first promulgated in 1854 it was simply referred to as the 'Ain' or 'law': see *supra* note 3.

<sup>20</sup> *Statistical Year Book*, *supra* note 6 at II.

for the most part only a few hundred feet above sea level. Until the threat of malaria was eliminated in the 1950s, only the Tharu people, who had an immunity to the disease could live here. Now it is the home of about 48% of Nepal's population<sup>21</sup> because of its fertile land and the employment opportunities which exist in Nepal's second largest city, Biratnagar and other industrial centres just north of the Indian border.

Within these diverse geographical areas live a rich abundance of animals, birds, insects, flowers, plants, and trees. Chances are that somewhere among the multi-varied settings you would find landscapes similar to one in your home country. Perhaps that is one of the reasons this region has attracted such an abundance of caste and ethnic groups over the centuries. The *2003 Statistical Year Book* lists over 100 of them.<sup>22</sup> In addition, over 90 mother tongues are set out.<sup>23</sup> Hindus make up the majority of the population (80.6%), while Buddhists (10.7%), Muslims (4.2%), Christians (.4%), and members of other religions comprise much of the balance.<sup>24</sup>

Tourism remains one of the main industries of Nepal, although it has been seriously affected by the Maoist insurgency. For example the number of tourist arrivals dropped from 463,646 in 2000 to 361,237 in 2001.<sup>25</sup> Other important industries include textiles and carpet manufacturing. Most of the population, however, make their living by agricultural production.

In 2002, Nepal ranked 140<sup>th</sup> out of 177 countries on the United Nations Development Programme's Human Development Index.<sup>26</sup> The life expectancy at birth is 59.6 years and the adult literacy rate is 44%.<sup>27</sup> However, the female adult literacy rate is only 26.4% (the male rate is 61.6%).<sup>28</sup> Nepal has only 5 physicians per 100,000 people (most of whom practice in the cities), compared to 187 for Canada, 279 for the United States, and 367 for Norway.<sup>29</sup> It is estimated that 17% of the population is undernourished.<sup>30</sup> The GDP per capita in 2002 was \$230.00 compared to \$29,480.00 for Canada and \$35,750.00 for the United States.<sup>31</sup>

#### (4) Some historical background

For many centuries, the area of Nepal consisted of small independent principalities and kingdoms, although there were periods of time when dynasties ruled large areas. Nepal was molded into a country in the mid to late 18<sup>th</sup> Century when the Kingdom of Gorkha,

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<sup>21</sup> *Ibid.* at II.

<sup>22</sup> *Ibid.* at 27-32.

<sup>23</sup> *Ibid.* at 21-26.

<sup>24</sup> *Ibid.* at 16.

<sup>25</sup> *Ibid.* at 111.

<sup>26</sup> United Nations Development Programme, *Human Development Report 2004* (Oxford: Oxford University Press, 2004) at 141.

<sup>27</sup> *Ibid.* at 141.

<sup>28</sup> *Ibid.* at 219.

<sup>29</sup> *Ibid.* at 156-58.

<sup>30</sup> *Ibid.* at 162.

<sup>31</sup> *Ibid.* at 184-86.

led by its king, Prithvi Narayan Shah, began its conquest of the other kingdoms. A Shah king has remained on the throne of Nepal ever since. King Gyanendra is the ruling monarch at present, who was elevated to the throne following the massacre of his brother, King Birendra and his family in June of 2001. The official version is that King Birendra's son, Prince Dipendra was the perpetrator, killing himself after murdering his mother, father, and other members of his family. Doubts remain, however, in the minds of some Nepalis as to what actually happened on that tragic evening.<sup>32</sup>

At the conclusion of the Gorkha conquests, Nepal was a much larger country geographically than what it is today. An unsuccessful war with the British from 1814 to 1816 led to a peace treaty under which Nepal lost about one-third of its territory. With the exception of an area ceded by the British to Nepal in the late 1850s (a reward for the help Nepal provided to the British in dealing with the Indian mutiny), Nepal's present borders have remained the same since that peace treaty was concluded.

Although Shah kings have continued to reign in Nepal until the present day, they had no real power from 1846 to 1951, during which time the Rana family ruled Nepal, treating the country as their own private fiefdom. The Rana Prime Minister was above the law and garnered for himself and his family any surplus revenues generated by the government each year. Nepal was virtually cut off from the outside world during this period, with only the British having a continual presence there. Little money was spent on education and improving the lot of the people.

A key point in understanding Nepal is that it has never been conquered<sup>33</sup> or colonized by an outside power. Prior to the 1950s, its culture and institutions had developed over many centuries with very little direct influence from the west. However, it was certainly susceptible to influence from its large southern neighbour, India and over the centuries Hinduism gradually became the dominant religion and cultural influence.

### **(5) Democracy in Nepal**

It was a time of great promise in Nepal. The Rana regime had been overthrown. The hero of the revolution, King Tribhuvan returned from India on February 15, 1951 and, three days later, announced that by the end of 1954, elections would be held for a constituent assembly, which, once elected, would draft the country's new constitution.<sup>34</sup> This promise was repeated several times by King Tribhuvan in subsequent years, but was left unfulfilled by the time of his death in 1955. In fact it remains unfulfilled to this

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<sup>32</sup> For a discussion of these doubts and why they have arisen see Aditya Man Shrestha, "Royal Massacre in Nepal – A Lingering Mystery" in D. B. Gurung, ed., *Nepal Tomorrow: Voices & Visions* (Kathmandu: Koselee Prakashan, 2003) 124 [*Nepal Tomorrow*].

<sup>33</sup> However, it could be argued that the war of 1814-16 was a partial conquest of Nepal, even though it was ended by a peace treaty.

<sup>34</sup> Deepak Thapa with Bandita Sijapati, *A Kingdom under Siege: Nepal's Maoist Insurgency, 1996 to 2003* (Kathmandu: The Printhouse, 2003) at 15 [*Kingdom under Siege*]. See also R. Andrew Nickson, "Democratisation and the growth of communism in Nepal" in *Understanding the Maoist Movement of Nepal* (Kathmandu: Martin Chautari, 2003) [*Understanding the Maoist Movement*].

day. Although there have been democratically elected governments in Nepal, elected representatives have never been entrusted with the task of drafting a constitution.

In February, 1959, King Mahendra promulgated Nepal's first constitution, but it had not been drafted by a constituent assembly (there had still been no elections to that point). Rather, it was largely based on a draft made by a British constitutional expert, Sir Ivor Jennings, which he prepared during a one month stay in Nepal as the King's guest. Significant powers were reserved to the King, as Sir Ivor notes in his letter of April 27, 1958 to Mr. F. S. Tomlinson of the British Foreign Office:

The draft is quite short and comparatively simple. Since there is nobody, apart from the King, around whose authority the Constitution could be built, the draft gives the King unusually wide powers, especially in the event of a partial or complete failure of constitutional machinery. I explained to the King that some of the proposed arrangements would be criticised as "undemocratic", but that I thought them necessary to prevent breakdown. I also said that, given the personal prestige which he seems to enjoy in the villages, it was possible to contemplate his playing a more active part than, say the Queen in the United Kingdom or the President in India, without running the risk of placing the Throne in jeopardy. It is, however, very difficult to draw conclusions after a mere month in Kathmandu, especially because opinions about the chances of the political parties are so diverse. The situation will probably become clearer after the elections, and in any case the King will need advice from H.B.M. Ambassador. I feel reasonably satisfied that the Draft, as it stands, will work: but I cannot guarantee that I have properly seised the local situation.<sup>35</sup>

Sir Ivor Jennings's frank admission of his limited knowledge of the local context highlights the difficulties facing a well-intentioned foreigner in a task of this kind, no matter how great his expertise in the area in which he is advising.

On December 15, 1960 King Mahendra used his wide powers under the 1959 Constitution to dissolve Nepal's first duly elected government. Several of its leaders were put in jail. King Mahendra promulgated a new constitution in 1962, which introduced a panchayat model of government. This method of governance was in place until 1990. Although the system changed to a certain extent over the years, it basically involved the election locally of the members of village level panchayats which had certain administrative and judicial powers. They were supervised by higher level panchayats, whose members were elected from among the members of the lower level panchayats. These higher level panchayats elected members to the Rastriya Panchayat, which was the highest governing body and also included representatives of certain organizations and nominees from the palace. This changed when direct elections to the Rastriya Panchayat were instituted in 1980.<sup>36</sup> However, the powers of the Rastriya

<sup>35</sup> Letter from Sir Ivor Jennings to F. S. Tomlinson dated April 27, 1958: located at National Archives (FO 371/135966) Kew, Surrey, England.

<sup>36</sup> John Whelpton, *A History of Nepal* (Cambridge: Cambridge University Press, 2005) at 101 [*History of Nepal*].

Panchayat were limited and ultimate control resided with the King, whose influence was strongly felt at all levels. This system of government barely survived a referendum in 1980.<sup>37</sup>

The panchayat system of government became increasingly unpopular during the 1980s, eventually leading to widespread unrest and demonstrations, which at times turned violent.<sup>38</sup> In April, 1990, King Birendra finally yielded to popular pressure and took steps which eventually led to the promulgation of a new constitution on November 9, 1990. This new constitution has remained in force without amendment. It was not the product, however, of deliberations among duly elected representatives of the people. The initial draft of the constitution was made by a Constitution Recommendations Committee (CRC) which was formed early on in the process. It was made up of a Justice of the Supreme Court and members appointed by the King on the recommendation of the Prime Minister. There were no women members of the committee. Some were constitutional experts. The others included representatives of the major political parties.

Before preparing the first draft of the constitution, the CRC engaged in extensive consultations. Ironically, it was a member of the Commission, Nirmal Lama, who spoke out against special concessions for ethnic groups:

Lama's approach proved persuasive within the Commission, not least because of his own status as a minority spokesman, and his arguments against any system of job reservation, ethnic constituencies or proportionate representation were accepted. Lama's main thrust was that minorities may not be better protected by a quota system as protection depended upon a consensus amongst the major political forces of the country.<sup>39</sup>

Accordingly, apart from the constitution declaring that Nepal, among other things, is a multi-ethnic nation, no specific provisions were included which might help to alleviate the marginalization of ethnic groups.

Deepak Thapa sums up the left's reaction to the 1990 Constitution in this way: "Although none too happy, the moderate left kept quiet. On the other hand, the radical communists and the country's various minority groups condemned the constitution outright since their respective demands for a constituent assembly and the recognition of a multiethnic Nepal went unfulfilled."<sup>40</sup>

What is a constituent assembly? I have not come across anything in the literature I have reviewed, elaborating on this term, apart from the following statement in the Maoist's proposal presented for consideration during negotiations, which followed a ceasefire in 2003: "The interim government will hold elections to a constituent assembly which will

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<sup>37</sup> Nickson, *supra* note 34 at 7.

<sup>38</sup> *Ibid.* at 9-15.

<sup>39</sup> Surya Dhungel, Bipin Adhikari, B. P. Bhandari, Chris Murgatroyd, *Commentary on the Nepalese Constitution* (Kathmandu: DeLF, 1998) at 39.

<sup>40</sup> *Kingdom under Siege*, *supra* note 34 at 35.

have representation from different classes, caste/ethnic groups, regions, sex and communities, and the constituent assembly will draw up and promulgate a new constitution.”<sup>41</sup> Accordingly, at least from the Maoist’s point of view, the idea behind a constituent assembly is that it would be an elected group of people which would be truly representative of the make-up of the nation.

## **(6) The Communist movement in Nepal**

### **(a) Introduction**

One cannot understand the situation in Nepal today without some knowledge of what the Maoists call the ‘people’s war’.

Although there is some dispute about this, it is generally regarded that the communist movement was founded in Nepal on September 15, 1949 when the first Nepali translation of the Communist Manifesto was made public.<sup>42</sup> A prominent feature of the communist movement in Nepal has been the number of splits and mergers which have occurred over time. Attempts to describe this phenomena has led to some rather complex flow charts.<sup>43</sup>

The largest communist party, Communist Party of Nepal (United Marxist-Leninist) has remained in the mainstream of politics in Nepal. It has even formed the government on one occasion on its own. On other occasions it has been a coalition member of the government.

The party behind the Maoist insurgency today is the Communist Party of Nepal (Maoist). Initially, the CPN (Maoist) and its political wing United People’s Front Nepal (which was dissolved in 2000) were part of the political mainstream. In fact the UPFN garnered 5% of the popular vote and won 9 of the 205 seats in the House of Representatives following the first election under the 1990 constitution, held on May 12, 1991. This made them the third largest party in Parliament. This changed in 1994, when the UPFN boycotted the mid-term elections and “found themselves out on the street.”<sup>44</sup> Nevertheless, as far back as 1991 the CPN (Unity Centre), a predecessor of the CPN (Maoist), had passed a resolution that a ‘people’s war’ should be launched to achieve the party’s goals.<sup>45</sup>

### **(b) Leadership**

There are two main leaders of the Maoists, Pushpa Kamal Dhal alias Prachanda, who heads up the CPN (Maoists) and Baburam Bhattarai, who, following the recent resolution of his differences with Prachanda, once again holds senior positions in the party.

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<sup>41</sup> *Ibid.* at 201.

<sup>42</sup> *Kingdom under Siege*, *supra* note 34 at 20.

<sup>43</sup> See for example, *ibid.* at 44.

<sup>44</sup> C. K. Lal, “Nepal’s Maobaadi” in *Understanding the Maoist Movement*, *supra* note 34 at 137.

<sup>45</sup> *Kingdom under Siege*, *supra* note 34 at 43.

Prachanda was born in the Himalayan foothills on December 11, 1954, where his father worked as a farm hand. Apparently, Prachanda did well in school and impressed his teachers. A defining moment in Prachanda's life is described as follows:

Prachanda describes himself as an easy-going, fun-loving school-boy who sang and danced and played football, volleyball, and kabaddi. 'But one day I saw a moneylender insulting my father. My father fell at the moneylender's feet. But the moneylender kicked him. It lit a fire inside me. It was a political lesson I never forgot. It changed the course of my life.'

Despite his leftist leanings, after graduation Prachanda worked for USAID for a few months before plunging full time into politics.<sup>46</sup>

Prachanda is known as a superb organizer and a charismatic leader. So far at least he seems to be in control of the CPN (Maoists) although there have been serious differences between Prachanda and Bhattarai in the past.

Bhattarai is gifted intellectually and is one of several examples of Nepalis who have emerged from humble beginnings in the hills and achieved scholastic success. In 1970, he finished first in the National Board examinations which follow the completion of the 10 years of basic schooling offered in Nepal. About 18,000 students took the exam that year. Bhattarai went on to obtain a bachelor's and master's degree in 1977 and 1979 respectively, in the areas of architecture and planning. In 1986 he obtained a Ph.D from the prestigious Jawaharlal Nehru University in New Delhi. It is interesting to note that both Prachanda and Bhattarai, who champion the causes of the lower castes and marginalized groups, are upper caste Brahmins.

Bhattarai describes his background in this way:

As per your query about my individual background, you can take me as a typical representative of a Third World educated youth of peasant background, who finds the gross inequality, oppression, poverty, underdevelopment and exploitation of the overwhelming majority of the population in a class-divided and imperialism-dominated world just intolerable, and grasps Marxism-Leninism-Maoism as the best scientific tool to change it positively.<sup>47</sup>

Bhattarai has written extensively<sup>48</sup> and is deeply concerned about social injustice in Nepal. He was not content to adopt an academic lifestyle and simply write and lecture about his observations and views. He concluded that the injustice in the country could only be corrected through the "barrel of a gun", rather than by the free exchange of ideas.

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<sup>46</sup> SNM Albdi, "Power Play" in *Understanding the Maoist Movement*, *supra* note 34 at 386.

<sup>47</sup> Interview with Baburam Bhattarai entitled "Maoists Seek a Democratic Nepal" in *Understanding the Maoist Movement*, *supra* note 34 at 329.

<sup>48</sup> See for example his latest book: *The Nature of Underdevelopment and Regional Structure of Nepal: A Marxist Analysis* (Delhi: Adroit Publishers, 2003).



### (c) The 'people's war'

The proclamation of the 'people's war' in Nepal in February, 1996 went largely unnoticed.<sup>49</sup> At that time most people did not anticipate that any group would be able to mount a serious challenge to the government from outside the democratic system. After all democracy was still in its infancy in Nepal - it was only about five years old. Wasn't more time needed to see if it would be effective in dealing with the problems facing Nepali society?

The UPFM, however, were not prepared to wait. They delivered a 40 point demand to Prime Minister Deuba on February 4, 1996. It concluded with the following sentence: "If there are no positive indications towards this from the government by February 17, 1996, we would like to inform you that we will be forced to adopt the path of armed struggle against the existing power."<sup>50</sup>

One of the central demands was that a new constitution be drafted by elected representatives.<sup>51</sup> Other demands included the closing of the Gurkha recruiting centres; restricting foreign cultural, economic, and political influence in Nepal; abolishing the Royal family's special privileges; making Nepal a secular nation; and, ending discrimination based on caste, gender, and ethnicity. For example, the Maoists demanded that where "ethnic communities are in the majority, they should be allowed to form their own autonomous governments."

The ultimatum was largely ignored and the 'people's war' was launched on February 13, 1996 by the ransacking of three police outposts and the office of the Agricultural Development Bank, located in a small village in the Gorkha district. No-one was killed in these incidents.<sup>52</sup>

Since that time, the CPN (Maoists) whose tactics, on occasion, have been barbaric,<sup>53</sup> have taken control of large sections of the rural areas. They have set up their own governments and judicial systems in some of the areas they control.<sup>54</sup> The success of the

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<sup>49</sup> *Kingdom under Siege*, *supra* note 34 at 85. See also Arjun Karki and David Seddon, "The People's War in Historical Context" in Arjun Karki and David Seddon, eds. *The People's War in Nepal: Left Perspectives* (Delhi: Adroit Publishers, 2003) at 23 [*People's War*]. I cannot recall reading or hearing about the declaration while I lived in Nepal.

<sup>50</sup> *Kingdom under Siege*, *supra* note 34 at 194.

<sup>51</sup> *Ibid.* at 191.

<sup>52</sup> *Ibid.* at 48-50.

<sup>53</sup> *Ibid.* at 131-32 and 162. For a description of the many and frequent human rights abuses on both sides, see an article published by Amnesty International, "Nepal: A Spiraling Human Rights Crisis" in *Understanding the Maoist Movement*, *supra* note 34 at 261. See also Manjushree Thapa, "The War in the West" in *ibid* at 315 and Informal Sector Service Centre (INSEC), *Human Rights Yearbook 2004* (Kathmandu: INSEC, 2004)[INSEC] where the following is reported: "The Maoists also continued attacks and murdered many unarmed security personnel and their families, workers and leaders of political parties and ordinary citizens. INSEC has recorded many instances where the victims were tortured before being killed." (page 9).

<sup>54</sup> *Kingdom under Siege*, *supra* note 34 at 106-09. For an article on how the 'people's war' has affected the Kham Magar ethnic group see Anne de Sales, "The Kham Magar Country, Nepal: Between Ethnic Claims

Maoist movement has generated extensive literature in Nepal which provides an in-depth analysis of the history and present structure of the Maoist movement. The leaders have also been interviewed by journalists on several occasions with those interviews published on the Maoist's websites<sup>55</sup> and elsewhere.<sup>56</sup> What follows are observations and conclusions which I have drawn from my review of some of that literature.

The Maoists have found their greatest support among women, ethnic groups, and lower castes, who have historically borne the brunt of discriminatory laws and practices in Nepal.<sup>57</sup> The grinding poverty in some of the more isolated rural areas has also provided fertile ground for revolution. However, such wide-spread discrimination has always been present in Nepal, and the government and the courts were at least taking some steps to correct the problems. Some progress was being made and it is obvious that solutions can not be found to wide-spread poverty and systemic discrimination overnight. What then triggered what has so far been a highly successfully revolution in the rural areas?

No doubt the capable and motivated leadership of the Maoists is a factor. They carefully studied the situation in Nepal, and sought to learn from the experience of other revolutionary movements, including the Shining Path guerrillas in Peru. The 'people's war' has been planned meticulously, and according to the Maoists has already moved through the first two stages of a guerrilla movement described by Mao (strategic defence and strategic stalemate) into the stage where the movement takes the offensive and achieves victory.<sup>58</sup> On the other hand, with respect to the government of Nepal: "One of the tragedies of post-1990 Nepal has been the unstable politics at the centre which saw twelve changes of government between 1991 and late 2002."<sup>59</sup>

There is also widespread resentment, especially among marginalized ethnic groups that the Brahmin/Chhetri caste group, which makes up about 28.5% of the population controls a disproportionate share of the wealth and positions of power in the country.<sup>60</sup> People in the rural areas also perceive that the lion's share of development expenditures benefit the urban areas and those living within them - even if the stated goals of the projects are focused on alleviating poverty in the rural areas. The population is also becoming better educated but, especially with the economy reeling from the effects of the Maoist uprising, there are few opportunities available for youth completing advanced education.<sup>61</sup> Baburam Bhattarai describes the situation in this way:

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and Maoism" in *Understanding the Maoist Movement*, *supra* note 34 at 59. The author says this at page 59: "It is the Kham Magars' 'country' that has turned out to be the stronghold of the 'people's war' launched four years ago by the revolutionary Maoist movement. The life of the Kham Magar has been turned upside-down by this, and many of them have died." For a description of the state of the low caste Dalits in Nepal see Padma Lal Bishwakarma, "Dalit as the Victim of Caste System and Untouchability in Nepal" in *Nepal Tomorrow*, *supra* note 32 at 316.

<sup>55</sup> [www.insof.org](http://www.insof.org) and [www.cpnm.org](http://www.cpnm.org)

<sup>56</sup> See for example *Understanding the Maoist Movement*, *supra* note 34; and, *People's War*, *supra* note 49.

<sup>57</sup> *Kingdom under Siege*, *supra* note 34 at 74-79.

<sup>58</sup> *Ibid.* at 98-99.

<sup>59</sup> *Ibid.* at 87.

<sup>60</sup> *Ibid.* at 74-79.

<sup>61</sup> *Ibid.* at 80-81.

How do you expect social peace and harmony to prevail in a socio-political system which increasingly generated poverty, unemployment, illiteracy and all-round underdevelopment for more than ninety per cent of the toiling population in mostly rural areas and filthy richness and extravagance for a handful of parasitic classes in rural and urban areas?<sup>62</sup>

The brutality and the arbitrariness of the state's response to the insurgency has also helped the rebel's cause. Two significant police operations, one in 1995 and the other in 1998, alienated large segments of the population as a result of the indiscriminate rapes, killings, and torture that characterized such operations.<sup>63</sup>

The Maoists have also set up their own taxation system, which is operating in both the urban and rural areas. People dare not refuse a request for a 'donation'. If they do they run the risk of torture or death. As a Nepali friend of mine advised me, when the Inspector General of Police and his wife and bodyguard were murdered by the Maoists on the streets of Kathmandu, everyone realized that no-one could be protected from Maoist's reprisals for failure to do their bidding. Accordingly, it is likely a rare event when someone refuses to provide a donation to the Maoists, even if they live outside the Maoist strongholds.

The scope of human rights abuses by the Maoists and the State cannot be comprehensively described:

The level of abuse in terms of executions, disappearances, torture, maiming and use of civilians and child soldiers in the combat can only be speculated on because human rights groups, the media, and others have hardly monitored the events on the ground. There is no comprehensive data to confirm the level of human rights abuses.<sup>64</sup>

INSEC concluded that, in 2002 and 2003 alone, 4,514 people had been killed by the security forces and 1,997 by the Maoists.<sup>65</sup> They have also reported many instances of torture, mutilation, assaults, rapes, and other forms of human rights abuses by both sides of this tragic conflict.

Thapa writes: "On December 2002, Amnesty International condemned both the government and the Maoists for committing grave human rights violations. While it accused the Maoists of killing around 800 civilians, it maintained that half of the killings by security forces since November 2001 might have been unlawful".<sup>66</sup>

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<sup>62</sup> Interview with Baburam Bhattarai entitled, "The Phobia of Guerilla War is Hounding the Reactionaries" in *Understanding the Maoist Movement*, *supra* note 34 at 44.

<sup>63</sup> *Kingdom under Siege*, *supra* note 34 at 48 and 90-94. See also *People's War*, *supra* note 49 at 20-21 and 24-25.

<sup>64</sup> *Kingdom under Siege*, *supra* note 34 at 151 [footnote omitted].

<sup>65</sup> INSEC, *supra* note 53 at 10.

<sup>66</sup> *Kingdom under Siege*, *supra* note 34 at 150.

There is now an ordinance in effect<sup>67</sup> under which a security officer can arrest and detain a person if that security officer believes, on appropriate grounds, that the person might become involved in terrorist activities.<sup>68</sup> Under that law a person, once arrested can be held for up to a year before that person must be brought before the court.

The following paragraphs capture the deep despair that most Nepalis feel about the present situation:

The quality of life in the Nepali midhills has considerably deteriorated this past half-decade. In some parts, Maoists are in control, elsewhere bandits are masquerading as insurgents. The politicians visit their villages and districts no more. Local fairs, ceremonies and rituals have been abandoned, perhaps never again to be revived fully. The blasts of musketry to herald Dasain celebrations and other joyous occasions will be heard no more as guns kept as heirlooms from as far back as the war with the British (1814-16) are surrendered by villagers to the authorities (that is, those still remaining after the rebels' appropriations). Families leave their homesteads to live as refugees in roadhead settlements [sic], and young men flee to work as ever-cheaper menial labour in India, the Gulf and Southeast Asia.

If the Maoist strategy is to wreck the economy and plunge the nation into chaos, they have succeeded in large measure. Vital infrastructural installations are being destroyed, the tourism industry is more or less in its death throes after the attack on the Lukla airstrip, which reverberated around the globe. The garment industry is a skeleton of its old robust self, and every aspect of production and industry is producing at a fraction of its capability. There are no more investors coming in to Nepal, and only foreign aid, remunerations from expatriate labour, and financial reserves accumulated in past years have kept the economy standing, but not for much longer. More and more money is being siphoned from development into fighting the insurgency, and development works are at near standstill.<sup>69</sup>

The country is now teetering on the brink of collapse. It is difficult to predict what the eventual outcome of this crisis may be. On February 1, 2005, King Gyandra declared a state of emergency,<sup>70</sup> seized power, suspended several freedoms under the Constitution, and imposed drastic limits on the freedom of the press. It is even more difficult now to gain a sense of what is happening throughout the country, although one thing is admitted by both sides - that the bloodshed continues.

The words of Aristotle, written 1400 years ago, ring true for the situation in Nepal today:

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<sup>67</sup> *Terrorist and Destructive Activities (Control and Punishment) Ordinance*, 2061 promulgated on October 13, 2004.

<sup>68</sup> Email from M. K. Dangol dated February 20, 2005.

<sup>69</sup> Deepak Thapa, "Erosion of the Nepali World" in *Understanding the Maoist Movement*, *supra* note 34 at 255.

<sup>70</sup> The state of emergency was lifted on April 29, 2005.

Man, when perfected, is the best of animals; but if he be isolated from law and justice he is the worst of all. Injustice is all the graver when it is armed injustice; and man is furnished from birth with weapons which are intended to serve the purposes of wisdom and goodness; but which may be used in preference for opposite ends.<sup>71</sup>

The Nepali people are now the unfortunate victims of armed injustice.

In early January, 2003, I visited the Khimti hydroelectric project (in which UMN related companies had been involved) with one of my sons and one of my daughters. I had not seen it finished – I had left Nepal during the course of construction. We walked down the picturesque Khimti valley, one of my favourite treks, staying the first night in a village house part-way along the trail. The next day we toured the dam-site and then made our way through terraced fields to the powerhouse-site, several kilometers downstream. In the afternoon, as we neared the end of our trek, groups of Nepali children passed by us, returning to their village after school. As they walked by, neatly dressed in their school uniforms, many of them would stop, arch their shoulders back and with wide smiles on their faces greet us with an enthusiastic, “Good Afternoon”. Perhaps they had been practicing how to greet foreigners in their school that afternoon, although it is not uncommon to have a friendly welcome from people in the rural areas. As we looked beyond their wide grins and bright and cheerful faces, we could see machine gun nests and the barbed wire that surrounded the powerhouse-site and an army encampment. A soldier stood in the nearest machine gun nest, ready to repel any Maoist attack on this important part of Nepal’s infrastructure. It left us with a sad feeling as we completed our journey. The cheerful innocence of those schoolchildren against the backdrop of the machinery of death and violence tragically highlighted what had happened to a once peaceful country.

## **(7) The legal system in Nepal since 1951**

### **(a) Introduction**

Nepal’s legal system is an interesting mix. As will be discussed below, its roots are firmly planted in the classical Hindu legal tradition. During the 1950s and 1960s, a British-style adversary system was developed for resolving disputes. Some writers suggest that Nepal’s wide-ranging legal code, first promulgated in 1854, was inspired by the French Napoleonic code – at least insofar as its comprehensive nature is concerned. There is legislation in place in a number of areas, based on western models. Traditional means of resolving disputes, where local customs are applied, appear to be still common in the rural areas. The ‘people’s courts’ deal with most of the disputes in the areas controlled by the Maoists.

The revolution in 1951, which ended the rule of the autocratic Rana regime brought changes in the legal system:

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<sup>71</sup> Aristotle, *Politics*, trans by Ernest Barker (Oxford: Oxford University Press, 1995) at 11-12.

After the dramatic events of 1951, Nepal shifted the basis of its legal system from the historical model of Hindu law to the unfamiliar and untried principles of a model built largely on norms of British law and constitutional practice. The pace of this constitutional reform, and the "westernisation" of the legal system, was driven by a desire to eliminate the non-democratic feature of previous indigenous systems in favour of what were widely regarded as being the more appealing features of democratic systems of law, justice and administration. This thrust led to a complete change in the nature and status of the Hindu state.<sup>72</sup>

Lawyers rarely appeared in the courts under the Rana regime. That changed, however, after the revolution.<sup>73</sup> There was at least one note of protest regarding the changes which occurred after 1951.<sup>74</sup>

### (b) The Maoist factor

As a result of the widespread use of the 'people's courts', the number of cases being dealt with in the District Courts have dropped considerably: "In the period mid-July 2001 to mid-July 2002 some 71,000 cases were filed in the different courts in 75 districts and this has dwindled to a mere 58,000 in the period of one year from mid-July 2002 to mid-July 2003."<sup>75</sup>

It is impossible to obtain more than a glimpse of how the Maoists are dealing with civil disputes. As far as I am aware, no studies have been done and there are only isolated reports of how the Maoist's dispute resolution mechanisms function. It will have to

<sup>72</sup> Dhungel and others, *supra* note 39 at 22.

<sup>73</sup> Laxman Aryal, "Evolution of Nepalese Legal Profession." in Surya P. S. Dhungel, Pushkar M. Bajracharya and Bhuban B. Bajracharya, eds. *Readings in the Legal System of Nepal* (Delhi: Laws Publication, 1986) 137.

<sup>74</sup> Rewati Raman Khanal, "Historical Perspective of Judicial Tradition in Nepal" in *ibid* at 154. This interesting article traces the history of the legal tradition of Nepal. I say tradition as the author deals more with the underlying principles than the outward structure of the legal system. He notes on page 158: "Judicial administration at the lowest level in different communities was conducted by the local people of respective communities in accordance with their customs and traditions. Hence, different names were given to such local bodies by them based on the nature of cases concerned." On page 159, he indicates that, under Hindu tradition justice flows from the king. Regarding access to justice, he writes on page 160: "In the judicial system of Nepal, the door of justice is always open to those who are in need. Before 1903 B.S. [1846] people used to go to the door of Royal Palace or King's court of local judicial bodies. They used to listen to the people's complaints. If they were out of their jurisdiction they would refer such cases to the lower courts concerned. They would not be simply rejected as is done these days." And later, on the role of the judge: "The judicial tradition is that the judge must be cleverer than both the plaintiff and the defendant. But this point is getting increasingly weak due to the emergence of the legal practitioners in the decision making process. Judges no longer need to go into the depth of the issues; he gives verdict on the basis of legal arguments presented by the lawyers representing the parties concerned. And advocates in turn charge fees. This means, now the plaintiff/defendant has to be very watchful. There is lack of lawyers in hill areas, and in urban areas the fee of the lawyers is very high. These things are against the judicial tradition of Nepal." This is the only note of protest I have found thus far against the changes in the role of the judge and the introduction of lawyers into the system following the revolution in 1951.

<sup>75</sup> INSEC, *supra* note 53 at 41.

suffice to extract some comments and descriptions from some of the articles I have reviewed.

In her article regarding the impact of the 'people's war' on the Kham Magar ethnic group, Anne de Sales writes:

The senior men of the clans would hold a meeting at the headman's house in the presence of the parties to the dispute, and the difference would be discussed and settled. Villagers rarely resorted to the state's legal institutions in the district capital. Nowadays disputes of this sort very quickly move out of the control of the protagonists themselves. The Maoists get hold of it and send their hooded guerillas (chhapamar) to kill the 'class enemy' who has made a 'false accusation'.<sup>76</sup>

In an article on the role of women in the Maoist movement in Nepal, there is the following description of the workings of a people's court:

In Surkhet district the people tell of a Maoist people's court. An all-women guerilla unit with the area commander came to a village at 10 p.m to hold court. On trial was a husband who was habitually drunk and mercilessly beat his wife. He was warned. Everyone was told to bring out their bottles of raksi, locally made and purchased. The bottles bought were to be returned to the shop. The Maoists would warn the shopkeeper. The home-brewed alcohol was destroyed after keeping some aside for medicinal and ritualistic purposes. A homily was delivered on the ill effects of alcohol, and the linkage between alcohol, immiserisation, wife beating and illiteracy explained. After holding an adult literacy class, they left.<sup>77</sup>

C. K. Lal offers the following assessment of Maoist justice:

But as instances of extortion grew and standards of behaviour of Maoist cadres fell, an impression was created in the society that Maobaadis were no different from other run-of-the mill politicians except the fact that their cadre was more organised, more ruthless, and they had the power of the gun to settle all scores-political or otherwise. The advantage of instant justice that Maobaadis had promised turned out to be even more tyrannical than the slow pace of justice dispensed by conventional courts – in an extreme example, local cadres uprooted a jack-fruit tree when a case of its contested ownership was brought to the 'people's court' run by Maobaadis.<sup>78</sup>

A more positive spin is reflected in the following sympathetic account:

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<sup>76</sup> de Sales, *supra* note 54 at 81.

<sup>77</sup> Shobha Gautam, Amrita Banskota and Rita Manchanda, "Women in the Maoist Insurgency in Nepal" in *Understanding the Maoist Movement*, *supra* note 34 at 107.

<sup>78</sup> Lal, *supra* note 44 at 141.

Yet another attraction of the Maoists is their mobile court system. Their People's Courts hear complaints at the grassroots and give verdicts instantaneously. 'Cases are immediately settled in the people's courts, unlike in regular courts, which are time-consuming as well as costly. This is the reason why people are being attracted to the Maoist justice system', commented advocate Saroj Upreti of Dolakha. The rate of case registration reportedly decreased in district courts following the Maoist announcement of handling cases through their people's courts. Space Time Daily has quoted a Maoist source as saying the People's Court in Dolakha settled a case that had been pending for 14 years, within a day. It was a land case and the victim was poor and disabled. For the victims, tired of the slow pace of regular courts, Maoist mobile courts give a sense of relief, and People's Courts are the only judicial forums available for the poor, who cannot access the expensive judicial forums provided under the rubric of the regular court system.<sup>79</sup>

In an article written by an American journalist, Li Onesto, regarding what she observed during her extensive travels with the Maoists in early 1999, we are introduced to Maoist justice with this description:

The party led the people to form 3-in-1 committees made up of people from the party, the people's army and the mass organisations. These new committees have been given authority to judge and settle various disputes among the people – like arguments over land, disputes over debts, cases where a husband is beating his wife, divorce, etc. More and more people have taken cases to be judged before these revolutionary united front committees. And the masses have also used these new forms of revolutionary power to deliver justice to enemies of the people. For example, the people will struggle with spies and snitches and warn them to stop helping the police. But if these bad elements persist in their counter-revolutionary activity the 3-in-1 committee will decide they should be punished. And in some cases if what these people have done has resulted in the death of someone, they might be killed.<sup>80</sup>

She goes on to report that, in the Rolpa district no cases are being brought to the government courts, while on "the area and district level there have been about 700 cases brought before the people's court. At the village level there have been a couple of thousand cases."<sup>81</sup>

The Human Rights Yearbook 2004 includes the 'people's courts' in the list of challenges facing the official court system: "The Judiciary faces another challenge today – the so-called "people's courts" set up by the Maoists. Delays in the legal process continue to

<sup>79</sup> Mukunda Kattel, "Introduction to 'The People's War' and Its Implications" in *People's War*, *supra* note 49 at 54-55.

<sup>80</sup> Li Onesto, "Report from the People's War in Nepal" in *Understanding the Maoist Movement*, *supra* note 34 at 161.

<sup>81</sup> *Ibid.* at 164-65.



deprive many of their right to justice. In addition the Maoists have also prevented many people from seeking justice at the courts.”<sup>82</sup>

In the Maoist’s policy document, which describes their vision for Nepal, the nature of the justice system is only briefly described:

17. All laws, orders and judicial systems of old reactionary state that exercise exploitation-oppression on the people shall be declared null and void. New laws and directives favourable to the cause of the people shall be issued and people’s democratic judicial system shall be founded.

18. People’s Courts at various levels shall be constituted in order to impart justice to the people. Its office-bearers shall be appointed by House of People’s Representatives of the concerned levels and they shall be responsible to them...

20. All organs of the state should follow revolutionary working style of honesty, simplicity and service to the people and they should strongly oppose red tape, corruption and extravagance.<sup>83</sup>

Based on these reports, it appears that the Maoists dispute resolution techniques are highly informal, speedy, simple, cheap, and ideologically driven. In other words the rule of law is not present, but the rule of ideology. If you are a landlord or a money lender, it may well be suicidal to resort to the ‘people’s court’ against a tenant or borrower from among the poor. The outcome appears to be dependent to a large extent on the broad views of the Maoists as to what makes up a just society, as opposed to what principle of law should be applied in the circumstances of the case. There is no concept of an independent judiciary. The ‘people’s courts’ are seen as an arm of the party, as a means of advancing the party’s agenda.

### **(c) Feminist perspectives**

There have also been attacks on the legal system from a feminist perspective:

Women in Nepal are virtually second-class citizens...Nepal has been constitutionally declared as a Hindu Kingdom. Hindus made up the religious majority and as such Nepal’s legal framework is largely shaped in accordance with the Hindu Orthodox value system. Understandably, virtually every aspect of Nepalese society is influenced or guided by Hindu beliefs, values and social morals. Women’s independent personality is denied by the legal system of Nepal. Women’s sex or marital status determines their legal position. Women’s life in a

<sup>82</sup> INSEC, *supra* note 53 at 4. Apart from Maoist control, distance is also a problem. The nearest District Court can be several days walk away from a village.

<sup>83</sup> Communist Party of Nepal (Maoist), *Common Minimum Policy and Programme of United Revolutionary People’s Council, Nepal* accessed from [www.insof.org](http://www.insof.org) on January 4, 2005.

Hindu culture, from crib to cremation, is circumscribed, regimented, exploited, caged, consumed, and destroyed by a religion-poisoned society.<sup>84</sup>

However, things are changing. The courts are becoming more progressive in dealing with gender discrimination. Reform efforts are also targeting this area. As a result of the eleventh amendment to Nepal's legal code in 2002, there are very few provisions left in the law which discriminate against women.<sup>85</sup>

Although I am proposing that Nepal look to its own tradition for ideas in the area of judicial reform, I am not suggesting that any approach be adopted which is discriminatory or contrary to equality rights. As has already been pointed out, on page 3, above, the use of a jury may help to eliminate discrimination and promote equality.

#### **(d) A view from the bench**

Kalyan Shrestha, a justice of the Court of Appeal has recently written a very frank assessment of the legal system in Nepal.<sup>86</sup> He notes that the courts tend to be too slow, too expensive, and generally out of reach:

Of all accusations leveled against the courts, delay in delivery of justice seems to be prominent. Firstly, a great majority of the people are either unaware or unable to bring their cause to the court and secure justice. Secondly, the procedures adopted by the court are so cumbersome that the litigant loses his taste and ambition by the time the case is finally disposed of. It is not a matter of weeks or months, but of years and even decades, that the litigant shall have to forbear to persist on his thirst till justice is finally done. Delay has been a curse of our judicial system and is what also saps this confidence in the judicial system as a whole.<sup>87</sup>

He attributes at least some of the difficulty to the British-style adversary system which has been adopted:

Some of the problems on the road to an expeditious delivery of justice are associated with the inefficient operation of the adversary system. We have a very advanced law of evidence which is like a copy of English law. But due to the lack of infrastructures, it has not worked well...<sup>88</sup>

Something urgently needs to be done to make law of procedure suitable to the living realities of our society. How far the present role of a judge as an umpire between the parties to a suit, an attribute of the adversely [sic] system, is suitable

<sup>84</sup> Yubaraj Sangroula and Geeta Pathak, *Gender and Laws – Nepalese Perspective* (Kathmandu: Pairavi Prakashan, 2002) at 3-4 [footnote omitted].

<sup>85</sup> Email from M. P. Sharma dated June 9, 2005.

<sup>86</sup> Kalyan Shrestha, "Harnessing the Capabilities of Judiciary to Meet Challenges for Expeditious Delivery of Justice" in *Nepal Tomorrow*, *supra* note 32 at 344.

<sup>87</sup> *Ibid.* at 352-53.

<sup>88</sup> *Ibid.* at 353.

and in conformity with our cultural values, and how far the law of evidence has helped us to bring justice to a right course, should be critically examined, and a definite direction for the future should be set forth...<sup>89</sup>

The laws are Nepali and of the Nepali people, and so this has to be understood and applied in a comprehensive way. We cannot just caricature what the West did on similar occasions. Because our condition is not like that of the West. Let us invoke our indigenous talent to find solutions to our problems.<sup>90</sup>

There is certainly widespread agreement in Nepal that significant changes are needed in the justice system. Some of the efforts at reform are described in the next section.

#### **(e) Reform efforts**

The *Local Self-Governance Act* was passed by Parliament in 1999. It provides that three person arbitration boards, made up of selected local individuals, will mediate and, if necessary arbitrate certain kinds of disputes at the local level. Although this grass roots type of dispute resolution process enjoys widespread support,<sup>91</sup> it has not yet been put into effect because elected local bodies are needed for its implementation.<sup>92</sup> Because of the Maoist uprising, it is not possible to hold elections for such local bodies.

There has also been concerns expressed that there is no provision for ensuring that the arbitration board has either a member with knowledge of what law to apply and how to conduct the process fairly or an appropriate level of guidance in that regard.<sup>93</sup> In addition, experiments with somewhat similar kinds of decision-making approaches, through local bodies under Rana, panchayat, and democratic regimes met with limited success because of the politicization of the process (among other reasons), although such local bodies did not have the independence from the administrative process that arbitration boards under the *Local Self-Governance Act* will enjoy.<sup>94</sup>

The United Nations Development Program is funding a project called the "Strengthening the Rule of Law Programme" which is seeking to improve Nepal's justice system in several ways. Its objectives include the drafting of a comprehensive civil code and criminal code which would be free of discrimination; providing assistance to the courts to make them more efficient and effective; and, the pilot-testing of local arbitration boards. As the project's pamphlet states, it is "designed with the two basic strategies of making

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<sup>89</sup> *Ibid.* at 362.

<sup>90</sup> *Ibid.* at 366.

<sup>91</sup> Reliance Law Firm, *Legal Study on Arbitration Board*, submitted to His Majesty's Government of Nepal, Ministry of Law, Justice and Parliamentary Affairs under the Strengthening the Rule of Law Project, UNDP-NEP/00/011, undated [*Arbitration Board Study*].

<sup>92</sup> Email communication from M. P. Sharma dated June 9, 2005.

<sup>93</sup> *Supra* note 91 at xii and 42-45. See also Madan Kumar Dangol, "Judicial Power of Local Bodies under Local Self-Governance Act, 1999: Problems and Prospects" unpublished seminar paper submitted to Faculty of Law, Tribhuvan University in 2003 in Master of Laws programme at 3, 32, 35, 39 & 40.

<sup>94</sup> Dangol, *supra* note 93 at 3, 30-32.

justice accessible to all, especially the poor, women and other disadvantaged people, and enhancing the competency of the legal sector.”

The project conducted a study in the Bardiya, Dhankhuta, and Kaski districts in order to determine how disputes were being dealt with at the grass roots level within those areas and how the way of resolving disputes under the *Local Self-Governance Act* would be regarded. A detailed questionnaire was used as part of the study which was directed to lawyers, judges, litigants, political leaders, and others. The information from the responses is set out and analysed in the Arbitration Board Study.<sup>95</sup>

The study team made a number of findings, conclusions, and recommendations including that disputes in the areas studied were, for the most part, being dealt with informally at the local level through the use of relatives, trusted officials, and traditional dispute resolution mechanisms; that mediation was the usual method employed to resolve a dispute; that the local methods of dispute resolution were, for the most part, working well; and, that the majority of people thought the ‘mediation/arbitration’ concept under the *Local Self-Governance Act* would be welcome and useful, since the people prefer to avoid, if at all possible, the ‘winner take all’ approach of the adversary system.

The authors describe the resulting challenge in this way: “There are many informal and indigenous dispute settlement mechanisms operating in the study districts. The findings of the field study support the above statement. The challenges however are how to give formal recognition to these indigenous institutions within the framework of decentralization.”<sup>96</sup> The authors are firmly of the view that, with some improvements, the ‘mediation/arbitration’ approach under the *Local Self-Governance Act* should work well at the grass roots level and avoid the pitfalls of the past.<sup>97</sup>

One certainly has to use caution in reaching conclusions, with respect to the country as a whole, based on data obtained from areas within three districts. However, it appears to be generally acknowledged that the official court system has not been utilized in many areas of Nepal as the means of resolving disputes for a number of reasons, including delay, cost, distance,<sup>98</sup> the foreign nature of the courts, and corruption.

#### **(f) Corruption in the judicial system**

There is no dispute that corruption is a serious problem in the Nepalese judicial system. It is a common theme in the literature which discusses the challenges the nation is facing. The following are just two examples.

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<sup>95</sup> *supra* note 91.

<sup>96</sup> *Ibid.* at 23.

<sup>97</sup> Dangol, *supra* note 93 shares this view as well.

<sup>98</sup> See *supra* note 82.

In a recent article,<sup>99</sup> Mihir Kumar Thakur outlines the history of corruption in Nepal and the efforts which have been made to overcome the problem. After reviewing the statutory provisions in place for dealing with corruption and their enforcement in the courts, he concludes: "The decisions of the Supreme Court in corruption cases are not very encouraging. Some decisions of the Court completely frustrated the efforts of anti-corruption agencies like CIAA and SPD."<sup>100</sup> At the end of the article he makes this pessimistic assessment of the situation: "Corruption in Nepal is chronic. Some efforts have been made to arrest it but little success has been achieved so far. Due to this corruption, it is spreading by leaps and bounds and it has infected the entire political and administrative machinery of the nation."<sup>101</sup>

The Human Rights Yearbook 2004 cites a study conducted by the Nepal Law Society which surveyed 775 respondents. Among them 78 admitted to exerting influence on judges to find in their favour and 68.4% "believed that the judiciary is plagued by corruption... Rampant corruption in judiciary was identified as the basic cause for inability of the courts to deliver quick and proper justice."<sup>102</sup>

#### D. Conclusion

Where are we now in our journey? So far, I have tried to provide the reader with a broad overview of the present legal and political situation in Nepal and a very general outline of its recent history.

Nepal is a country which is being torn apart by civil strife between two heavily armed camps, both of which have shown their willingness to ignore fundamental human rights and use brutal violence to achieve their goals. The official court system no longer functions in areas under Maoist control. In other areas, it is perceived as corrupt, slow, and untrustworthy or ignored altogether in favour of indigenous customs and dispute resolution mechanisms. When the present conflict is resolved, Nepal will be facing a significant challenge: how to deal with the problem of the lack of trust in and reach of the official legal system. Where will it look for ideas? Should Nepal continue to look to the west for guidance? Should Nepal look to its roots for features in its classical system that were working well? One thing seems certain: there will be no easy answers and potential solutions will need to be the subject of a wide-ranging debate among all interested parties in Nepal.

Before embarking on our journey into the fascinating realms of the classical Hindu and Nepalese legal traditions, I will now sketch out the theoretical framework in which I will be working and describe the literature which I have found helpful during the course of my research.

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<sup>99</sup> Mihir Kumar Thakur, "Law of Corruption in Nepal" in *Annual Survey of Nepalese Law 2001*, Bhimarjun Acharya, ed., (Kathmandu: Nepal Bar Council, 2002) 210.

<sup>100</sup> *Ibid.* at 223-24.

<sup>101</sup> *Ibid.* at 229.

<sup>102</sup> INSEC, *supra* note 53 at 44.

## CHAPTER II – THE BROADER CONTEXT

### A. Dealing with the difference and distance between cultures

Legal theory is not an important aspect of the practice of law in British Columbia. During my twenty years of practice, I never once encountered any discussion or debate about legal theory with clients, lawyers, or judges. I cannot recall a single continuing legal education seminar which dealt with this topic nor encountering any discussion or debate about the relevance of legal theory to the practice of law. Issues relating to such things as post-modernism, post-structuralism, post-colonialism, legal pluralism, feminism, and critical legal studies simply never arose in my small town practice.

What struck me early on, following my return to law school in 2004, was the importance which the law school attached to legal theory. Although core courses remained much the same as when I first attended from 1977 to 1980, the 'isms' had certainly staked out their territory, which seemed to be jealously guarded. The way we think about the law and the philosophical underpinnings of our justice system are now of much greater importance. I found this change refreshing but bewildering. Of course there have been many attempts to describe the nature of the 'isms' that hover around legal scholarship.<sup>103</sup> Certain broad contours are agreed upon, but the boundaries and features of their territory are difficult to describe and grasp. Nevertheless, we do need to ask ourselves, especially with respect to the kind of study which I have undertaken, what approach we are using and in what broad framework we are working.

Globalization is bringing cultures into more frequent contact and closer proximity with each other, in the legal field as in other disciplines. Much greater importance is being placed on understanding different legal systems – their laws and the ways in which disputes are resolved. Attention is not only being paid to the legal systems of other countries, but also to those of indigenous peoples. One of the reasons for this interest in other legal cultures is the sense of crisis we have in our own, at least insofar as access to justice is concerned.<sup>104</sup> A search is on for ideas about how we can construct dispute resolution processes in which complexity and cost are not barriers for those without the means to cope with those obstacles.

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<sup>103</sup> The best I found is contained in Hilaire Barnett, *Introduction to Feminist Jurisprudence* (London: Cavendish, 1998) – Chapter 9, "Postmodernism and Critical Legal Studies"; see also, Reza Banakar and Max Travers, eds, *An Introduction to Law and Social Theory* (Oxford: Hart, 2002).

<sup>104</sup> For example, in 2004 the British Columbia Civil Justice Reform Working Group was formed by the government of British Columbia with a mandate to determine what changes are needed in our civil justice system to make it more accessible. There is a sense that the Supreme Court, which is our court of original jurisdiction, is out of reach for ordinary British Columbians. The Working Group is made up of the Chief Justice of the Supreme Court, the Attorney-General of British Columbia and other representatives of the bench, bar, and government. More information about the Working Group is available at its website: [www.bcjusticereview.org](http://www.bcjusticereview.org).

As I have mentioned in the Preface, above, my interest in the Nepalese legal system began during the time I lived and worked in Nepal from 1992 to 1997. My studies in the Master of Laws program at UBC have provided me with an opportunity to learn more about it. At first I was reluctant to embark upon an analysis of Nepal's legal system and its history because of the limitations and challenges of a study of this kind. My views and ways of thinking have been moulded by a western legal education and 20 years of practicing law here. Although I am intimately acquainted with how disputes are resolved in British Columbia, the same of course is not the case with Nepal. How I interpret and represent the workings of its courts and laws, which are foreign to me, is going to be heavily influenced by my background and education.

There is an advantage, however, in an outsider's perspective. There is a benefit to being off the playing field, up in the stands so to speak, where a different view can be obtained of what is happening in the game. As a spectator, I can become acquainted with the most important rules, identify what is happening at least superficially on the field, and understand the major trends. The subtleties may well escape me, and no doubt I will not have all of the insights of those caught up in the ebb and flow of the competition. I may well misapprehend something. On the other hand perhaps something will catch my eye that a player on the field might have missed.

Whether or not to embark on this study gave rise to a fierce inner debate. Should I not stick to an analysis of the access to justice problems here in British Columbia? However, many are engaged in that task and I felt that we can learn from the Nepalese experience. I also believe that it would be quite valuable for legal communities to have a dialogue, especially in this age of globalization, in which we share about the strengths and weaknesses of our own system and first impressions and observations about foreign justice systems.

What I treasure most about my time in Nepal is the friendships formed there and what I learned from its culture. Part of my motivation for this study is a desire to learn even more, but I also hope, as I mentioned in the Preface, above, that it might be the start of a dialogue between the British Columbia and Nepalese legal communities. We both have British-style adversarial systems. We both have access to justice problems. Both Nepal and Canada are embarked on multi-cultural experiments – ours just beginning, but Nepal's many centuries old. How can we not benefit from learning more about each other and sharing what we see in our own and each other's cultures?<sup>105</sup>

I had initially hoped to compare the legal systems of British Columbia and Nepal in some way but that proved to be too ambitious a project for a master's thesis. Accordingly, this study focuses on certain aspects of the legal system of Nepal and its history. I am taking a judicial reform perspective: what ideas might be found in the history of Nepal's legal system for judicial reform in Nepal today? Should Nepal look to its roots for guidance as to how to address access to justice issues? In this chapter, I will attempt to describe how my approach to these questions fits within the theoretical framework.

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<sup>105</sup> See *supra* note 5 of the Preface.

Of course a large part of what I am doing is an historical analysis. I have been warned about the pitfalls in a very entertaining book by David H. Fisher.<sup>106</sup> He describes over 100 different fallacies which historians have committed and provides examples. Because there are so many, one can at least hope to avoid some of them!

Interesting comparisons can be drawn between the historian's task and what happens during a trial in a lawsuit. In almost all trials certain facts are admitted. Likewise when dealing with history, there is no dispute about certain events. For example, everyone accepts that the Kot Massacre<sup>107</sup> took place in September, 1846 – the sources are unanimous and there is simply no basis to argue otherwise. There is no point in wasting time in debate over when that event took place.

However, most trials do turn on factual issues. The battle over which version the judge should accept can be intense. Witnesses may offer contradictory testimony. Cross-examination may highlight weaknesses – inability to observe, motivation to lie, bias, and faulty memory. Documents may point in different directions. Normally a judge would have the benefit of a searching analysis of all of the circumstances relating to the factual issue. Even then, it may be very difficult to determine the truth.

The historian must carefully assess her sources and identify their limitations in the quiet of her office. She may not have the benefit of questioning people who are witnesses to the event. Much may have to be inferred from documents and written accounts. Like a trial lawyer, she must be alive to the strengths and weaknesses of the available testimony. In a way the trial lawyer's task is easier, in that she is expected to advocate only one side. On the other hand, the historian has the unenviable task of trying to determine and evaluate all points of view.

The point has often been made that language has its limitations, especially in cross-cultural communications. This is exacerbated in a situation where you are dealing with the history of a different culture. Take for example a description of the functioning of the Nepalese legal system in the first half of the 19<sup>th</sup> century. If we are dealing with descriptions by those involved in the system, then we may well be given a view of the situation which paints too positive a picture.<sup>108</sup> They will be inclined to defend its viability and integrity, especially if they hold positions of leadership and responsibility. Perhaps more importantly, we need to consider the inability of language to fully describe and represent the reality of what is observed.

So we are facing difficulties associated with the bias of the observers and the weaknesses of language as a means of communication. But this is only the beginning. The words used are then translated. The precise meaning and nuances of the original language can

<sup>106</sup> David Hackett Fischer, *Historians' Fallacies: Toward a Logic of Historical Thought* (New York: Harper & Row, 1970).

<sup>107</sup> See below page 91-92.

<sup>108</sup> See for example, James Q. Whitman, "The Neo-Romantic Turn" in *Comparative Legal Studies: Traditions and Transitions* Pierre Legrand and Roderick Munday, eds. (Cambridge: Cambridge University Press, 2003) [*Traditions and Transitions*] at 334. See also his reference to Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986) at 400-13.



easily be misinterpreted or lost. The translation is a representation of a representation.<sup>109</sup> The translation may be read by someone from a different culture living in a different time who interprets those representations based on perceptions and conceptions from her own culture. No doubt this further distorts the true picture of events. Yet in spite of these multi-layered representations, and the associated problems of communication, I do not believe the resultant picture is so distorted that there cannot be meaningful dialogue about those distant times and events. Limitations of language and bias of observers certainly have to be considered and taken into account in a study of this kind but, in my opinion, they are not insuperable obstacles. If inadequacy of language and bias were bars to communication our world would be deathly silent.

The goal of this study also needs to be kept in mind. It does not seek to unravel all the mysteries of the classical Nepalese legal system and describe it as a photograph might depict a scene in nature. Rather, it is meant to communicate what was seen from my perspective - the first impressions of a person steeped in the dispute resolution practices of a western British-style adversary system. It is up to the legal community in Nepal to determine if what seeps through the filter of that background is worth further consideration.<sup>110</sup> It is up to them to determine if the ideas which have come to mind and the tentative conclusions reached should be followed up. I offer them acknowledging the distance from which I speak and the difference in cultures, both legal and otherwise, which is involved.<sup>111</sup>

As I mentioned, I am not seeking to compare the Nepalese legal system with a foreign legal system. What I will be doing, however, is comparing to some extent, the classical Nepalese legal system with the one which took its place. This brings me within the scope of what is regarded as comparative law.<sup>112</sup> Recent attempts have been made to analyse the various approaches used in comparative law, both past and present.<sup>113</sup> Like cultural anthropology, suggestions have been made that a foreign observer of a culture is facing significant challenges and limitations in arriving at valid and meaningful conclusions. However, in spite of all the soul-searching which has gone on in these respective

<sup>109</sup> For a discussion of the problems associated with interpretation in the legal context see Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) at 167-234.

<sup>110</sup> See for example, Roderick Munday, "Accounting for an Encounter" in *Traditions and Transitions*, *supra* note 108 at 20: "The ultimate test, in Lasser's view, is that one's work must 'pass muster' with significant sections of those practising, teaching or otherwise being involved within the foreign system. His solution is not especially crisp, but then the problems it is addressing have thus far proved indomitable." The reference to Lasser is to his article referred to *infra* note 114.

<sup>111</sup> See the discussion of distance and difference in Gunter Frankenberg, "Critical Comparisons: Rethinking Comparative Law" (1985) 26:2 *Harvard International Law Journal* 411.

<sup>112</sup> See for example Roger Cotterrell, "Comparatists and Sociology" in *Traditions and Transitions*, *supra* note 108 at 134-35. See also Annelise Riles, in the introduction to *Rethinking the Masters of Comparative Law* (Oxford: Hart, 2001) at 11: "The comparative lawyer is a person who engages comparison for a purpose, in other words, whether it is to find a model for modernization, or to harmonize legal regimes."

<sup>113</sup> See for example the various articles in *Traditions and Transitions*, *supra* note 108. See also Annelise Riles, "Wigmore's Treasure Box: Comparative Law in the Era of Information" (1999) 40:1 *Harvard International Law Journal* 221.

disciplines about the task at hand,<sup>114</sup> it appears a new confidence has emerged that something worthwhile can result from an honest and careful effort to understand and interpret what is observed in a foreign culture.<sup>115</sup> It should not be surprising if such

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<sup>114</sup> See for example Mitchel De S.-O.-L'E Lasser, "The Question of Understanding" in *Traditions and Transitions*, *supra* note 108 at 212:

The problems of understanding the 'other' (however defined) have been written about at great length in any number of humanities and social-science fields ranging across, to list but a few, hermeneutics, anthropology, cultural studies, women's studies/feminism and philosophy. This varied literature addresses these problems so relentlessly as to raise the very serious and rather vexing possibility that it may be quite impossible to understand anyone or anything!

See also Clifford Geertz, *After the Fact: Two Countries, Four Decades, One Anthropologist* (Cambridge, Mass.: Harvard University Press, 1995) at 130:

It is simply the condition of things that anthropology, like social sciences in general, is a far more difficult line of work, difficult and uncomfortable, now that the "we define, they are defined" assumptions that sustained and guided it in its forming phases have been brought into question. There is a need for extensive revisions of our notions as to what anthropology is, what its aims should be, what it can reasonably hope to accomplish; why it is anyone should pursue it.

The solution which Peter Just adopts in his recent book *Dou Donggo Justice: Conflict and Morality in an Indonesian Society* (Lanham: Rowman & Littlefield, 2001) is to take what might be described as a 'common-law' approach to his ethnographic study of the Dou Donggo justice system:

For me, a solution is provided by concentrating my efforts on storytelling in general and in particular on the exegesis of a few well-chosen law cases (see French 1996). By focusing on cases, I have selected a genre of events, one that has standing for me, for my informants, and for fellow anthropologists who have shown an interest in these things. They are a kind of social event upon which a certain analytical morphology can be imposed and yet they invite exegesis that inevitably spreads outward into realms of discourse actually much broader than most anthropologists of law have entertained. (page 13)

<sup>115</sup> See for example John Monaghan & Peter Just, *Social & Cultural Anthropology: A very short introduction* (Oxford: Oxford University Press, 2000) at 33: "We all recognise that complete descriptive objectivity is impossible, that a comprehensive understanding of any society or culture is unattainable, and that ethical problems are more easily posed than resolved. That we continue to pose these questions is perhaps the best indication of the fundamental health of anthropology as both an academic discipline and a humanistic enterprise." See also Munday, *supra* note 110 at 17:

Ought one, therefore, to expect perfect communication in comparative legal studies? In Großfield's view, such an expectation is plainly unreasonable and the comparatist must settle for imperfect communication. According to him, we should 'avoi[d] perfectionism'. Even if comparatists are condemned forever to miss many of the subtle referents in which foreign legal discourse is inevitably steeped, they cannot just abdicate their responsibilities. It is possible to convey much of the sense by resorting to crafted explanations of the concepts and cultural references that accompany foreign discourse. Imperfect representations seem preferable to none at all. The comparatist's enduring mission, then, is to act as a communicator and as a tireless builder of cross-cultural bridges.[footnote omitted]

Further see Sherry B. Ortner, *Life and Death on Mt. Everest* (Princeton: Princeton University Press, 1999) where, in her ethnographic study of the Sherpa people, she seeks to deconstruct the representations made about Sherpa culture by westerners involved in mountaineering expeditions and to offer stories and narratives from the Sherpas themselves.

efforts produce quite different perspectives. A trial often involves the judge choosing between two or more valid perspectives, based on the same set of circumstances, following a much more in-depth testing and analysis than an historian or anthropologist can usually hope to carry out.

Where would I peg this study with respect to the modernist/post-modernist landscape? In some sense anyway, it could be seen as post-modern, as I do not accept that substituting a legal code for a dharma/custom based legal system in 1854 was a sign of progress. It is modernist in the sense that I believe principles can be distilled from an analysis of the classical Nepalese legal system which may be of value in the access to justice debate in the country today. But again, the question as to whether my conclusions are useful depends on the judgment of the legal community in Nepal. Only their collective wisdom can draw from this study whatever might be meaningful and of benefit in practice.

It has always been emphasized in the common-law legal tradition that a decision usually very much turns on the facts of a particular case. An experienced litigator knows that the case is normally won and lost on the facts and that there is no substitute for becoming as fully acquainted as possible with the situation under consideration. Experienced and capable counsel and a wise judge are a good formula for arriving at truth and justice. Right answers emerge from the exercise of good judgment based on a searching analysis of the case. Arguments could be made as to what aspects of those assertions are modernist or post-modernist, but I doubt such a task would be helpful. What seems to me to be most important is to communicate as honestly, respectfully, and fully as we can about ourselves and each other in cross-cultural studies. There is an old proverb: "As iron sharpens iron, so one man sharpens another."<sup>116</sup> I expect the same is true with respect to a mutually engaged and respectful dialogue between cultures and communities.

Edward Said was not against this kind of dialogue – rather he encouraged it.<sup>117</sup> This was not the Orientalism which he attacked.<sup>118</sup> Rather, he was criticising the labelling and caricatures that are used to control perceptions of foreign cultures and justify acts of coercion and violence. Unfortunately his voice has largely gone unheeded among the political elites. The idea that violence applied in the right way achieves justice still seems to be firmly in place throughout the world, no matter what the political or religious persuasion or location. You just have to be better at violence than the bad guy, an

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<sup>116</sup> Proverbs 27:17, from the New International Version of the Bible.

<sup>117</sup> See his lecture entitled "Orientalism Once More" delivered at the Institute of Social Studies on May 21, 2003, reprinted in *Development and Change* 35(5): 869-879 (Oxford: Blackwell, 2004) at 872:

What I do argue also is that there is a difference between knowledge of other peoples and other times that is the result of understanding, compassion, careful study and analysis for their own sakes, and on the other hand knowledge—if that is what it is—that is part of an overall campaign of self-affirmation, belligerency and outright war. There is, after all, a profound difference between the will to understand for purposes of co-existence and humanistic enlargement of horizons, and the will to dominate for the purposes of control and external dominion.

<sup>118</sup> Edward W. Said, *Orientalism* (New York: Random House, 1979).

endless stream of Hollywood movies tells us. In the midst of these blaring voices, the cries of the innocent victims of this violence are scarcely heard.

## B. A review of the relevant literature

Robert Lingat's book, *The Classical Law of India* provides a good starting point for the study of the classical Hindu legal tradition.<sup>119</sup> A more recent account may be found in *Hindu Law: Beyond Tradition and Modernity* where Werner Menski seeks to analyse the entire history of Hindu law from a post-modernist perspective.<sup>120</sup> J. D. M. Derrett is another western legal scholar who wrote extensively on the history of Hindu law and whose insights remain relevant.<sup>121</sup> The introductions in the translations of the Hindu sacred literature contain helpful information.<sup>122</sup> Valuable insight can also be obtained from Indian scholars.<sup>123</sup> J. V. Kane's text contains the most exhaustive treatment of the history of the classical Hindu legal tradition.<sup>124</sup>

What is very surprising is that none of these scholars has done a study of the classical Nepalese legal system, even though it may have been the last to survive in the classical Hindu legal tradition. Further, we may possess more information about how it functioned than any other such system. Nevertheless, their analysis of the sacred texts, as they relate to the administration of justice in ancient India, provide the basis for an understanding of the roots of Nepal's legal system. I rely most heavily on Lingat's analysis, because of its succinct character, but I have also drawn from Menski, Derrett, and other authors to give the reader at least some insight into areas where there are differences of opinion and perspectives or where I concluded that the author has provided a helpful analysis.

H. Patrick Glenn's book, *Legal Traditions of the World*<sup>125</sup> provides an interesting and helpful overview of some of the world's legal traditions including the chthonic,

<sup>119</sup> Robert Lingat, *The Classical Law of India* (Berkeley: University of California Press, 1973).

<sup>120</sup> Werner Menski, *Hindu Law: Beyond Tradition and Modernity* (Oxford: Oxford University Press, 2003).

<sup>121</sup> J. Duncan M. Derrett, *History of Indian Law (Dharmaśāstra)* (Leiden: E. J. Brill, 1973); "The Judicial Panchayat: The Future of an Ancient Indian Rural Institution" in *Rural Communities, Third Part, Asia and Islam XLII* (Paris: Dessain et Tolra, 1982); *Religion, Law and the State in India* (London: Faber and Faber, 1968); and, *Studies in Hindu Law* (Torino: Pubblicazioni Di Indologica Taurinensia, 1994).

<sup>122</sup> Wendy Doniger, *The Laws of Manu* (London: Penguin, 1991); Richard W. Lariviere, *The Nāradaśmṛti, critical edition and translation* (Delhi: Motilal Banarsidass, 2003); and, Patrick Olivelle, *Dharmasūtras: The Law Codes of Āpastamba, Gautama, Baudhāyana, and Vasiṣṭha, annotated text and translation* (Delhi: Motilal Banarsidass, 2000).

<sup>123</sup> See, for example, Satyaajeet A. Desai, *Mulla Principles of Hindu Law* 18<sup>th</sup> ed. (New Delhi: LexisNexis Butterworths, 2004); A. Kaul, *Administration of Law and Justice in Ancient India* (New Delhi: Sarup & Sons, 1993); Madhukar M. Patkar, *Nārada, Brhaspati and Kātyāyana: A Comparative Study in Judicial Procedure* (New Delhi: Munshiram Manoharlal, 1978); Axel Michaels ed., *The Pandit: Traditional Scholarship in India* (New Delhi: Manohar, 2001); Mahesh Kumar Sharan, *Court Procedure in Ancient India* (New Delhi: Abhinav, 1978); and, S. Varadachariar, *Radha Kumud Mookerjee Endowment Lectures, 1945 on The Hindu Judicial System* (Lucknow: The Lucknow University, 1946).

<sup>124</sup> P. V. Kane, *History of Dharmaśāstra* (Poona: Bhandarkar Oriental Research Institute, 1946).

<sup>125</sup> H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 2000).

Talmudic, civil law,<sup>126</sup> Islamic, Hindu, and common law traditions. In this book, the reader can obtain a sense of where the Hindu legal tradition fits with the other major legal traditions without having to try to review the mass of material which exists in each of these separate areas.

Rewati Raman Khanal has written, in Nepali, the leading text on Nepal's legal history.<sup>127</sup> Unfortunately no English translation of Khanal's text has yet been made, so I was unable to read and analyse it. However, M. K. Dangol has provided me with some information from the book. For example, he pointed out that Khanal included a chapter on the writings of Brian Hodgson (see Chapter IV, below).

Where else does one look for information about the history of Nepal's legal system? Nepali lawyers and legal scholars have written articles on some topics, both in English and Nepali, relating to Nepal's legal history.<sup>128</sup> Some of the general texts and histories contain information about Nepal's legal history,<sup>129</sup> although it is interesting to note that the most recent general history of Nepal, written by John Whelpton and published earlier this year, contains virtually no information about Nepal's legal system.<sup>130</sup> Nevertheless, I

<sup>126</sup> A more in depth look at the civil law system can be found in a book by Peter De Cruz, *Comparative Law in a Changing World* (London: Cavendish, 1995) 43-100.

<sup>127</sup> However, R. R. Khanal has also written a brief article, in English, on the nature and history of Nepal's legal system: see *supra* note 74. For texts on the legal history of Nepal in English see: Kaisher Bahadur K.C., *The Judicial Customs of Nepal* (Kathmandu: Ratna Pustak Bhandar, 1971); and, Bishal Khanal, *Regeneration of Nepalese Law* (Kathmandu: Bhrikuti, 2000).

<sup>128</sup> See for example, the following articles in English: R. R. Khanal's article *supra* note 74; Laxman Aryal's article *supra* note 73; Bhimarjun Acharya, "A Misconception on Nepalese Legal System and Jurisprudence" (2001) 14:1&2 Nepal Law Review 238; K. K. Adhikari, "Criminal Cases and Their Punishments Before and During the Period of Jang Bahadur." (1976) 3:1 Contributions to Nepalese Studies 105 [*Criminal Cases and Their Punishments*]; K. K. Adhikari, "A Brief Survey of the Organization and Structure of Nepali Law Courts During the Third Quarter of the Nineteenth Century" (1979) 6:2 Contributions to Nepalese Studies 11; Bal Bahadur Mukhia, "Nepalese Jurisprudence at a Glimpse and Role of Legal Education for its Advancement" (2004) 17:1&2 Nepal Law Review 216; Rajit Bhakta Pradhananga, "An Overview of Efforts Towards Codification of Criminal Law in Nepal" (2003) 16:1&2 Nepal Law Review 68; Mahesh C. Regmi, "Preliminary Notes on the Nature of Rana Law and Government" (1975) 2:2 Contributions to Nepalese Studies 103; and, Shambhu Prasad Gyawali, "Nepalese Legal System: A Historical Perspective" in *Readings in the Legal System of Nepal*, *supra* note 73 at 147.

<sup>129</sup> K. K. Adhikari, *Nepal Under Jang Bahadur 1846-1877* (Kathmandu: Buku, 1984); Surya M. Adhikary, *The Khasa Kingdom: A Trans-Himalayan Empire of the Middle Age* (Jaipur: Nirala, 1988); H. N. Argawal, *Nepal-A Study in Constitutional Change* (New Delhi: Oxford & IBH, 1980); S. Amatya, *Rana Rule in Nepal* (New Delhi Nirala, 2004); Surya Dhungel, Bipin Adhikari, BP Bhandari and Chris Murgatroyd, *Commentary on the Nepalese Constitution*, *supra* note 39; Bhuwan Lal Joshi and Leo E. Rose, *Democratic Innovations in Nepal – A Case Study of Political Acculturation* (Berkley: University of California Press, 1966); P. Landon, *History of Nepal* reprint (Delhi: Ardash, 2001); S. Levi, *Nepal: Historical Study of a Hindu Kingdom* trans. by unknown translator (Kathmandu: Kaiser library, unpublished); Rajit Bhakta Pradhananga, *Homicide Law in Nepal: Concept, History and Judicial Practice* (Kathmandu: Ratna Pustak Bhandar, 2001); D. R. Regmi, *A Century of Family Autocracy in Nepal*, 2<sup>nd</sup> ed. (Varanasi: The Nepali National Congress, 1958); D. R. Regmi, *Modern Nepal* (Calcutta: Mukhopadhyay, 1961); M.C. Regmi, *Nepal: A Historical Miscellany* (Delhi: Adroit, 2002); M. C. Regmi, *Thatched Huts and Stucco Palaces: Peasants and Landlords in 19<sup>th</sup> Century Nepal* reprint (Delhi: Adroit, 1999); A. Sever, *Aspects of Modern Nepalese History* (New Delhi: Vikas, 1996); and, A. Sever, *Nepal under the Ranas* (New Delhi: Oxford & IBH, 1993).

<sup>130</sup> *supra* note 36.

found Whelpton's books very helpful resources for information about Nepal's general history, especially with regards to the events leading up to Jang Bahadur Rana taking power in 1846, his visit to Europe, and the nature of his reign.

What is known about the functioning of Nepal's legal system, prior to 1790, is based on inscriptions, royal decrees, and other administrative records which have survived.<sup>131</sup> They are rather sketchy and much has to be inferred. Although Hamilton and Kirkpatrick provided some information about Nepal's legal system around the beginning of the 19<sup>th</sup> century,<sup>132</sup> it was not until Brian Hodgson published his articles on the legal system of Nepal<sup>133</sup> that any person, western or Nepali, had studied or written about the legal system in any depth. As far as I am aware, no material has subsequently been found which would significantly add to what is contained in Hodgson's writings regarding how the Nepalese legal system functioned during the first half of the 19<sup>th</sup> century.

In addition to Hodgson's published articles, he left behind extensive records which are located at several places. These records may well shed further light on the functioning of the Nepalese legal system. A Nepalese scholar, Dr. Ramesh Dhungel is presently leading a project which is seeking to catalogue all of the Hodgson's papers, wherever located throughout the world. This will no doubt simplify the task of finding and researching whatever further relevant material may be available.

A biography of Brian Hodgson was written by his friend, W. W. Hunter. Commissioned by Hodgson's wife, it was published in 1896.<sup>134</sup> A conference was recently held which discussed the work of Brian Hodgson. This led to the publication of a book containing papers which are based on presentations made at the conference.<sup>135</sup> In these papers scholars from various disciplines critically analyse Hodgson's work in their area of expertise and provide an analysis of his work from the point of view of modern scholarship. These papers give valuable insight into Hodgson's abilities as a scholar and will be referred to in Chapter IV, section B, below. One of the papers, by David Waterhouse provides a biographical sketch of Hodgson's life.<sup>136</sup> He describes Hunter's biography in this way: "This work, on which Hunter spent a substantial amount of time, is extremely thorough, though, as is normal with Victorian biographies, somewhat uncritical in its approach."<sup>137</sup> Waterhouse points out that the *Origins of Himalayan*

<sup>131</sup> Surya Adhikary, *supra* note 129; Bahadur K.C. *supra* note 127; U. N. Sinha, *Development of Panchayats in Nepal* (Patna: P.C. Dwadesh Shreni, 1972). I rely heavily on Sinha's analysis of the history of the panchayat in Chapter VI, section B, below for the period prior to 1800.

<sup>132</sup> F. Hamilton, *An Account of the Kingdom of Nepal* (New Delhi: Manjusri, 1971); C. Kirkpatrick, *An Account of the Kingdom of Nepaul* (London: W. Bulmer and Co., 1811).

<sup>133</sup> 1836 Article, *supra* note 4; Brian H. Hodgson, "Some Account of the Systems of Law and Police as Recognised in the State of Nepal" (1834) 1 *Journal of the Royal Asiatic Society* 258 reprinted in *Miscellaneous Essays relating to Indian Subjects* vol 2 (London: Trubner & Co., 1880) 211 [1834 Article].

<sup>134</sup> W. W. Hunter, *Life of Brian Houghton Hodgson* (London: John Murray, 1896).

<sup>135</sup> David Waterhouse, ed. *The Origins of Himalayan Studies: Brian Houghton Hodgson in Nepal and Darjeeling 1820-1858* (London: Routledge Curzon, 2004) [*Origins of Himalayan Studies*].

<sup>136</sup> David Waterhouse, "Brian Hodgson-A Biographical Sketch" in *ibid.* at 1.

<sup>137</sup> *Ibid.* at 21.

*Studies* is the "first overall look at Hodgson's life and contribution to scholarship since Hunter's biography of 1896."<sup>138</sup>

Jang Bahadur Rana befriended several Westerners during his reign (1846-1877). Some of them wrote about their interaction and discussions with him.<sup>139</sup> How he came to power and the events of his reign have also been subjected to close scrutiny by Western and Nepali scholars.<sup>140</sup> Stiller's book just noted is a valuable resource because it contains letters and other documents, some in the original English and some translated from Nepali, relating to Jang's rise to power and Hodgson's involvement in the politics of the country. They provide, perhaps, the only example of the actual workings of a panchayat in the judicial system at the time.<sup>141</sup>

One of the most important events of Jang's reign was the promulgation of the Ain,<sup>142</sup> the country's first legal code in 1854. There have been several studies of various aspects of the Ain. However, as far as I am aware, the only book, in English, which seeks to provide a comprehensive analysis of the Ain is by Andras Hofer.<sup>143</sup>

Hofer's book is important for the purposes of this study because it does describe, at least to some extent, the impact which the Ain had on existing customs. Written from an anthropological perspective, he categorizes and analyses the vast material contained in the document and provides some insight into its roots. There is no discussion, however, on the impact of the Ain on dispute resolution processes in Nepal. The panchayat is not mentioned. I relied on M. K. Dangol's review of the Ain<sup>144</sup> in order to reach conclusions in that area.

The books written about the Rana regime (1846-1951) tend to focus on the various Rana prime ministers.<sup>145</sup> Very few foreigners were allowed into the country during this time. Apart from the histories written by Landon and Levi,<sup>146</sup> and the articles by Adam,<sup>147</sup> there was very little scholarly activity by foreign or local scholars during this period.

<sup>138</sup> *Ibid.* at xxi of the Preface.

<sup>139</sup> H. A. Oldfield, *Sketches From Nepal* vol. 1 (London: W. H. Allen, 1880); L. Oliphant, *A Journey to Kathmandu* (London: John Murray, 1852); D. Wright, *History of Nepal translated from the Parbatiya by Munshi Shew Shunker Singh and Pandit Shri Gunanand with an Introductory Sketch of the Country and People of Nepal* by Daniel Wright reprint (New Delhi: Madras, 1993).

<sup>140</sup> Adhikari, *supra* note 129; Amatya, *supra* note 129; D. R. Regmi, *supra* note 129; Ludwig F. Stiller, *Letters from Kathmandu: The Kot Massacre* (Kathmandu: The Tribhuvan University Press, 1981); John Whelpton, *Jang Bahadur in Europe* (Kathmandu: Sahayogi Press, 1983); John Whelpton, *Kings, Soldiers and Priests: Nepalese Politics and the Rise of Jang Bahadur Rana, 1830-1857* (New Delhi: Manohar, 1991).

<sup>141</sup> See pages 94 to 98, below.

<sup>142</sup> As has already been mentioned in *supra* note 3, 'Ain' literally means 'law'.

<sup>143</sup> Andras Hofer, *The Caste Hierarchy and the State in Nepal* 2<sup>nd</sup> ed. (Lalitpur: Himal Books, 2004).

<sup>144</sup> Email from M. K. Dangol dated February 20, 2005.

<sup>145</sup> Adhikari, *supra* note 129; Amatya, *supra* note 129; Sever, *Nepal under the Ranas* *supra* note 129.

<sup>146</sup> *supra* note 129.

<sup>147</sup> Leonhard Adam, "Criminal Law and Procedure in Nepal a Century Ago: Notes left by Brian H. Hodgson." (1950) 1:2 *Far Eastern Quarterly* 146 and "The Social Organization and Customary Law of the Nepalese Tribes" (1936) 38:4 *American Anthropologist* 533.

Especially in the countryside, where the bulk of the population lived as subsistence farmers, the country remained a closed book.

Things began to change following the 1951 revolution. Literature by Western and Nepali scholars gradually increased in the areas of ethnography, anthropology, sociology, zoology, and other disciplines as access to the rural areas opened up. However, no western legal scholar has yet had a detailed and comprehensive look at the history of Nepal's legal system, although there have been articles on some topics. Western legal experts have been involved in current legal matters such as the drafting of legislation. The Norwegian Bar Association has provided assistance to and has close ties with the Nepal Bar Association, especially in the areas of human rights and legal aid.

The literature by Nepali legal scholars has been increasing rapidly in recent years, especially after Tribhuvan University started its LL.M program in 1997. Presently 50 students are accepted each year. A Ph.D program has also been added.<sup>148</sup> However, as far as I am aware, few have suggested that Nepal should look to its roots in order to seek ideas for judicial reform. The tendency has been to look to the West for ideas.

What is available in English which describes the present Nepalese legal system? The Supreme Court has published a book containing its leading judgments.<sup>149</sup> The Nepal Bar Council has also been publishing, for several years, an annual review of Nepalese law. Of course various sources can be accessed on the web which provide an overview of the present system.

The Nepali language is used in the Nepalese judicial system. Most articles in the various legal journals are in Nepali. Some of the legislation and portions of Nepal's present legal code have been translated into English, although the court rules are only available in Nepali. However, if one goes to a bookstore in Kathmandu which is selling law school texts, most of them would be instantly recognisable to a lawyer from India, Canada, or England. One sees the leading English texts on contracts, torts, evidence, and other topics on the shelves. Although much of the written textual material for Nepali law schools is in English, lectures are usually in Nepali. One Nepalese lawyer told me that the few courses which are entirely in English tend to be dreaded by students. He said that the students hope they can at least eke out a passing grade in those courses. I have found, however, that the lawyers I have dealt with (most of whom practice in Kathmandu) are quite proficient and comfortable in English.

No detailed study has yet been done on the history of the legal profession in Nepal,<sup>150</sup> although at least one article has dealt with this topic.<sup>151</sup> In that article, Laxman Aryal points out that at first the problem was the quantity of lawyers – in 1952, when the Nepal

<sup>148</sup> Email communication from M. K. Dangol dated February 20, 2005.

<sup>149</sup> Ram Krishna Timalsena ed. *Some Landmark Decisions of the Supreme Court of Nepal* (Kathmandu: Supreme Court of Nepal, 2003).

<sup>150</sup> Email communication from M. K. Dangol dated February 20, 2005.

<sup>151</sup> Aryal *supra* note 73. Laxman Aryal subsequently served on the committee which drafted the 1991 constitution and was later appointed to the Supreme Court bench. He has retired from the bench but remains one of the most influential members of the legal community.



Bar Association was formed, there were only about 12 members, but later, when the first *Legal Practitioners Act* was passed in 1968 the problem was the quality of their work. Lawyers had been discouraged from practicing in the courts under the Rana regime but this changed following the 1951 revolution.<sup>152</sup>

The civil war in Nepal has now caught the attention of the world. Numerous articles on the crisis have been published in newspapers and magazines. When I was in Nepal in December, 2004, several books were available in bookstores which dealt with the Maoist uprising in depth.<sup>153</sup> However, it is difficult to obtain a clear picture, especially now, as to the current situation in the countryside. The King is seeking to tightly control media reporting. Propaganda continues to abound from both sides.

Where does this study fit within the flow of ideas in the above literature? In what way does it add to the analysis in these publications? As I will discuss below,<sup>154</sup> Nepali and Western scholars have referred to Hodgson's writings to draw conclusions about the functioning of Nepal's legal system during the first half of the 19<sup>th</sup> century but this is the first attempt, as far as I am aware, to do a critical analysis of his writings. What were the biases of Hodgson and his informants? To what extent was Hodgson in a position to analyse and pass on information about the administration of justice at that time? What were his abilities as a scholar? Can conclusions safely be drawn from his writings? Further, I do not know of any other study which focuses on the role of the panchayat and custom in the classical Nepalese legal system, how it was impacted by the promulgation of the Ain, or what ideas might emerge from their role for judicial reform in Nepal today. It also appears this study may contain the first suggestion that a jury be considered for Nepal's dispute resolution system.

### C. Conclusion

The purpose of this chapter was to provide the reader with the theoretical underpinnings of this study; a description of the literature which was reviewed during the course of my research; what publications proved most helpful and relevant; and, where this study fits within and how it goes beyond what has already been written.

This involved a side-trip on our journey; although, this was needed to obtain a view of the contours and geography of the academic landscape in which we are travelling. With that information, and the understanding of the problem of the lack of trust in and reach of the Nepalese legal system gained from Chapter I, we will return to the main road. It is now time to have a look at the fascinating roots of the Nepalese legal system in the classical Hindu tradition.

The next chapter describes the sources of that tradition, analyses some components of it,

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<sup>152</sup> Email communication from M. K. Dangol dated February 20, 2005.

<sup>153</sup> See pages 10-20 of Chapter I, above, for a review of some of this literature.

<sup>154</sup> See pages 69 to 70, below.

and sketches out the key concept – dharma. Here are the remote headwaters of the mighty river which has flowed with such strong currents throughout the history of this region and continues to shape its culture. What were its ideals in the administration of justice which made it attractive to so many diverse groups of people for such an extended period of time? One of the purposes of the next chapter is to answer that question.

## CHAPTER III - THE CLASSICAL HINDU LEGAL TRADITION

### A. The nature of the sacred literature

#### (1) The Dharmasutras

The earliest surviving literature which makes up part of the classical Hindu legal tradition are the Dharmasutras. Four of the earliest sutras which have survived are named Apastamba, Gautama, Baudhayana, and Vasistha. These Sanskrit texts can be found in a recently published volume in which the Hindu Law scholar, Patrick Olivelle provides annotations to the Sanskrit texts and a translation of them into English.<sup>155</sup> At the beginning of his introduction, Olivelle describes them in this way:

The texts translated here are the four surviving works of the ancient Indian expert tradition on the subject of *dharma*. Written in a pithy and aphoristic style, these Dharmasūtras represent the culmination of a long tradition of scholarship: they reveal deep learning and document intense disputes and divergent views on a variety of topics as broad as the category of *dharma* itself.<sup>156</sup>

Opinions vary as to when the sutras were written. P. V. Kane dates their authorship to some time during the period 600 B.C. to 300 B.C.<sup>157</sup> Olivelle notes that many scholars have simply agreed with Kane although Olivelle describes this dating as nothing more than an 'educated guess'.<sup>158</sup> Based on Olivelle's analysis, the sutras are of a more recent vintage. He would date Apastamba, Gautama, and Baudhayana "from the beginning of the third to the middle of the second centuries BCE, and somewhat later for Vasiṣṭha."<sup>159</sup>

What do these sutras contain? What are they all about? They are quite comprehensive in their scope, setting out duties for students, teachers, husbands, wives, judges, rulers, and others. The Dharmasutras also contain rules for such things as offerings, purification, penance, receiving guests, begging, marriage, inheritance, and funeral rites as well as for sexual conduct, eating, bathing, and other bodily functions.

What can these four sutras tell us about the culture from which they emerged? One thing they convey is a confidence in the rightness of a certain way of life and a strong belief that it was worth preserving and emulating in excruciating detail. However, it is a way of life largely reserved for the Brahmin. We are told very little about what is expected of the other classes on a day to day basis, although the rewards are the same:

People of all classes enjoy supreme and boundless happiness when they follow the Laws specific to them. Then, upon a man's return to earth, by virtue of the residue of his merits he obtains a high birth, a beautiful body, a fine complexion,

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<sup>155</sup> Olivelle, *supra* note 122

<sup>156</sup> *Ibid.* at 1.

<sup>157</sup> Kane, *supra* note 124 at xvii.

<sup>158</sup> Olivelle, *supra* note 122 at 9.

<sup>159</sup> *Ibid.* at 10.

strength, intelligence, wisdom, wealth, and an inclination to follow the Law.<sup>160</sup>  
So, going around like a wheel, he remains happy in both worlds.<sup>161</sup>

The sutras emphasize that there is a hierarchy which is in place, known as the four varnas: "There are four classes: Brahmin, Kṣatriya, Vaiśya, and Śūdra. Among these, each preceding class is superior by birth to each subsequent."<sup>162</sup> Each of the classes has certain duties:

Brahman, clearly, placed his grandeur in Brahmins along with the duties of studying and teaching, offering and officiating at sacrifices, and giving and receiving gifts, for the preservation of the Vedas. In Kṣatriyas he placed his strength along with the duties of studying, offering sacrifices, giving gifts, using weapons, and protecting the treasury and creatures, for the enhancement of government. In Vaiśyas he placed the duties of studying, offering sacrifices, giving gifts, agriculture, trade, and animal husbandry, for the enhancement of economic activity. In Śūdras he placed the service of the higher classes, for it is said, "they were created from his feet."<sup>163</sup>

Punishments for a crime are different, depending on your caste. If a Sudra male commits adultery with a Brahmin female, the penalty is death. However, a Brahmin male could

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<sup>160</sup> In most instances, Olivelle translates 'dharma' as Law, although he indicates, on page xvi (*supra* note 122):

Some words pose a special challenge to the translator. The most obvious is *dharma* (see p. 13). Wherever possible I have translated it as Law(s). It is, however, impossible and unwise to be consistent; some nuances and meanings of the term cannot be rendered as Law. I have used other terms, such as righteous(ness) and duty, but to signal to the reader that we are dealing with this central term I have always place [sic] *dharma* within parentheses whenever it is translated with any term other than Law(s).

Later he says: "The term *dharma* may be translated as "Law" if we do not limit ourselves to its narrow modern definition as civil and criminal statutes but take it to include all the rules of behavior, including moral and religious behavior, that a community recognizes as binding on its members." (page 1). However, J. D. M. Derrett is emphatic that dharma does not mean law: "Whereas the rarely used word *dharmam* means a "rule", including a rule of law, *dharma* carries so wide a range of meaning that comparative scholars have despaired of a one-word equivalent. It does *not* mean "law".": Derrett, *Studies in Hindu Law* *supra* note 121 at 23 [footnotes omitted]. My own view is that dharma should not be translated since we have no word in English that adequately conveys the meaning of the word, even in contexts where it might be translated as 'law'.

<sup>161</sup> Apastamba 2.2.2-3 – all quotations from the sutras will be from Olivelle's translation.

<sup>162</sup> Apastamba 1.1.4-5.

<sup>163</sup> Baudhayana 1.18.2-6. Scholars have noted that the actual caste structure of Indian society, which has been quite diverse throughout its history, does not fit neatly into this structure. See for example the remarks of Prayag Raj Sharma: "...in the context of empirical caste studies in any region of India, a uniformly accepted hierarchy is difficult to find. It varies from region to region and seems influenced by the politically and economically dominant caste group or groups living in a particular region...To find a satisfactory equation between the *varna* and the caste is an unresolved dispute among anthropologists." From the Introduction to the book by Hofer, *supra* note 143 at xxiv-xxv.

never suffer the death penalty. Banishment would be the worst punishment he might face.<sup>164</sup>

Mobility did exist between classes; "By following the righteous (*dharma*) path people belonging to a lower class advance in their subsequent birth to the next higher class, whereas by following an unrighteous (*adharma*) path people belonging to a higher class descend in their subsequent birth to the next lower class."<sup>165</sup>

High standards of behavior were expected of Brahmins: "Discipline, austerity, self-control, liberality, truthfulness, purity, vedic learning, compassion, erudition, intelligence, and religious faith—these are the characteristics of a Brahmin."<sup>166</sup> Sudras did not fare too well by comparison: "Bearing long grudges, envy, mendacity, reviling Brahmins, slander, and ruthlessness—these should be recognized as the characteristics of a Śūdra."<sup>167</sup> The fact that they reviled Brahmins would seem to indicate that Sudras were not necessarily happy to be at the bottom of the heap!

## (2) The Dharmasastras

One translation of 'dharmaśāstra' is the 'science of righteousness'. Doing the right thing, living the right way continued to be a topic of great scholarly interest in Hindu society. As a result new authoritative literature emerged after the sutras. The most famous and revered is the Manusmṛti, which was likely the earliest of the smṛti literature.<sup>168</sup> According to Kane, it is attributable to the period of 200 B.C. to 100 A.D. and was followed by the other main smṛtis, Yajñavalkyasmṛti, Nāradaśmṛti (100 A.D. to 400 A.D.), and Brhaspatiśmṛti (300 A.D. to 500 A.D.).<sup>169</sup>

Lingat tells us that the three main smṛtis (Manu, Yajñavalkya, and Nārada) differ from the sutras in three ways. Firstly, they differ in style in that they are "written entirely in verse".<sup>170</sup> Secondly, they differ in content:

As for subject-matter, the *dharma-śāstras* deal with the same subjects as the *dharma-sūtras*, but they are much more extensive works and they give a much larger place to rules of a juridical character. The *sūtras* are concerned, above all, to lay down the duties incumbent on members of the different castes, and confine themselves to giving several particular solutions, or to expressing certain general

<sup>164</sup> See for example Apastamba 2.27.8-9: "An Ārya who has sex with a Śūdra woman should be banished, while a Śūdra who has sex with an Ārya woman should be executed..."

<sup>165</sup> Apastamba 2.11.10-11.

<sup>166</sup> Vasistha 6.23.

<sup>167</sup> Vasistha 6.24.

<sup>168</sup> The word 'smṛti' literally means to remember and conveys the idea of tradition. See Lingat, *supra* note 119 at 9 and 13.

<sup>169</sup> Kane, *supra* note 124 at xvii. I will limit my attention to the Manusmṛti and Nāradaśmṛti as it appears these two smṛtis were of greatest influence in Nepal. Evidence of what śāstras were referred to is quite sparse but see Hodgson's 1834 Article, *supra* note 133 at 236 where he indicates the 'Code of Menu' [sic] is one of the sources of Nepalese penal law.

<sup>170</sup> Lingat, *supra* note 119 at 73.

principles to regulate disputes which arose. The *dharma-śāstras* by no means neglect the observances and practices of religion or ritual, but they undertake to give in detail the rules which should guide the king in the exercise of his functions.<sup>171</sup>

Thirdly, the *smrtis* claim divine authority and origin, whereas the *sutras* were more in the way of manuals for a certain class of Brahmins.<sup>172</sup> Lingat concludes: "The *dharma-śāstras* evince then not only a widening of the teaching of *dharma*, both in its content and in its importance, but also a specialisation in what is now an independent discipline."<sup>173</sup>

As in the *sutras*, the main focus of the *Manusmṛti* is on the kind of life a Brahmin is expected to lead. Manu mentions the four main castes (Brahmin, Ksatriya, Vaisya, and Sudra) and the stages of life of a Brahmin (student, householder, forest hermit, and ascetic). He urges the Brahmin to fulfill his duty: "Twice-born men in all four stages of life must constantly and carefully fulfill their ten-point duty. The ten points of duty are patience, forgiveness, self-control, not stealing, purification, mastery of the sensory powers, wisdom, learning, truth, and lack of anger." (6.91-92).<sup>174</sup>

The caste hierarchy requires Sudras to be severely punished if they would dare attack a Brahmin:

If a man of the lowest caste injures a man of a higher caste with some particular part of his body, that very part of his body should be cut off; this is Manu's instruction. If a man raises his hand or a stick, he should have his hand cut off; if in anger he strikes with his foot, he should have his foot cut off. If a man of inferior caste tries to sit down on the same seat as a man of superior caste, he should be branded on the hip and banished, or have his buttocks cut off. If in his pride he spits on him, the king should have his two lips cut off; if he urinates on him, the penis; if he farts at him, the anus. (8.279-82)

Manu also clearly articulates, at great length, the consequences of deviant behavior upon rebirth:

Violent men become carnivorous (beasts); people who eat impure things become worms; thieves (become animals that) devour one another; and men who have sex with women of the lowest castes become ghosts. A man who has associated with fallen men or has had sex with the wife of another man or has stolen the property of a priest becomes a priest-ogre. A man who out of greed has stolen jewels, pearls, or coral, or the various gems, is born among goldsmiths. For stealing grain, a man becomes a rat; for brass, a goose; for water, an aquatic bird...(12.59-62)

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<sup>171</sup> *Ibid.* at 73.

<sup>172</sup> *Ibid.* at 74.

<sup>173</sup> *Ibid.* at 74.

<sup>174</sup> All quotations of Manu will be from the translation by Doniger, *supra* note 122.

These kind of statements about the importance of the Brahmin's duty and the serious consequences of sin very much mirror what is in the sutras. However, as Lingat mentions above, compared to the sutras, the smrtis deal at much greater length with the administration of justice.

It was the sutras and the smrtis which were regarded as authoritative in the classical Hindu legal tradition. Although much in the way of commentaries and digests followed, they were seen as interpretations of, not substitutes for the authoritative texts. These texts have been memorized, studied, analyzed, and carefully dissected by countless pandits and other scholars for over a thousand years. With respect to modern scholarship, however, Menski laments: "It is somewhat sad and surprising that very few academic, let alone practicing lawyers, even in India today, seem to be interested in studying, researching, and teaching classical Hindu law."<sup>175</sup> He describes himself as "one of the very few remaining scholars of Hindu law in the world outside India".<sup>176</sup> There is also a sense that the quality of scholarship among pandits has not reached the same standard in recent years.<sup>177</sup>

It is beyond the scope of this paper to attempt to deal with the commentaries and digests. In any event, it appears that, in the classical Nepalese legal system, reference was made directly to the smrtis and not to any commentary, digest, or other scholarly interpretation of the sacred texts.

## **B. The administration of justice and the role of the king in the sacred literature**

### **(1) In the Dharmasutras**

There is surprisingly little in the Dharmasutras about the administration of justice. In Apastamba, almost at the end of the text, the following appears:

Men who are learned, of good family, elderly, wise, and unwavering in their duties shall adjudicate lawsuits, in doubtful cases investigating the matter by examining the evidence and using ordeals. In the morning of an auspicious day and in the presence of a blazing fire, water, and the king, both sides should be asked to present their case and, with everyone's approval, the chief witness should answer the questions truthfully. Should he answer untruthfully, the king should punish him; and in addition hell awaits him after death. Should he answer truthfully, he will go to heaven and all beings will sing his praises. (2.29.5-10)

Apastamba also provides guidance to the king with respect to the kind of residence in which he should live, the hosting of vedic scholars as guests, providing protection for his

<sup>175</sup> Menski, *supra* note 120 at 39.

<sup>176</sup> *Ibid.* at xv.

<sup>177</sup> Ashok Aklujkar, "Pandita and Pandits in History" in *The Pandit: Traditional Scholarship in India*, *supra* note 123 at 34: "Brahmanical pāṇḍitya is in the doldrums. Attempts to maintain it have been made and are being made, but there has been a very serious decline in its quantity as well as quality." In the footnote to that sentence (note 34), the author begins with this sentence: "The pandits themselves have been acutely aware of the loss of quality."

subjects from thieves, who to appoint as administrators (“Āryas who are upright and honest” (2.26.4)), and the collection of taxes. The King is also responsible for the welfare of his subjects: “And in his realm no one should suffer from hunger, illness, cold, or heat, either through want or by design.”(2.25.11)

Gautama contains more direction for the king. His duties in war are set out, including how to distribute booty (10.13-23). He is to mete out just punishment and support certain people, including “Brahmins who are vedic scholars”. (10.9) The king rules over all his subjects, except Brahmins (11.1), although they are obliged to honour the king (11.8). If his subjects wander from the path of dharma, the king has the responsibility to lead them back to the correct way of life (11.9-11). “He should appoint as his personal priest a Brahmin who is learned, born in a good family, eloquent, handsome, mature, and virtuous; who lives according to the rules; and who is austere.” (11.12) The following verses tell him how to go about resolving disputes:

Reasoning is the means of reaching a correct judgment. Having reached a conclusion in this manner, he should decide the case equitably. If there is conflicting evidence, he should consult those who are deeply learned in the triple Veda and reach a decision, for, it is said, acting in that way, he will attain prosperity. (11.23-26)

Later Gautama tells us the judge should either be the king or a learned Brahmin. (13.26)

Gautama prescribe rules relating to the evidence of witnesses. (13.1-31) The most important is that the witness “speak the truth”. The person who gives false testimony should be “reprimanded and punished”(13.23), but it is not an offence if a person gives false testimony if his life depends on it (13.24).

Baudhayana has very little to say about the duties of the king. However, the right to collect taxes is clearly tied to the duty to protect his subjects; “Receiving one sixth as taxes, a king should protect his subjects.” (1.18.1) The king is told to appoint a personal priest, someone who is “pre-eminent in all matters.”(1.18.7) The king’s duties in war are briefly described. (1.18.9-13) Regarding witnesses, we are told:

People of all four classes who have sons can be witnesses, except vedic scholars, the royalty, wandering ascetics, and those who lack humanity.\* If a witness abides by his recollection, he will receive praise from those in authority; whereas if he acts to the contrary, he will fall into hell. Such a man should live on hot milk for twelve days (B 2.2.37) or offer ghee in the sacred fire while reciting the Kūṣmāṇḍa verses.(1.19.13-16).

Baudhayana is silent on how the king should go about resolving disputes.

Vasistha indicates that a Brahmin and the king have the following duties regarding governance: “The three classes shall abide by the instructions of the Brahmin. The Brahmin shall proclaim their duties (*dharma*), and the king shall govern them



accordingly." (1.39-41) The king or his minister are to preside over court proceedings and act impartially. (16.1-3) The dharma of the king is to "take care of all creatures" (19.1). He should also appoint a personal priest to carry out ritual duties (19.3-6), ensure his subjects conform to their dharma (19.7), and punish offenders (19.9).

## **(2) In the Manusmṛti**

The administration of justice and the role of the king are dealt with more systematically and in much greater detail in the Manusmṛti. The book opens with a chapter on its divine origin and eternal nature. Various topics which are the main concern of the sutras are then dealt with, such as the four varnas, the duties of a Brahmin in his four stages of life, the problems of impurity and purification, and the study of the Veda.

The Manusmṛti then contains a lengthy section on the role and duties of the king. Unlike the scattered and piecemeal treatment this topic receives in the sutras, this section is comprehensive and well-organized. Manus tells us what he is doing right from the start: "I will explain the duties of kings, how a king should behave, how he came to exist, and how (he may have) complete success." (7.1) We find the same kind of kingly duties in Manus that are set out in the sutras. For example, we are told that the king is responsible for the dharma of his people: "The king was created as the protector of the classes and the stages of life, that are appointed each to its own particular duty, in proper order." (7.35) He is also to punish the wrongdoer: "Upon men who persist in behaving unjustly he should inflict the punishment they deserve, taking into consideration realistically (the offender's) power and learning and the time and place." (7.16) The king is also instructed how to wage war and treat his enemies.<sup>178</sup> The advice is much more detailed than in the sutras. The king is to "fearlessly fight to win" (7.197) when the circumstances are right. On the other hand, the king "should try to conquer his enemies by conciliation, bribery, and dissension, either together or separately, but never by fighting. For since it can be observed that neither victory nor defeat belongs permanently to either of two powers who fight in battle, therefore he should avoid fighting. But if even the three expedients mentioned above cannot be used, he should be prepared to fight in such a way as to conquer his enemies." (7.198-200)

What really sets the Manusmṛti apart from the sutras is how the administration of justice is dealt with, especially in the area of resolution of civil disputes. These are divided into eighteen different categories:

These (causes) are: first, non-payment of debts; then, deposits; sale without ownership; partnerships; failure to deliver what has been given; failure to pay wages; violation of an agreement; revocation of purchase and sale; disputes between the owner (of livestock) and the herdsman; boundary disputes; assault; verbal abuse; theft; acts of physical violence; sexual misconduct with women; the duties of husband and wife; division (of inheritance); and gambling and betting (on animals). These are the eighteen causes of legal action here. (8:4-7)

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<sup>178</sup> Manus 7.162-208.

The king is to hear lawsuits, but he can appoint a priest to take his place (8.8-9) There is extensive advice as to how a case is to be heard, including guidance in relation to witnesses and even how to assess credibility:

He should discover the inner emotion of men from the outward signs, by their voice, colour, involuntary movements, and facial expressions, by their gaze and their gestures. The inner mind-and-heart is grasped by facial expressions, involuntary movements, gait, gesture, speech, and changes in the eyes and mouth. (8.25-26)

The goal of the king should be to try these cases on the basis of "eternal justice." (8.8) A king who administers justice in the way Manu describes "reaches the ultimate level of existence." (8.420)

### (3) In the Nāradaśmṛti

The first critical edition of the Nāradaśmṛti was recently published.<sup>179</sup> Lariviere begins his general introduction with this remark:

The Nāradaśmṛti is unique in the corpus of Sanskrit literature. It is the only original collection of legal maxims (*mūlaśmṛti*) which is purely juridical in character. Unlike all the other known *mūlaśmṛtis*, which contain sections dealing with righteous conduct and penance (*ācāra* and *prāyścitta*), the Nāradaśmṛti focuses solely on legal procedure (*vyahāra*) and the substantive law that is included in this traditional category. The fact that the Nāradaśmṛti is cited frequently by later writers in the Indian legal tradition testifies to its importance. There is some evidence which indicates that the Nāradaśmṛti may have even influenced monarchs and their governments: when the great ruler of the Malla dynasty in Nepal, Jayathiti, designed his legal and social reforms, he may well have consulted the Nāradaśmṛti.<sup>180</sup>

Lariviere goes on to describe it as the "juridical text *par excellence*"<sup>181</sup> and concludes that the "Nāradaśmṛti is indeed the *mūlaśmṛti* which offers the best single summary of the classical Hindu legal system."<sup>182</sup>

Menski objects to Lariviere's characterization of the Nāradaśmṛti as being "purely juridical in character":

All of this is well and good, but the claim that this text is purely secular goes in my view too far, since it ignores the wider social context within which the compiler(s) of this text operated. All that such ancient texts are saying, even if they *appear* to focus on secular procedure, is that self-controlled order was

<sup>179</sup> Lariviere, *supra* note 122.

<sup>180</sup> *Ibid.* at 1 [footnote omitted].

<sup>181</sup> *Ibid.* at 1.

<sup>182</sup> *Ibid.* at 2.

eventually found insufficient by itself. From this, it seems, lawyers have a little too rapidly drawn the convenient conclusion that positive law is a necessity in itself and that legal procedure will be needed.

In the ideal world of ancient, classical Hindu laws, there was no such conceptual justification for legal intervention. The leading expectation remained that all individuals should follow their specific dharma in self-controlled manner.<sup>183</sup>

Menski is anxious to debunk the notion that the *smṛtis* and *sūtras* should be regarded as legal codes to be applied in a positivist fashion. Rather, he takes what he calls a post-modern view of the classical Hindu legal tradition. Under this conception, laws were not applied to the facts of the case when a dispute arose. Rather, solutions were found that were appropriate to the circumstances, having regard, firstly and mainly, to conscience and custom and, secondarily, to dharmic principles.<sup>184</sup>

In his introduction, Lariviere discusses the date and authorship of the *Nāradaśmṛti* and *Manuśmṛti*. He concludes: "I doubt whether such texts as the *Nāradaśmṛti* or the *Manuśmṛti* were composed by a single individual."<sup>185</sup> Rather, he sees them as compilations of authoritative sayings that were gradually added to by scholars as time passed. Regarding the date of these *smṛtis*, he says:

To continue the tradition of attempting to date this text relative to Manu, the *Nāradaśmṛti* is closer to the time of Manu than many scholars had previously thought. If we place the *Manuśmṛti* in the period between the 2<sup>nd</sup> or 3<sup>rd</sup> century B.C. and the 2<sup>nd</sup> of 3<sup>rd</sup> century A.D., I would date the *Nāradaśmṛti* approximately

<sup>183</sup> Menski, *supra* note 120 at 108.

<sup>184</sup> *Ibid.* at 42: "South Asian legal history shows clearly that, first of all, from ancient times Hindu law never developed the aspiration to 'rule' from above in positivist legal fashion. Instead, it sought to rule from within." [footnote omitted] See also at 85: "If the basic Hindu conceptual rule was and is that every individual is unique and different, and that every situational context has its peculiar features, requiring a situation-specific response and solution, an appropriate law must of necessity be something different from positivist state laws that prescribe how all people must act in certain situations." And also at 125-26:

In practical terms, common Hindus would never have looked first to *śruti* and then to *smṛti* for ascertaining dharma, even though these are the highest sources. The texts indicate a hierarchy of authority, but do not purport to guide us on the practicalities of ascertaining that authority. Since these texts do not disclose how Hindus would gauge the dharmic needs of a particular situation, it is useful to turn to social reality. Common sense suggests that the textual statements about the hierarchy of sources of dharma must be read in reverse order to retrace the methodology of finding the actual sources of dharma. The sequence of sources of dharma must therefore be examined in reverse, so that individual satisfaction about 'doing the right thing in the right way at the right time'; individually experienced and socially sanctioned, is in fact chronologically the first source of dharma. This connotes with the statements in the immediately preceding section about the primacy of self-controlled order in processes of *vyavahāra* or dispute settlement. In other words, these texts are consistent with other statements of 'legal' hierarchy and make it clear that self-controlled ordering is the first and foremost method of 'finding' dharma, i.e. ascertaining the relevant Hindu law.

<sup>185</sup> Lariviere, *supra* note 122 at 3.

one or two centuries later. Such a relative chronology is a shaky edifice. Even approximations of five hundred-year periods may eventually prove to be widely off the mark. Yet, this is the best we can do with the data available to us.<sup>186</sup>

Using 47 manuscripts, Lariviere indicates that his goal is to "attempt to reconstruct the earliest possible recension of the Nāradaśmṛti."<sup>187</sup>

The introduction of the Nāradaśmṛti announces that it was composed by Lord Manu Prajapati for the "welfare of all beings" and "maintaining proper conduct".<sup>188</sup> We are advised that, at one time, there was no need for a court system: "When men had dharma as their sole purpose and were speakers of the truth, then there was no legal procedure, no enmity, and no selfishness. Legal procedure came into being at the time when dharma was lost among men. The overseer of legal procedures is the king: he has been made the rod-bearer."<sup>189</sup>

We find the common theme that the king is responsible for the dharma of his people: "Since the king is responsible for implementing dharma, he should not put up with error however subtle it may be. The king should resort to fact alone since dharma is the root of prosperity."<sup>190</sup> Speed is essential in certain matters: "He should hear the dispute at once in cases dealing with cattle, land, gold, women, theft, abuse, urgent matters, assault, and accusations of grave sins."<sup>191</sup> Judges must be careful in how they deal with cases: "If a legal proceeding is improperly heard, the judges should incur that penalty, for no one keeps to the straight and narrow without the threat of punishment."<sup>192</sup> The difficulties of getting to the bottom of the matter, especially as it relates to findings of credibility are acknowledged:

There are many types: some who lie may seem to be truthful, and some who are honest may seem to be untruthful. Therefore scrutiny is in order. The sky looks like a flat surface and the firefly seems to be aflame, but there is no surface in the sky and no fire in the firefly. Therefore one has to examine things even though they happened in plain sight. One who pronounces judgment on these things after investigating them does not fail in his duty.<sup>193</sup>

The responsibility for deciding disputes falls on the king and the judges he appoints:

The members of the king's court should be experts on the science of dharma; they should be of good family, truthful and unbiased. They support dharma, but the king is its root. Therefore, the king should settle legal matters along with these

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<sup>186</sup> *Ibid.* at 13.

<sup>187</sup> *Ibid.* at 38.

<sup>188</sup> *Ibid.* at 253.

<sup>189</sup> Nāradaśmṛti (Legal Procedure) 1.2 – all quotations are from Lariviere's critical edition – see *supra* note 122.

<sup>190</sup> Nāradaśmṛti (Legal Procedure) 1.24-25 (part).

<sup>191</sup> Nāradaśmṛti (Legal Procedure) 1.39.

<sup>192</sup> Nāradaśmṛti (Legal Procedure) 1.57.

<sup>193</sup> Nāradaśmṛti (Legal Procedure) 1.62-64.

virtuous ones. When legal disputes are faultless, the judges are faultless. Since their faultlessness comes from dharma, dharma should be the only thing they pronounce.<sup>194</sup>

Essentially the king and his judges are expected to carry out their duties expeditiously and wisely. Failure to do so is a breach of their dharma and is deserving of punishment.

The balance of the Naradasmṛti deals with what Lariviere translates as "Titles of Law". These are the same categories which are set out in the Manusmṛti. However, each topic is given a more systematic and detailed treatment. The chapter on the non-payment of debt contains guidelines with respect to documents and witnesses. For example, we are told: "A document may only be overruled by another document. A case which relies on witnesses may be overruled by other witnesses. A document being superior to a witness, however, witnesses may be overruled by a document."<sup>195</sup> There are also verses emphasizing the importance of being truthful: "Thus it is revealed to us: "Truth alone is the supreme gift. Truth alone is the supreme austerity. Truth alone is the supreme dharma of everyone."<sup>196</sup> There is also the familiar assertion that the king is responsible for punishment of offenders: "The king should always diligently attend to business, the Vedas, and the administration of justice; he should use skillful means to capture and punish the guilty in the city and the countryside."<sup>197</sup>

Kane provides this assessment of the classical Hindu legal system:

Nārada, Br̥haspati and Kātyāyana represent the high water mark of ancient Indian adjective law. These writers flourished before 600 A.D. and the first two of them are probably older by several centuries than that date. They present an orderly system providing for the appointment and duties of judges, proper pleadings, the law of evidence and limitation, decrees and their execution, crimes and punishments. This system compares most favourably with any system of judicial procedure prevalent anywhere in the West up to the 18<sup>th</sup> century A.D.<sup>198</sup>

It was certainly a system which set out high ideals for its judges, although how these ideals were fleshed out in practice would no doubt have varied widely from place to place. One distinguished Indian jurist even asked: "whether the judicial system described in the Hindu Law books was only an ideal or imaginary system or represented a system of administration actually in vogue" but concludes that the "rules laid down are so detailed and practical and their development is so natural that they must have been the result of actual experience in the daily administration of justice."<sup>199</sup>

<sup>194</sup> Naradasmṛti (Legal Procedure) 3.4-6.

<sup>195</sup> Naradasmṛti (Titles of Law) 1.125

<sup>196</sup> Naradasmṛti (Titles of Law) 1.195.

<sup>197</sup> Naradasmṛti (Titles of Law) 19.69.

<sup>198</sup> Kane, *supra* note 124 at 410.

<sup>199</sup> Varadachariar, *supra* note 123 at 231.

### C. The meaning of dharma

As has been noted above, there is no English word that adequately reflects the breadth and depth of meaning of the word 'dharma'. It is sometimes translated as 'law', 'righteousness', 'duty' or 'religion', depending on its context, but these words are usually inadequate representations of what the author intends to convey. Accordingly, I agree with Lariviere's approach, where he does not translate the word.

Nevertheless, you can obtain a sense for the nature of 'dharma' and the meaning it carried in the classical Hindu legal tradition through a study of the context in which the word is used. For example, in the sutras, we are told that 'dharma' is found in the Veda, in tradition, and in the practice of "those who know the Veda."<sup>200</sup> In other words there is a certain 'rightness' about it as a result of its authoritative origin and its adoption by trustworthy people. This, of course, is what the sutras seek to record – what is right conduct for a person, depending on their gender, age, caste, and situation in life. Following one's dharma can lead to "boundless happiness"<sup>201</sup> and can result in being promoted to a higher caste.<sup>202</sup> Dharma can be learned from people of all castes, including Sudras and women.<sup>203</sup> Although the sacred literature can assist in achieving one's dharma, it is more important to look to the conduct of those who know how to live properly.<sup>204</sup> "Good conduct is the highest Law for all—that is certain. A man seeped in vile conduct comes to ruin in this world and the next."<sup>205</sup>

Manu says the same thing as the sutras about the origin of dharma.<sup>206</sup> We have read how the loss of dharma led to the need for court proceedings.<sup>207</sup> In this context dharma is being equated with right conduct. We are also told that "dharma is based on truth"<sup>208</sup> so it signifies something beyond just behaving in the right way. Dharma is an essential element in court proceedings: "A court is not a court if there are not elders. Elders are not elders unless they pronounce dharma. Dharma is not dharma unless there is truth. Truth is not truth if it is mixed with sophistry."<sup>209</sup>

It is also interesting to note how the Naradasmṛti characterizes the dharma of a judge: "Just as a hunter would pursue the tracks of a wounded deer by traces of blood in the forest, so he (the judge) should pursue the tracks of dharma."<sup>210</sup> This is a dramatic image. The judge is to be part of the wildness of the hunt, facing the uncertainties and risks of the pursuit in perhaps unknown and dangerous territory. Contrast this image to

<sup>200</sup> Gautama 1.1-2. See also Apastamba 1.1.1-2, Baudhayana 1.1.1-4 and Vasistha 1.4-5.

<sup>201</sup> Apastamba 2.2.2

<sup>202</sup> Apastamba 2.11.10.

<sup>203</sup> Apastamba 2.29.11 & 15.

<sup>204</sup> Apastamba 2.29.13-14.

<sup>205</sup> Vasistha 6.1.

<sup>206</sup> Manusmṛti 2.6.

<sup>207</sup> *supra* note 189 and accompanying text.

<sup>208</sup> Naradasmṛti (Legal Procedure) 1.11

<sup>209</sup> Naradasmṛti (Legal Procedure) 3.17

<sup>210</sup> Naradasmṛti (Legal Procedure) 1.32

the passive decision-maker in the British common-law tradition, who listens to the submissions made by the parties and weighs the evidence the parties choose to present. The common-law judge is not the hunter carefully tracking the quarry, braving the elements and the complexity of wild terrain, rather the judge is back at the lodge comfortably seated, enjoying the view, and waiting to be served venison with vintage wine.

What is the dharma which the judge is seeking? There does not appear to be anything rigid or mechanical about the hunt. The judge is not directed to identify the relevant principles of law, make findings of fact, and then apply the law to the facts. There is a right path and a right destination in the forest, just as there is a right way to proceed and a right decision in a court case. In judicial proceedings dharma is the outcome that the situation calls for, a reflection of the eternal order in the world. The meaning of dharma has that post-modern flavour which Menski describes.<sup>211</sup> As Olivelle notes: "Its very complexity may be the reason for the lack of a single comprehensive study of the term."<sup>212</sup>

#### D. Conclusion

During my stay in Nepal (from 1992 to 1997), I flew from Kathmandu to Jumla (a district center in the western region of Nepal) and then trekked to the headwaters of the Chaudhabise Khola.<sup>213</sup> About a four day walk from Jumla, these headwaters are nestled in a spectacular mountain cirque with snow-covered Himalayan peaks forming a natural amphitheatre on three sides. In these remote surroundings, beside a glacier at the end of a valley carpeted in alpine meadows, water trickles out from between the small rocks of a scree slope. As this water gradually finds its way down the valley, where initially the only signs of human habitation are seasonal shepherd huts, it is joined by waters from other streams, eventually becoming a river well before passing by Jumla.

The headwaters of the classical Hindu legal tradition were in the sutras, where scholars first started to trace out the ideals which should guide judges and the king in the administration of justice. Attracted by these ideas, later scholars added their contribution to the flow until finally, by the time of the *smritis*, those ideals became a well-defined river. While flowing through many channels and cutting across a variety of landscapes, the river's currents would guide Hindu dispute resolution for several centuries, including in Nepal until the passing of the *Ain* in 1854. The river was stopped at this obstacle, but found some ways around and through it, although it lost more and more of its strength as time went on. Its currents continue to flow, however, in the culture and still find expression in some of the indigenous customs and dispute resolution mechanisms which can be found in some areas of Nepal.

In this chapter, I have identified the literature which guided the classical Hindu legal tradition and sketched out the principles describing the role of the king and how justice

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<sup>211</sup> *supra* note 120.

<sup>212</sup> Olivelle, *supra* note 122 at 14 [footnote omitted].

<sup>213</sup> 'Khola' in Nepali, means 'river'.

was to be administered. I have also sought to give the reader some idea as to the meaning of 'dharma', which is the central concept in the sacred literature and how it influenced the way disputes were to be handled.

Having identified the source and the nature of the flow of the classical Hindu legal tradition, it is now time to examine the landscape through which it passed during the first half of the 19<sup>th</sup> century in Nepal. The first step will be to examine the sources which tell us about that landscape and then assess their reliability. In other words, to what extent can we rely on the picture which is sketched out in this literature? Having made that assessment, I will describe, in a summary way, how the administration of justice was carried out during the period. This will complete the picture of the context in which the Nepalese legal system functioned at that time and allow me to analyse the role of custom and the panchayat in the classical Hindu and Nepalese legal traditions in Chapter V.



## CHAPTER IV - THE CLASSICAL NEPALESE LEGAL SYSTEM

### A. The sources for a description of the classical Nepalese legal system during the period 1790 to 1854

The first description of the Nepalese legal system by an English observer appeared in a book published in 1811.<sup>214</sup> The author, Colonel Kirkpatrick had been sent to Nepal in 1793 by the British,<sup>215</sup> following a request by the Nepalese regent, Bahadur Shah for assistance in their dealings with the Chinese.<sup>216</sup> Kirkpatrick does not seek to provide a comprehensive description of Nepal's legal system. However, in the course of describing the functions of the important government officials, he comments on the role of what he calls the 'Dhurma-Udhikar',<sup>217</sup> the 'Bichâries' and the 'Dittha',<sup>218</sup> and also includes a paragraph on the laws of Nepal.<sup>219</sup> Kirkpatrick notes that the Dharmasastras form the basis of the laws of Nepal (but does not mention any specific sastra), indicates that the water ordeal is sometimes used to decide cases, and states that the criminal side of Nepalese law is vigorously enforced, but he expresses doubt about how the civil law is applied, having regard to the nature of the sastras and what he calls "the suspicious nature of the courts."<sup>220</sup> He concludes by saying that perhaps owing to some 'glaring imperfection' in their civil laws, Bahadur Shah asked the British "for a code of laws, with a view to the better regulation of his country."<sup>221</sup> Nevertheless, a page later, Kirkpatrick expresses the opinion that "the government affords, on the whole, considerable protection to foreign merchants, rendering them in all cases, it would appear, as strict and as prompt justice as the imperfect nature of its general polity will admit."<sup>222</sup>

<sup>214</sup> Kirkpatrick, *supra* note 132. Portions of this book relating to the legal system of Nepal were published in a recent issue of Kanoon, a leading Nepalese legal journal.

<sup>215</sup> Kirkpatrick's visit in 1793 was not the first time Europeans had visited Nepal. Capuchin missionaries established a Catholic mission in the Kathmandu valley in 1715, but were later expelled following Prithvi Narayan Shah's conquest of the area. The writings of the Capuchin fathers may be fertile ground for further research – perhaps they contain some descriptions of the workings of the Nepalese legal system. Whelpton refers (*supra* note 36 at 33) to an account by Fr. Desideri who visited the valley in 1721 while returning from Tibet: see Ippolito Desideri, *An Account of Tibet: The Travels of Ippolito Desideri of Pistoia, SJ, 1712-1727*, Filippo De Filippi, ed. (Taipei: Ch'Eng Wen Publishing Company, 1971). However, the only reference to the law or legal system of Nepal is in the following quote, which appears on page 314: "The chief people in Nepal, after the petty Kings, are the Gurù and the Pardàn [Pradhana]. The former are priests and spiritual directors, but are allowed to marry and are not numerous. Every Kinglet has his special Gurù, to whom he turns for advice. The Pardàn are ministers, officers of the law, and nobles."

<sup>216</sup> Whelpton, *supra* note 36 at 39.

<sup>217</sup> This is a reference to the Dharmadhikari: see *infra* note 298. The spelling of Nepalese words in Kirkpatrick's book (including the spelling of Nepal) is not always accurate. Hamilton (see *supra* note 132) ascribes this to the negligence of the publisher.

<sup>218</sup> Kirkpatrick, *supra* note 132 at 201-02. For a discussion of those terms see pages 70 to 71, below.

<sup>219</sup> *Ibid.* at 203.

<sup>220</sup> *Ibid.* at 203.

<sup>221</sup> *Ibid.* at 203. Apparently, Bahadur Shah's request was not pursued, as I have not seen any further reference to it in later literature.

<sup>222</sup> *Ibid.* at 204.

Francis Hamilton was the next European to write a book about Nepal, which was first published in 1819.<sup>223</sup> In his introduction, Hamilton indicates that it is his intention to describe Nepal as it was prior to the start of the war with the British in 1814. He spent 14 months in Nepal, during 1802 and 1803 and a further two years near its border collecting information from various people. Hamilton acknowledges the assistance of several persons, including a Brahman who had been a judge in a territory close to Nepal. In the introduction to the 1971 edition, Marc Gaborieau, a leading scholar, concluded with this remark: "far from being a curiosity for collectors, the book of Hamilton, generally reliable and so easy and pleasant to read, remains one of our most important sources."<sup>224</sup> Unlike Kirkpatrick, Hamilton mentions the panchayat, his description of which will be dealt with below.<sup>225</sup> The functions of various court officials are described as well as the nature of punishments handed down by the courts.<sup>226</sup> Hamilton expresses some scepticism about Kirkpatrick's opinion that foreign merchants can expect justice in the Nepalese courts. Rather, Hamilton indicates that commerce is in a 'state of decay' owing, in part to "the recovery of debts being now very much neglected in the courts of justice".<sup>227</sup> He also observes that a "poor creditor, in general, has no recourse against a powerful debtor" in the Nepalese courts.<sup>228</sup>

The most important source of information about the Nepalese legal system for the first half of the 19<sup>th</sup> century is the writings of Brian H. Hodgson. As will be described below, Hodgson wrote extensively and published many articles about various aspects of life in Nepal, including its geography, birds, animals, languages, ethnic groups, religion, caste structure, and commerce. He also published two articles dealing with the administration of justice in Nepal. The first (which contains two parts) appeared in the first volume of the *Journal of the Royal Asiatic Society* in 1834.<sup>229</sup> His next article on the Nepalese legal system was published in 1836.<sup>230</sup>

The first part of the 1834 Article is entitled, "On the Law and Police of Nepal" and contains ninety-eight questions and answers. Hodgson posed questions to three Nepalīs who were knowledgeable about Nepal's legal system. After receiving and translating the answers, Hodgson sent the questions and answers to the Royal Asiatic Society in Bengal. As the introduction indicates, the questions and answers which appear in the article were collated from several sets which Hodgson had sent to the Society.<sup>231</sup> It appears that at least some of the original source material is now part of the records of the British Library in London, England.<sup>232</sup>

<sup>223</sup> Hamilton, *supra* note 132.

<sup>224</sup> *Ibid.* A portion of Hamilton's book relating to the Nepalese legal system has also been published in a recent issue of *Kanoon*.

<sup>225</sup> See pages 86 to 88, below.

<sup>226</sup> *Ibid.* at 102-06.

<sup>227</sup> *Ibid.* at 104.

<sup>228</sup> *Ibid.* at 104.

<sup>229</sup> 1834 Article, *supra* note 133.

<sup>230</sup> 1836 Article, *supra* note 4.

<sup>231</sup> 1834 Article, *supra* note 133 at 211.

<sup>232</sup> Hodgson papers, India Office Library and Records located at British Library, London vol. 6 pp. 82-156 [British library records]. Hodgson divides these by chapter. All questions and answers are handwritten in English. The first chapter is entitled "No. I Judicial System & Police of Nepal" which is a series of 106

Hodgson's 1836 article is based on the same sets of questions and answers together with "several supplementary papers containing the result of his own (Hodgson's) observation and research."<sup>233</sup> This article begins with a comparison between the Nepalese and English justice systems written for the most part by a Captain Herbert. The rest of the article quotes extensively from the answers to the questions posed by Hodgson to the Nepalese legal experts. It is arranged systematically and deals with a number of topics such as the nature and jurisdiction of the courts (in Kathmandu and elsewhere), the functions of the officers working in the courts, the police, the procedure used in the courts, the normal course followed in a civil suit and criminal matter, what fees are charged to litigants, the nature of punishments imposed in criminal matters, the rules of evidence, a description of the water ordeal, how the panchayat functioned, and the source and nature of the civil and criminal laws of the kingdom. The article, though published in 1836, was written in 1831: it ends with "Nepal Residency, 29<sup>th</sup> January, 1831." Even though the first part of the article was written by someone else, and the second part assembled by G. M. Batten, we are told that Hodgson corrected and approved the article before publication.

As far as I am aware, there is not much in the way of official records which would shed light on the functioning (as opposed to the structure) of the Nepalese legal system during the first half of the 19<sup>th</sup> century. I do not know of any Nepali literature (fiction, non-fiction, or poetry) or oral history which might give us a glimpse of how justice was administered during this period. It appears Hodgson was the first to write about the judicial system of Nepal in any depth. Because his writings provide such an important source of information, I will briefly describe his life and work in the next section.

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questions and answers. The second chapter has a similar title: "No II Judicial system & Police of Nepal" and contains 109 question and answers. The third chapter begins with the following title: "No. III Judicial System of Nepal – Additional queries and their answers (by the respondent of No. II)" In this chapter, 15 question and answers are set out. The next chapter's title is similar to the titles of the first and second chapters: "No. IV Judicial System of Nepal." Here we find 29 question and answers including a section entitled "Remarks appended by respondent". The next chapter is entitled "No. V. Part I Judicial System of Nepal Crimes & punishments." After naming the courts in Kathmandu, Patan and Bhaktapur, Hodgson lists and describes various crimes punishable in the courts. This is followed by the second part, entitled, "No. V Part II, Judicial System of Nepal Crimes and Punishment" in which Hodgson describes the punishments carried out during three separate 'jail deliveries' – occasions when punishments handed down by the courts were carried out. These included a beheading of a lower caste man who had "sexual commerce with a Brahmani", a Khas who had his "member virile cut off for sexual commerce with a Brahmani" and a man from the hills who was beheaded "for killing a cow by a violent blow" (for a more complete description of punishments carried out during jail deliveries as described by Hodgson see Adam, *supra* note 147). The next chapter is entitled: "No. VII Judicial System & Police of Nepal – Additional Queries and their answers by the respondent in Nos II & III". (I am unable to account for what might have happened to chapter no. VI.) Chapter No. VII contains 40 questions and answers. An important question (which, to my knowledge, has not yet been investigated) is whether or not these sets of questions and answers, written in English, are translated from written questions and answers in Nepali. We are told, in Hodgson's 1836 article (*supra* note 2), that he was provided with written responses to his questions (page 95). These would have been in Nepali. A distinguished Nepali scholar, Dr. Ramesh Dhungel is presently leading a project which is seeking to catalogue all of Hodgson's writings. This may reveal the extent to which the original written answers to Hodgson's questions are still available.

<sup>233</sup> 1836 Article, *supra* note 4 at 98.

## B. Who was Brian H. Hodgson?

Brian Hodgson was born in England on February 1, 1801.<sup>234</sup> He lived a long life, passing away in 1894. His father lost the family fortune in a banking venture when Hodgson was of young age, but his father's connections proved to be helpful in securing an opportunity for Hodgson with the East India Company. When Hodgson was about 15 years old, he attended Haileybury, a school whose program was intended to train young men for overseas work with the Company. The first two years of the program were spent in England where Hodgson excelled in all subjects, except math.<sup>235</sup> He then travelled to Calcutta, where he continued his studies. The climate negatively affected his health and Hodgson was told that he needed to make a choice. He could return to England, seek a post at a higher elevation, or face the prospect of an early death. The opportunities in the hilly regions were quite limited at that time. Nevertheless, Hodgson was able to secure an appointment as Assistant Resident in Kumaoan in 1819, an area which the Company had wrested from Nepal's control about four years earlier. After spending about a year there, he was transferred to Kathmandu, where he served as Assistant Resident from 1820 to 1822.

Initially, Hodgson did not expect to be in Nepal for the long term. A transfer to Calcutta in late 1822 put him into a job that positioned him well for future promotions to senior positions in India. His health again acted up and, to avoid a return to England, he accepted the job as postmaster at the Residency in Kathmandu. Hodgson served in this position until being appointed Assistant Resident again in 1823. It appears a strong factor influencing Hodgson's determination to remain in the service of the East India Company was the fact that his income had become the primary means of support for his family back in England,<sup>236</sup> a family which included three sisters and three brothers.

Hodgson held the position of Assistant Resident until 1833 (although he was the Acting Resident for a period of time between 1829 and 1831), when he was appointed Resident (a position roughly equivalent to an Ambassador). Hodgson served in that position until he was forced to leave Nepal by his superior, Lord Ellenborough, in late 1843. Waterhouse tells us that the events leading up to his departure were something on which Hodgson brooded for the rest of his life.<sup>237</sup> After briefly returning to England, Hodgson went back to India and settled in Darjeeling in 1845, where he continued his studies of various aspects of life in Nepal and the surrounding regions. His father's ill health prompted him to return to England in 1857, where he lived the remaining years of his life. Although Hodgson married twice, he had no children from these relationships. However, Hodgson formed a relationship with a Muslim woman, Meharrunisha Begum sometime in the early 1830s, from which a son and daughter were born. There may have

<sup>234</sup> Hodgson's first biographer, W. W. Hunter indicated his date of birth was February 1, 1800. For the reasons mentioned by David Waterhouse, it appears the better view is that Hodgson was born in 1801. See David Waterhouse, "Brian Hodgson – A biographical sketch" in *Origins of Himalayan Studies*, *supra* note 135 [Biographical Sketch].

<sup>235</sup> In fact, Hodgson was the gold medallist of his class: Hunter, *supra* note 134 at 17.

<sup>236</sup> *Ibid.* at 64.

<sup>237</sup> Waterhouse, *Biographical Sketch*, *supra* note 234 at 20. See below, pages 62 to 63.

even been a third child from this relationship, although the evidence remains inconclusive. Waterhouse indicates that Hodgson abandoned Begum when he left Nepal. He notes that "although he is said to have kept in touch, there are no records to confirm this."<sup>238</sup> Hodgson sent his children to Europe when they were at a young age, where they were cared for by one of his sisters. Both children died young: his daughter, Sarah of tuberculosis at about 15 years of age and his son, Henry at the age of 20.

As was mentioned above, a biography of Brian Hodgson was written by his friend, W. W. Hunter,<sup>239</sup> which Waterhouse describes as very thorough, but "somewhat uncritical in its approach."<sup>240</sup> Waterhouse points out that *Origins of Himalayan Studies* is the first comprehensive analysis of Hodgson's work since Hunter's biography.<sup>241</sup>

Hodgson spent over 20 years living in Nepal and, during that time, studied and wrote on various aspects of life there. When Hodgson left Nepal in 1843, the King of Nepal said, in a letter, that Hodgson had a "perfect knowledge of the customs and institutions of my Kingdom and of the Parbattia language."<sup>242</sup> This is not surprising when one considers the depth and breadth of Hodgson's research during his time there. His output included 11 papers on Buddhism and 146 papers on birds and animals, published both during and after his stay in Nepal.<sup>243</sup> He also published articles on the languages, ethnic groups, caste structure, geography, commerce, and legal system of Nepal. In addition he contributed 423 Buddhist manuscripts to various institutions in India and Europe;<sup>244</sup> hired local artists at his own expense to make hundreds of sketches of Buddhist architecture and thousands of sketches of birds, animals, people, and other subjects;<sup>245</sup> and, donated to museums more than 10,000 specimens of birds, mammals, and reptiles.<sup>246</sup>

<sup>238</sup> *Ibid.* at 9 [footnote omitted].

<sup>239</sup> Hunter, *supra* note 134.

<sup>240</sup> Waterhouse, *Biographical Sketch*, *supra* note 234 at 21.

<sup>241</sup> *Origins of Himalayan Studies*, *supra* note 135 at xxi. See also David Arnold, "Race, Place and Bodily Difference in Early Nineteenth Century India" (2004) 77:196 *Historical Research* 254, who writes at 268: "At this point it may be helpful to turn to one individual, Brian Houghton Hodgson, who captures many of the complexities and contradictions of the 'race' idea in early nineteenth-century India, but whose important contribution has been largely ignored." [footnote omitted] He notes an exception is T. R. Trautman, *Aryans and British India* (Berkeley, California, 1997), ch. 5.

<sup>242</sup> Letter from King Rajendra Bikram to Lord Ellenborough dated July, 1843, from a translation in Stiller, *supra* note 140 at 203. Stiller indicates that the letter was not officially delivered to Lord Ellenborough, although Hodgson sent a copy to the governor-general for his information. The 'Parbattia language' referred to is the Nepali language. Hunter writes, (*supra* note 134 at 87): "Part of Hodgson's influence with the Nepal chiefs was due to the extraordinary reputation which he acquired at this time as a man of ascetic life, deeply versed in divine things. His Buddhistic learning won the friendship of their Tibetan over-lord, the Grand Lama himself. His unwearied search after Sanskrit manuscripts and his transcriptions of Hindu texts endeared him to the pandits about the Nepal Court. Always an abstemious man, he became after his severe illness in 1837 almost a Brahman in regard to food and drink."

<sup>243</sup> Donald S. Lopez Jr., "The Ambivalent Exegete: Hodgson's contributions to the study of Buddhism" in *Origins of Himalayan Studies* *supra* note 135 at 52 [*Ambivalent Exegete*] and Ann Datta and Carol Inskipp, "Zoology...Amuses Me Much" in *ibid* at 136 [*Zoology*].

<sup>244</sup> Lopez, *Ambivalent Exegete*, *supra* note 243 at 55. Most of these manuscripts were obtained through the help of a local pandit, Amrtananda.

<sup>245</sup> B. H. Hodgson, "Architectural illustrations of Buddhism" in *Origins of Himalayan Studies*, *supra* note 135 at 111. See also Datta and Inskipp, *Zoology* (*supra* note 243 at 146) where the author reports:

How is Hodgson's work rated by the scholars who contributed articles to *Origins of Himalayan Studies*? With regard to his articles on Buddhism, Lopez concludes:

Hodgson's legacy, thus, is a mixed one. He is remembered today, when he is remembered at all, for sending Sanskrit manuscripts (manuscripts that he himself could not properly read) to European scholars, thereby adding to the flood of texts in a variety of Asian languages that would set in motion the textual study of Buddhism. Hodgson's manuscripts would prove crucial for the study of Sanskrit Buddhism in particular and of Indian Buddhism more generally. In this regard, the assessments provided by Burnouf, and later Müller, were accurate. He is less well-remembered for a contribution that from one perspective is best forgotten: he provided a description of Buddhist thought that was filled with errors and misconceptions that would be repeated for generations.

Yet Hodgson remains a fascinating figure in the history of British colonialism, embodying the shifts and ambivalences that so often attended the relations between colonizer and colonized. Hodgson passes back and forth between multiple poles. He expresses both a deep interest and a disdain for the doctrines of Buddhism; he expresses both a confidence and a suspicion in his native informant; he expresses both respect and contempt for the work of textual scholars; he expresses humility in describing his work as a collector of Buddhist texts (for which he should have been proud), but pride in his work as an interpreter of those texts (for which he should have been humble), renouncing fame as the former, fearing obscurity as the latter. He regarded the entire enterprise of seeking to understand Buddhist philosophy with both deference and dismissal...

The academic study of Buddhism was born with Hodgson's help, but it soon left him behind.<sup>247</sup>

J. P. Losty indicates, in his article dealing with Hodgson's work on Buddhist architecture: "...it is Hodgson's work on the discovery of the texts of Indian Buddhism which is perhaps his most enduring legacy."<sup>248</sup> He goes on to assess Hodgson's contribution to scholarship in the area of Buddhist architecture in this way:

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There are now three collections, two of them public, of watercolour paintings and pencil sketches of Nepal's vertebrate fauna. Hodgson generously donated the large majority to the Zoological Society of London and the British Museum. In 1874 he gave the originals to the Zoological Society of London. These are bound in 8 large folio volumes and comprise 1,125 sheets of birds and 487 of mammals. He donated another set of 1,319 sheets of illustrations of mammals, birds, reptiles and fish to the British Museum which were received in 1845 and 1858. [footnotes omitted]

<sup>246</sup> Datta and Inskipp, *Zoology*, *supra* note 243 at 141 and 143.

<sup>247</sup> Lopez, *Ambivalent Exegete*, *supra* note 243 at 66-67.

<sup>248</sup> J. P. Losty, "The Architectural Monuments of Buddhism: Hodgson and the Buddhist architecture of the Kathmandu Valley" in *Origins of Himalayan Studies*, *supra* note 135 at 77.

He did not collect for its own sake or for self-aggrandizement, but only so that his collections could be of use to scholarship. The examination of his Sanskrit Buddhist manuscripts he left mostly to others, but on the architecture, principally the Buddhist architecture, of Nepal, he made himself an expert...

Hodgson's work on Nepalese Buddhist architecture is both summed up and epitomized by his Memorandum. This displays both knowledge of and respect for the material culture of Nepalese Buddhism, but reveals Hodgson's lack of scholarly training very clearly. Even for a pioneer, as Hodgson was, the accumulation of facts is simply not sufficient, for they need to be interpreted in the light of an overall grasp of the subject. His facts are not systematized or presented properly, so that the unknowledgeable reader will have difficulty making much sense of it; and he displays a distressing tendency to ride off on his favourite hobby horses or to refight old battles...

Yet the architectural drawings are a precious reminder of the harmonious beauty of traditional Newar architecture, and are indeed our earliest accurate records of it. Subsequent alterations, demolitions, and earthquakes have lessened that heritage, so that these drawings are important as documentary evidence for an earlier state of the buildings. Only now, after their long neglect, can their true importance be realized, for the light which they shed on the material culture of the Kathmandu Valley in the early nineteenth century, and on the development of Buddhist architecture in the Valley during the previous one and a half millennia.<sup>249</sup>

In the area of zoology, Hodgson again is given praise for his abilities as a collector and observer: "His specimen collections of birds and mammals are undoubtedly one of his major achievements."<sup>250</sup> Datta and Inskipp lament that Hodgson was not able to publish a book on the zoology of Nepal:

That Hodgson's zoology of Nepal was never published is to be regretted. Using the stunning and lifelike watercolours now held in The Natural History Museum, London and the Zoological Society of London, backed up by his extensive scientific research, Hodgson had the potential to publish an outstanding natural history book which could have taken its place alongside Gould and others. It is where most of these contemporary works lack essential biological data, and are the poorer for it, that Hodgson's would have surpassed them all resulting from his personal knowledge of the animals and an informed understanding of the ecology of this unique zoological fauna, something which only a person who had lived there for many years could describe adequately.<sup>251</sup>

The authors go on to conclude their article with the following remarks about the significance of Hodgson's work today:

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<sup>249</sup> *Ibid.* at 102-04.

<sup>250</sup> Datta and Inskipp, *Zoology*, *supra* note 243 at 136.

<sup>251</sup> *Ibid.* at 148.

Sadly Hodgson's achievements are hardly recognized by naturalists who live in or visit the Himalayas today although his name is certainly familiar to them. Yet his work on Nepalese birds and mammals remains the backbone of our current knowledge. He laid the foundation of studies on Himalayan fauna and provided almost all the information available on Nepalese mammals, birds, amphibians and reptiles until the second half of the twentieth century, when Nepal, for the first time, was opened up to a new generation of zoologists.<sup>252</sup>

Inskipp begins an article on Hodgson's ornithological work with these remarks:

Brian Hodgson was the first person to study the birds of the forests and mountains of the Himalayas, a true pioneer of Himalayan ornithology. His work on birds is without doubt his major achievement in the field of zoology. Hodgson's bird collection of 9,512 specimens was one of the largest made in Asia and comprised 672 species, of which 124 were new to science. He is credited with first descriptions of 80 bird species...<sup>253</sup>

Hodgson's pioneering work was not limited to the area of zoology. His articles on the political, social, cultural, and linguistic aspects of life in Nepal are still of interest today. Martin Gaenszle writes:

However a few highly interesting ethnographic papers (in the broader sense) were published during the residency years, which show that Hodgson observed the social and cultural world around him with both pragmatic as well as analytic interest. These papers are somewhat unpolished, having the appearance of factual reports. The style bears the imprint of his former master G. W. Traill whom he assisted in Kumaon. They provided survey data, mere intelligence, so to say. But at the same time these early papers display a fine sense for the crucial issues and a close understanding of the indigenous realities. As many anthropological questions which are a matter of discussion up to the present are brought up here for the first time, Hodgson may be regarded as a founder of Himalayan anthropology.<sup>254</sup>

Later in his article, Gaenszle states; "We have seen that Hodgson was a pioneer of South Asian ethnography and has provided detailed accounts on Himalayan ethnicity and culture."<sup>255</sup> He also observes: "Hodgson has been a valuable source for anthropologists up to the present."<sup>256</sup>

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<sup>252</sup> *Ibid.* at 150.

<sup>253</sup> Carol Inskipp, "A Pioneer of Himalayan Ornithology" in *Origins of Himalayan Studies*, *supra* note 135 at 172.

<sup>254</sup> Martin Gaenszle, "Brian Hodgson as Ethnographer and Ethnologist" in *Origins of Himalayan Studies*, *supra* note 135 at 208-09.

<sup>255</sup> *Ibid.* at 220.

<sup>256</sup> *Ibid.* at 221.



With respect to Hodgson's articles on linguistics, George Van Driem writes; "Hodgson was thorough and conscientious about the linguistic facts. His description of Bahing is exemplary."<sup>257</sup> He ends his article with this statement: "A meticulous and patient review of all of Hodgson's linguistic notes and drafts could enhance the value of Hodgson's already colossal and enduring contribution to linguistics."<sup>258</sup>

What conclusions about Hodgson's research and writings can be drawn from all of these comments? What stands out is that Hodgson had an impressive ability to observe, collect, and record important details about various aspects of life in Nepal and the surrounding areas. It is this aspect of his work which continues to be of value to modern scholarship. On the other hand, when Hodgson ventured into the area of theorizing on what he found, he sometimes reached erroneous conclusions: not an uncommon fault among scholars!

Hodgson was certainly a man of his times. He was in favour of colonization of Nepal. Writing in 1856, Hodgson states: "I say, then, unhesitatingly, that the Himálaya generally is very well calculated for the settlement of Europeans, and I feel more and more convinced that the encouragement of colonization there is one of the highest and most important duties of Government."<sup>259</sup> In fact, towards the end of his stay in Nepal, Hodgson had formed the view that the Company would be "sooner or later compelled to subdue and occupy" Nepal.<sup>260</sup>

In 1831, he wrote to the Political Secretary in Calcutta, strongly advocating that the businessmen of Calcutta should become involved in the commerce of Nepal:

When we consider how much intelligent activity the native inhabitants of Calcutta have, of late years, been manifesting, we cannot help wondering that none of the mercantile class among them should have yet turned their attention to the commerce of Népal. Do they not know that the Népárs, or aborigines of the great Valley of Népal, have, from the earliest times, maintained an extensive commercial intercourse between the plains of India on the one hand and those of Tibet on the other; that Népal is now subject to a wise and orderly Native Government; that owing to the firm peace and alliance between that Government and the Honourable Company's, the Indian merchant has full and free access to Népal; that the confidence inspired by the high character of the native administration, and by the presence of a British Resident at the Court, has led the native merchants of Benáres to establish several flourishing kothees at Káthmándú...<sup>261</sup>

<sup>257</sup> George Van Driem, "Hodgson's Tibeto-Burman and Tibeto-Burman Today" in *Origins of Himalayan Studies*, *supra* note 135 at 243.

<sup>258</sup> *Ibid.* at 245.

<sup>259</sup> Brian H. Hodgson, "On the Colonization of the Himalaya by Europeans" in *Essays on the Languages, Literature, and Religion of Nepal and Tibet* reprint (New Delhi: Asian Educational Services, 1991) Part II 83 at 83 [Essays].

<sup>260</sup> Letter from B. Hodgson to Lord Ellenborough dated May 22, 1843, in Stiller, *supra* note 140 at 198.

<sup>261</sup> B. H. Hodgson, "On the Commerce of Nepal" in *Essays*, *supra* note 259 Part II at 97-98.

As is apparent in the above quote, one of Hodgson's goals at this time was to encourage greater Indian involvement in the commerce of Nepal. This is an important point to keep in mind when we look at Hodgson's articles on the legal system, below.

Hodgson also encouraged the East India Company to recruit soldiers from what Hodgson referred to as the 'military tribes' of Nepal. In a paper read before the Bengal Asiatic Society on January 9, 1832, Hodgson said:

In my humble opinion they are by far the best soldiers in Asia; and if they were made participators of our renown in arms, I conceive that their gallant spirit, emphatic contempt of Madhesias (people of the plains) and unadulterated military habits, might be relied on for fidelity; and that our good and regular pay and noble pension establishment would serve perfectly to counterpoise the influence of nationality, so far as that could injuriously affect us.<sup>262</sup>

Although Hodgson continued to advocate this position over the years, it was not until 1857 that Nepalese were recruited to assist in India. Because of their instrumental role in dealing with the Indian mutiny, part of the land seized by the British in the war of 1814-16 was returned to the Nepalese. In Hunter's biography of Hodgson, he concludes: "The development of the Gurkha regiments in the British service after the Mutiny, on the lines so long urged by Hodgson, forms one of the most remarkable chapters in the history of our Indian army."<sup>263</sup>

Hunter devotes a chapter in his biography to Hodgson's role in championing vernacular education in India.<sup>264</sup> Initially, Hodgson's views did not win the day, but by the time of his death:

Of the four million pupils in Indian schools and colleges recognised by the State in the last year of Hodgson's life, three and a half millions were receiving education entirely in the vernacular, and the remainder partly in the vernacular and partly in the English language. This was the result for which Hodgson began to labour as a young man of thirty-five, and which he saw accomplished at the age of ninety-four.<sup>265</sup>

Hodgson believed that the vernacular provided the best opportunity for people of all classes to have the opportunity for an education. He felt it was impractical and unwise to think that English could be imposed on the wide diversity of languages and culture in India.

Hodgson became heavily involved in the politics of Nepal during his term as Resident, believing this was the best way to neutralize what he perceived to be the military threat which Nepal presented. John Whelpton assesses Hodgson's political role in an article in

<sup>262</sup> B. H. Hodgson, "On the Military Tribes of Nepal" in *ibid.* at 41.

<sup>263</sup> Hunter, *supra* note 134 at 258.

<sup>264</sup> *Ibid.* at 310-24.

<sup>265</sup> *Ibid.* at 324 [footnote omitted].

the *Origins of Himalayan Studies*.<sup>266</sup> He begins his essay with these remarks: "Brian Hodgson's reputation today rests primarily on his contributions as a pioneering scholar of Nepal and the Himalayas. His academic work has stood that test of time, in some cases amazing well, as other chapters in this collection demonstrate."<sup>267</sup> Whelpton goes on to describe how Hodgson dealt with a large degree of continuing resentment in Nepal towards the British, arising from the loss of territory following the war of 1814-16; the numerous intrigues in the Nepalese court as rival factions sought power and influence; and, how an incident involving a British subject, Casinath Mull,<sup>268</sup> eventually led to Hodgson's departure from Nepal.

Basically, Hodgson felt the best way to neutralize the Nepalese threat was to support those in the Nepalese court who could be regarded as allies. Lord Ellenborough, who became Hodgson's superior in 1842, saw it differently. He wanted to pursue a policy of neutrality and simply rely on British military strength as a guarantee of peace. This clash of views came to a head when Hodgson refused to deliver Ellenborough's letter to the King, which dealt with a recent incident involving Casinath. Instead Hodgson delivered his own amended version which was more in keeping with how Hodgson thought the matter should be handled and indeed, Hodgson's revised version did eventually lead to the King providing a written apology to Ellenborough for trying to apprehend Casinath by force. In Hodgson's opinion, Ellenborough's letter was not strongly worded enough and would have ended up damaging Hodgson's relationship with his allies in the Nepalese court. Hodgson's disobedience led Ellenborough to insist that Hodgson leave Nepal, although his departure was not an immediate one. Ellenborough also believed that Hodgson could not be relied on to carry out his policy of neutrality.<sup>269</sup>

Hunter is extremely critical of Ellenborough's decision, viewing it as unjustified and hasty, one which flowed from Ellenborough's inexperience and his failure to properly consult with his superiors and advisors.<sup>270</sup> Whelpton's assessment of the situation is different:

In any evaluation of Hodgson's career as a whole, it is his work as Resident, and particularly his role in the 1840s, which is crucial and the controversies of that time have continued to exercise historians. It must be said first that Hodgson did succeed in keeping the peace, and war with Nepal, which Auckland had thought likely to come, was avoided. As has been seen, it was certainly believed in Kathmandu that he had saved the country from a clash with British India which would have ended its independence. Hodgson's popularity amongst his own colleagues, and later, the sympathetic biography by a personal friend, William Hunter, also ensured a high regard in Britain for his contribution. However, recent studies have modified Hunter's portrait of him as the complete master of

<sup>266</sup> John Whelpton, "The Political Role of Brian Hodgson" in *Origins of Himalayan Studies*, *supra* note 135 at 25 [*Political Role*]

<sup>267</sup> *Ibid.* at 25.

<sup>268</sup> See pages 65 to 67, below.

<sup>269</sup> Ellenborough's report to the Secret Committee of the East India Company dated July 8, 1842 in Stiller, *supra* note 140 at 152-54.

<sup>270</sup> Hunter, *supra* note 134 at 204-36.

events in Kathmandu. His sudden enthusiasms left him open to manipulation by Nepalese politicians, whose own alignment with the British was, as Lord Auckland clearly saw, only a matter of tactical convenience. There is also much to be said for the view of Lord Ellenborough and of Henry Lawrence, that the East India Company's interests were better served by simple reliance on its own military strength than by involvement in factional politics. The 'British ministers' of 1840-42 were in some ways a liability rather than an asset to the Company since they were so heavily dependent on overt British backing rather than bringing strength of their own to the alliance. It could be argued in reply that once Lord Auckland had decided in 1840 to demand changes in men as well as measures, some kind of British guarantee was needed to give 'good' men the courage to stand forward. In addition, once the initial commitment had been made, political stability in Nepal might have been better served by sticking to it. After 1846, Hodgson and his apologists cited the Kot Massacre as proof that Ellenborough's 1842 decision had been a grave mistake. Over the long term, though, Jang Bahadur, the man brought to power by the massacre, saw his interest in collaboration with the British and thereby vindicated Ellenborough and Lawrence. The Nepalese political system was to find its own equilibrium and geopolitical reality, not manipulation by any Resident, would ensure that the new ruler cooperated with his southern neighbour.<sup>271</sup>

With respect to a different series of events, involving changing political currents in the Nepalese Darbar during the 1830s, Whelpton reaches this conclusion regarding Hodgson's involvement at that time: "The whole sequence illustrates how justified was the comment of a later Governor-General, Lord Auckland: 'Mr. Hodgson writes so strongly from slight impressions that I have always looked at his communications with slight reserve.'"<sup>272</sup> Stiller reaches a similar conclusion regarding Hodgson's political role: "There can be no question that Hodgson's interference in domestic politics did great damage...The search for 'countenance' tended to destabilize the administration and created abnormal relationships within the Darbar. The discontinuation of the policy created a vacuum into which Jang Bahadur found it easy to step."<sup>273</sup>

The fact that Hodgson made a deep impression during his stay in Nepal is evidenced by the fact that oral history in the Muslim community regarding Hodgson has persisted in Kathmandu to this day.<sup>274</sup> In fact the only reason we know the name of Hodgson's Muslim mistress is from this history.<sup>275</sup> It is not surprising that someone as intensely interested as Hodgson in all aspects of life in the Valley would end up heavily involved in Nepalese politics. This involvement was not resented by the Nepalese. Rather, there seems to have been genuine affection towards Hodgson by most of those involved in the

<sup>271</sup> Whelpton, *Political Role*, *supra* note 266 at 35-36 [footnotes omitted].

<sup>272</sup> *Ibid.* at 28 [footnote omitted].

<sup>273</sup> Stiller, *supra* note 141 at 190.

<sup>274</sup> Haribar Raj Joshi, "Brian Houghton Hodgson - The Unsung Story" in *Origins of Himalayan Studies*, *supra* note 135 at 39.

<sup>275</sup> *Ibid.* at 43.

Nepalese court.<sup>276</sup> I think the reason Hodgson was so well-liked and admired by the Nepalese is summed up in this comment by Stiller: "For all of their difference of opinion, Hodgson cared, and the Darbar knew it."<sup>277</sup>

### C. Can we rely on what Brian Hodgson had to say about the Nepalese legal system?

It is important to note that the descriptions we have of the classical Nepalese legal system are quite limited. We have the observations of Hamilton, Kirkpatrick, and Hodgson and, in addition we have what Brian Hodgson was told by the legal experts he questioned. His informants would have been very knowledgeable about the workings of the Nepalese legal system at the time.<sup>278</sup> However, we also need to consider that his informants would have known that the information they supplied would be passed on to British authorities. How might this have affected what they told Brian Hodgson? The Nepalese rulers were always wary of the British, knowing that it would not take much provocation for the British to invade and conquer their country. The British would have been feared and perceived as a threat, even by their friends in the Nepalese darbar. Perhaps this would lead the informants to paint a picture of the legal system in such a way as to indicate no intervention in the country's affairs was needed, at least insofar as the functioning of the legal system was concerned. On the other hand, it is hard to imagine that the British would use the state of justice in a country to justify an invasion. The war of 1814-16 was essentially a boundary dispute – it had nothing to do with the operation of the legal system.

We also need to keep in mind that Hodgson was publishing his material on the legal system for a purpose. He was trying to persuade his superiors and others that trade with Nepal ought to be expanded. This would create a tendency to idealize what he saw. Because his information was coming from informants with close ties and allegiances to the legal system, they would also have a tendency to downplay its flaws and emphasize its strengths. They might well have chosen to overlook certain weaknesses.

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<sup>276</sup> Whelpton, *Political Role*, *supra* note 266 at 34-35. See also Hodgson's letter to Lord Ellenborough dated July 24, 1843 (in Stiller, *supra* note 140 at 205-06), where he describes a meeting which he attended at the Nepalese darbar. He concludes his letter with the following paragraph:

Your Lordship will smile at the above narrative. I cannot help it, for the kind words and looks of that immense room full of gallant Chiefs of all parties and opinions—some of whom even the recent royal wedding sufficed not to bring together demand at least the record of my gratitude. Other and official record I do not purpose to make of it till I have heard from Your Lordship in answer to this. I am absolutely at Your Lordship's disposal but I cannot well eventually avoid forwarding the Kharita and am afraid (if I can rightly read Parbattia's faces) that were I even to do so, Your Lordship would not be so rid of my kind and honest-hearted mountaineers—and such they are, apart from their detestable politics.

<sup>277</sup> Stiller, *supra* note 140 at 213.

<sup>278</sup> We are told that Hodgson's questions were answered by a retired chief justice of the courts of Kathmandu and by the Dharmadikar: 1836 Article, *supra* note 4 at 95: "One of these persons presided for many years with a high reputation for ability over the Supreme Court of Justice at Kathmāndu. Another was the present Dharmādhikāri of Nepal, a Brahman of great and various acquirements, and, from his situation, familiar with the legal administration of the country." I have not seen any mention of the identity of the third informant.

For example, what about the role of influence and power in the workings of the system? In the handwritten questions and answers there is this exchange:

Q. 11. How far, and how, does the Government meddle with the courts of law or exercise judicial authority?

A. 11. If the matter be grave, and the party (one or other) be dissatisfied with the judgment of the Courts of law, he applies first to the Premier—and, if he get not satisfaction from him neither, he then proceeds to the Palace gate and calls out 'Justice—Justice' which appeal, when it reaches the Raja's ears, is thus met—4 Kajis, 4 Sardars, 4 eminent Panchmen, 1 Ditha, and 1 Bichâri, are collected in the Palace and to them the matter is referred and their award is final.<sup>279</sup>

This answers the question to some extent, but it does not answer that part of the question which deals with meddling. Here we have a highly stratified society, where power and authority are treated with the utmost deference and respect. What would happen if the king wanted a case decided in a certain way, and communicated to a judge his desire? Would the judge be able to resist such influence? What if there was conflicting evidence in a case between a Brahmin and a low caste person? Would there be much chance that the low caste person would succeed even in a situation where the weight of evidence favoured the low caste person?

It is interesting to note that the above-quoted question is the only one that even comes close to dealing with this issue. By the time these questions were asked and answered, Hodgson would have been well aware of the role that power, position, and privilege played in Nepali society. Presumably he had the chance to observe the courts in action, although I have not come across an explicit statement to that effect.<sup>280</sup>

There is at least one example, in Hodgson's records which indicates that power and influence could be a major factor in the resolution of a dispute. Casinath Mull had been involved in a legal dispute with Sheobux Puri. Both were British subjects and the matter arose in British territory. Each party alleged money was owing by the other party. The claims were under consideration by a panchayat in Banaras (British territory). Sheobux also owed money to the Nepalese government. When Casinath came to Kathmandu on business, he was arrested by Nepalese authorities and held until such time as he agreed to submit his dispute with Sheobux to the jurisdiction of the Nepalese court. From Casinath's account of what happened we are told.<sup>281</sup>

<sup>279</sup> British Library records, *supra* note 232 at 6–129.

<sup>280</sup> My research so far has been limited to the articles, papers, and records mentioned in this thesis. It may be that in Hodgson's correspondence, his diary, or some other record, Hodgson does mention an actual visit to a court in session. He at least attended sessions when court-ordered punishment was carried out: see the article by Adam, *supra* note 147.

<sup>281</sup> Casinath Mull presented a petition to Brian Hodgson which describes the course of events of this lawsuit in the Nepalese courts. A translation of it is contained in Stiller, *supra* note 140 at 133 to 137.

1. The king had ordered the judge to extract from Casinath what was owing to the darbar;
2. The Raj Guru<sup>282</sup> had told Casinath that, upon payment of 4,000 rupees, the matter would be dealt with fairly.
3. The judge threatened Casinath with imprisonment and worse if Casinath did not deposit the amount which Sheobux alleged was owing.
4. When Casinath asked that Sheobux be required to deposit what Sheobux allegedly owed to Casinath, the judge refused and said that he (the judge) would act as Sheobux's surety.
5. The judge later fined Casinath 5,000 rupees, simply on the king's order.
6. The judge later added 5,700 rupees onto what a panchayat had found was owing from Casinath to Sheobux.
7. The Raj Guru threatened to disgrace the members of the panchayat before the king, unless they approved the addition of the 5,700 rupees.
8. The panchayat told the Raj Guru that they would have nothing to do with such fraudulent activity.

The king and the Raj Guru tried to characterize the addition of 5,700 rupees as interest and sought the panchayat's approval. However, we are told the panchayat replied: "if such be the Darbar's will, why summon us as a Panchayat? We can agree to no such ways of stating mercantile accounts. Let the Sarkar do as itself wills; but if the mode of reckoning interest be good for one party it must be good for the other."<sup>283</sup>

Hodgson intervened in this dispute and the Darbar eventually returned Casinath's money, apart from 4,000 rupees of the fine. In fact the judge himself was later fined 1,500 rupees for misconduct.

The government's statement of events does not mention most of the above misconduct.<sup>284</sup> It acknowledges the judge was fined, but on the basis that he had required one party to make a deposit and not the other. The darbar also alleged that Casinath had agreed to present himself in court upon Sheobux's return and it was on this basis that the government was seeking to have the matter adjudicated in the Nepalese courts. Casinath denied he had so agreed.

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<sup>282</sup> The Raj Guru was the royal spiritual advisor: see definition section of Whelpton, *History of Nepal*, *supra* note 36 at 264.

<sup>283</sup> Stiller, *supra* note 140 at 136.

<sup>284</sup> *Ibid.* at 138-39.

What can be concluded from what happened in this lawsuit? If what Casinath alleges in his petition is true at least one judge of the Kathmandu courts was prepared to do whatever he was told by the king and the Raj Guru was seeking bribes in return for exerting influence with the king. Basically, it would indicate that at least some corruption was present in both the judiciary and the upper echelons of the government. Nevertheless, what is in Casinath's petition has to be regarded with caution. We do not have Sheobux's version of events and the only thing admitted by the government is a lack of even-handedness by the judge with respect to deposits. Casinath certainly had a motive to paint a bleak picture of how he was treated in order to win the Resident's support.

It is interesting to note how steadfastly the panchayat resisted corruption, based on Casinath's account. It did not give way to threats by the Raj Guru. It refused to go along with the way the Raj Guru and the king had decided interest should be calculated. They basically told the king, 'why even bother to convene a panchayat if you are just going to do whatever you want?' One wonders if in fact this was one of the reasons that panchayats were a popular means of resolving disputes. Were they well-known for their ability to resist corruption and influence? Is this perhaps why they were not made a part of the system of justice under the Ain? Did those in power want to ensure their influence could be exerted, when needed, on individual judges?<sup>285</sup> More evidence is needed before even tentative conclusions can be drawn, but further investigation on this point is certainly warranted.

There is some indirect evidence, in Hodgson's questions and answers that a person's position could lead to preferential treatment in the courts:

Q. 58. How is the evidence of a man of rank taken?

A. 58. Such a person is not required to go into Court and depose—but an officer of the Court is deputed to wait on him at this house and to procure his evidence by interrogatories.

Q. 59. How the evidence of a woman of rank taken?

A. 59. In general, women are held incapable of being witnesses; but if, in some particular case, the evidence of a Lady of rank is indispensable, some person who has the [entrée of the Zenona]<sup>286</sup> is deputed to hear and report to the Court such Lady's evidence.<sup>287</sup>

<sup>285</sup> It is hard to imagine the kind of pressure that can be exerted in Nepalese society by someone with power, position, and influence. It is very difficult for a subordinate to resist such pressure. Perhaps there is strength in numbers, as the panchayat in Casinath's case seems to demonstrate. This may be a reason to consider a jury system for Nepal.

<sup>286</sup> The writing is not clear for what appears in these brackets – this is my attempt to interpret the handwriting.

<sup>287</sup> British Library Records, *supra* note 232 at 109.



We are not told what is meant by a 'man of rank' or a 'Lady of rank', but presumably it means a high caste person who is wealthy, powerful, and influential. It is reasonable to infer that, if special treatment was accorded to such people in their capacity as witnesses, then they would likely receive special treatment in their capacity as litigants. However, Hodgson does not deal that question. To do so would be contrary to Hodgson's purpose to portray the legal system as objective and principled in its approach. It would not inspire confidence in those who might ply their commercial trade in Nepal if the Nepalese legal system was reported to be dominated by the rich and powerful.

In fact, in one of Hodgson's articles on the legal system, he does his best to sell the reader on the attractiveness of the system:

The round of operations by which a judgment is reached in a Népálese court of justice is precisely such as a man of sense, at the head of his family, would apply to the investigation of a domestic offence; and the contracted range of all rights and wrongs in Népál renders this sort of procedure as feasible as it is expeditious and effectual. The pleasing spectacle is, however, defaced by the occasional rigour arising out of the maxim, that confession is indispensable; and by the intervention, in the absence of ordinary proof, of ordeals and decisory oaths.

An open court, *viva voce* examination in the presence of the judge, confrontation of the accuser, aid of counsel to the prisoner, and liberty to summon and have examined, under all usual sanctions, the witnesses for the defence---these are the ordinary attributes of penal justice in Népál; and these would amply suffice for the prisoner's just protection, but for the vehemence with which confessions are sought, even when they are utterly superfluous, but for the fatal efficacy of those confessions and but for the intervention of ordeals. Ordeals, however, are more frequently asked for than commanded; and perhaps it is true that *volenti non fit injuria*: at all events, with reference to enforced confessions, it must not be supposed that the infamous ingenuity of Europe has any parallel in Népál, or that terrible engines are ever employed in secret to extort confessions. No! the only torture known to these tribunals is that of stern interrogation and brow-beating, and, more rarely, the application of the kórá [a kind of whip] but all this is done in the face of day, under the judge's eye, and in an open tribunal; and though it may sometimes compromise innocence, its by far more common effect is to reach guilt. Besides, with respect to ourselves, the mere presence of the Residency *Munshi*, pending the trial of one of our followers, would prevent its use, or at least abuse, in regard to him. Or, ere submitting our followers to the Nepalese tribunals, we might bargain successfully with the Darbár for the waiving of this coercion, as well as for the non-intervention of the proof ordeal, *unless with the consent of the party*. And if these two points were conceded to us, I should, I confess, have no more hesitation in committing one of our followers to a Nepalese tribunal at Káthmándú, than I should in making him over to our own courts. I have mentioned, that the prisoner is allowed the assistance of counsel; but the

expression must be understood to refer to the aid of friends and relatives, for there are no professional pleaders in Népal.<sup>288</sup>

There were no prosecutors in Nepal. If someone faced a criminal charge, it was because another person had gone to the court and made the accusation. One wonders how a lower caste person would fare when accused by a high caste person. Hodgson does not express any concerns about a lack of objectivity in such a situation, in fact he does not address this situation at all. One is left with the impression that an objective weighing of the evidence can be expected in each case, apart from the use of ordeals and when the courts resort to torture to obtain a confession.

I do not doubt that Hodgson genuinely believed what he wrote, but allowance has to be made for the fact that his informants were high caste Hindus who would be inclined to paint a glowing picture of the legal system in which they had been so heavily involved. I also expect that the court officials would have been on their best behaviour if and when Hodgson was in attendance.

It is important to note the perspectives we do not have on the court system at that time. We do not know what the low caste litigant or accused had to say about the system. We do not know what relevance, if any, the judicial system had to the poor farmer who was trying to eke out a living off the land. Could he really expect to obtain redress in the courts for any injustice of which he was the victim? Perhaps in view of the local system of justice which is described below, he could, but the point I am trying to make here is that we are very much lacking a balanced perspective on the functioning of the legal system at that time.

We also need to consider that Hodgson was confined to the Kathmandu valley. Because of restrictions placed on him by the palace, he was not free to roam the countryside to observe the way of life in the other towns and villages of Nepal. Hodgson simply had to rely on what he was told about what was happening there.

Further, as has already been mentioned, there does not appear to be any Nepalese art or literature from the time, or even any oral history, which might shed light on the functioning of the legal system. The only descriptions we have then, are those of high ranking Nepali legal officials made to a British colonialist and the observations of Hodgson, Hamilton, and Kirkpatrick. Nevertheless, Nepali scholars have regarded what has been reported as accurate. In fact much of what Hodgson published on the Nepali legal system has been recently reproduced in three issues of a leading Nepali legal journal, *Kanoon* without criticism.

Nepali scholars continue to use Hodgson's writings as a reliable source of information about the legal system in Nepal at that time.<sup>289</sup> U. N. Sinha accepts the writings of

<sup>288</sup> 1834 Article, *supra* note 133 at 246-47.

<sup>289</sup> See for example, Adhikari, *Criminal Cases and Their Punishments*, *supra* note 128 where the author writes, on page 105: "It must be noted that although Hodgson's papers on the legal system were not based

Hamilton and Hodgson as trustworthy and, after reviewing those writings and the other evidence at his disposal, he reaches the following conclusion as to the effectiveness of the panchayat in administering justice in medieval Nepal: "To sum up, the panchayats, although devoid of many of their functions, still continued to play an important role in the settlement of village disputes and in imparting quick, on the spot and cheap justice for the common man."<sup>290</sup>

The distinguished Nepali scholar, D. R. Regmi also relies on Hodgson's observations. In *Modern Nepal*,<sup>291</sup> Regmi makes the following comment about the role of the panchayat during the mid-19<sup>th</sup> century: "The Pancha system also played an important part as they did in the villages of India, and in settling disputes of caste and water amongst certain communities taken individually."<sup>292</sup> In describing the nature of a trial by panchayat, the author describes what persons were selected to serve on the panchayat: "Old, honest and experienced men, whose disinterestedness had been proved in the past were chosen for this job."<sup>293</sup> Rewati Raman Khanal, who has written the leading text on Nepalese legal history (in Nepali) has also referred to Hodgson's material without criticism.<sup>294</sup> I am not aware of any Nepali scholar who has challenged the accuracy of the description of the Nepalese legal system contained in Hodgson's articles. Accordingly, on balance, I think it is safe to draw certain conclusions about the Nepalese legal system based on the information provided to Hodgson and what he, Hamilton, and Kirkpatrick observed. On the other hand, I think we need to keep in the back of our minds that we may well have an idealized picture of what was actually taking place.

#### **D. An overview of the classical Nepalese legal system based on Hodgson's material**

There were four courts in Kathmandu, which had concurrent and general jurisdiction over civil and criminal matters, with the exception that serious criminal matters (including those involving a loss of caste) had to be dealt with in the court known as the Inta Chapli. These courts were located a short distance from each other and were in session most of the year. The large centers nearby, Patan and Bhaktapur, each had their own court of general jurisdiction. Courts were also located in the provincial capitals and in many villages. All of these courts had to refer serious criminal matters (including those involving a loss of caste) to the Inta Chapli. There were also specialized courts in Kathmandu, Patan, and Bhaktapur which dealt with issues relating to land and houses. A court in Bhaktapur tried disputes arising between certain members of the Buddhist faith. Commenting on the overlapping jurisdiction and variety of courts in Nepal, Hodgson writes: "Its *inaccurate genius* is the chief characteristic of the Nèpāl judicial administration, as of that of the whole of Asia, and indeed of Europe until late years."<sup>295</sup>

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on official records, nevertheless they have withstood test and verification through comparison with available orders issued by the central government to district administrators as will be cited below."

<sup>290</sup> Sinha, *supra* note 131 at 83.

<sup>291</sup> D. R. Regmi, *Modern Nepal*, *supra* note 129.

<sup>292</sup> *Ibid.* at 295. See also Bahadur K.C., *supra* note 127 at 1-3.

<sup>293</sup> *Ibid.* at 298.

<sup>294</sup> Email communication dated March 1, 2005 from M. K. Dangol. See *supra* note 127.

<sup>295</sup> 1836 Article, *supra* note 4 at 104.

The chief judge was known as the Ditha who exercised authority over all four courts in Kathmandu, although for the most part he just sat in the courts of Inta Chapli and the Kot Lingh.<sup>296</sup> The Ditha had authority to make a final decision in all matters, with the exception of imposing punishments involving the loss of 'life or limb', in which case he needed the approval of the council of ministers or the king in council. The Ditha oversaw the work of the Bicharis, who functioned as judges - for the most part independently in minor cases and, under his direct supervision in more serious matters. Bicharis also presided over the courts in the mountain districts of Nepal. In the Terai or lowland area of the country, officials known as Faujdars presided over courts that operated based on "the old Moghel model."<sup>297</sup> Each Faujdar was under the authority of the administrator of his region, known as the Subah. At the village level, justice was administered in less serious matters by the village chief, under the supervision of a government official known as the Dwariah. The village chief was also involved in dealing with administrative matters, such as tax collection. The Ditha heard appeals from all courts in the Kot Lingh, from which a further appeal lay to the council of ministers. This council exercised both judicial and administrative functions - there was no separation between the executive and the judiciary in Nepal during this period. As set out in the dharmasastras, running the country and administering justice were seen as the king's responsibility, which he carried out through officials, some of whom had both judicial and administrative functions.

The Dharmadhikari<sup>298</sup> would also become involved in allegations which could give rise to a loss of caste:

Q. 32. What concern has the Dharmâdhikâri with the Courts of Law - in Civil causes or in Criminal? and [sic] out of 100 causes brought before the Courts about how many will fall in any shape under the Dharmâdhikâri's cognizance?

A. 32. In Civil Causes the Dharmâdhikâri has no concern whatsoever: nor in criminal causes save such as involve sin-offense against religion-or the loss of caste.<sup>299</sup>

We see a reflection of the dharmasastras in the following question and answer:

Q. 10. Any persuer general or defender general in the system?

A. 10. There is no Sircâri Vakeel<sup>300</sup> in our Courts: because, tho' in the Courts of Hindüstan, a Zillah Judge who has decided unjustly cannot be punished, but an

<sup>296</sup> The Kot Lingh was one of the four courts of Kathmandu. In his 1836 article, it is referred to as the 'Kot Singh', but, as M. K. Dangol has pointed out to me, this is an error.

<sup>297</sup> 1836 Article, *supra* note 4 at 105. Presumably this means these courts were functioning based on the Muslim justice system.

<sup>298</sup> See Whelpton's definition in *History of Nepal*, *supra* note 36 at 261: "righteousness officer (Brahman formerly responsible for enforcing caste regulations throughout the country)".

<sup>299</sup> British Library records, *supra* note 232 from source No. II at 6-101.

<sup>300</sup> 'Vakeel', in Nepali, means 'lawyer'.

appeal merely is provided, here, on the contrary, if the Dithâ do any wrong, he is immediately punished. We have therefore no need of a Government Vakeel.<sup>301</sup>

Judges could be punished if they were wrong, just as we saw in the case of Casinath, where the judge was punished for taking a deposit from Casinath and not from Sheobux.<sup>302</sup>

There were also numerous subordinate officials employed in these courts who carried out various duties, including apprehending people who were to be brought before the court, taking custody of prisoners, carrying out court-ordered punishments, serving court documents, and assisting in the execution of the civil judgments of the court. They were also involved in various administrative duties associated with the running of the courts.

One aspect of these courts, which would be the envy of most courts in the world today, was that complaints, whether of a civil or criminal nature, were normally attended to without delay from start to finish. After the complaint was made, a court official would be dispatched to find the defendant and bring him into court. Once there, the judge would urge the parties to come to a settlement:

The first great object of the courts of Nepal, when litigants come before them, is not trial, but reconciliation. The parties and witnesses all clamorously urge what occurs to them (never upon oath), and try their strength against each other. The general result of this apparently uncomely but really effectual procedure, is to bring the parties to an understanding, which the court takes care that the loser shall abide by. But if the court cannot thus succeed in bringing the parties to reconcile their difference or to submit it to the court's summary arbitrament, upon a view of the animated exhibition just described, then, and then only, the trial in our sense begins...<sup>303</sup>

Hodgson indicates that a variety of ways were used to decide issues which arose in a civil or criminal matter. Witnesses may be examined, although the court was generally not willing to wait for their arrival if they were not already present in court. Ordeals and decisory oaths<sup>304</sup> might be employed, or a panchayat might be convened "chiefly applied, but not exclusively, to civil actions."<sup>305</sup> There were no rules of evidence. As has been noted earlier, lawyers did not participate in court proceedings, although someone (usually

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<sup>301</sup> British Library records, *supra* note 232 from source No II at 6-96. See also in source No. III, at 6-118 where the same respondent says: "With regard to civil causes - every subject of Nepal has a right to appeal from the decision of the Ditha to the Council of State and in every case of appeal the Council summons the original parties and witnesses & hears the causes de novo - when if any corrupt practise appear on the part of the Ditha, the Ditha will be fined and punished & dismissed according to the circumstances."

<sup>302</sup> See pages 65 to 67, above.

<sup>303</sup> 1836 Article, *supra* note 4 at 111.

<sup>304</sup> 'Decisory oaths' were not used to confirm that evidence to be given would be true. Rather they were used as evidence itself - for example, someone might simply proclaim their innocence under oath and ask that this be accepted as a defence to whatever charge is brought against them.

<sup>305</sup> *Ibid.* at 112.

a relative) might appear on a party's behalf if that party could not attend or participate due to illness or incapacity.

The water ordeal was a common way to resolve doubtful matters (although other forms of ordeals were also in use). Assume there was just one plaintiff and one defendant. The plaintiff's name would be written on one slip of paper and the defendant's name on another. Each slip of paper would be rolled up and attached to a reed. The parties and court officials would gather at the Queen's pond. Firstly, the litigants were urged to come to some agreement. If no settlement was achieved, a Brahman would go through a short religious ceremony, following which two court officials would go into the deep water of the pond, each taking their place beside one of the reeds. At a signal, they would submerge themselves. When the first emerged from the water, the reed beside him was destroyed. The other reed was taken back to the court, the paper unrolled and the name of the winner declared. Certain fees were paid by the winner and loser at various stages of the ordeal.

This ordeal is not entirely dissimilar from the way issues are dealt with in the courts of British Columbia. I know from experience that the winner in a lawsuit is sometimes the person who can endure (stay under) the emotional and financial stress and strain of litigation the longest. For a layperson, especially one who has never experienced what it is like to be involved in a lawsuit, the stress and strain can be considerable – not entirely unlike being unable to breathe.

Another interesting aspect of litigation in the Nepalese courts at the time was that the winner paid more in fees than the loser in a proceeding based on debt. The winner paid to the government 10% of the amount involved and the loser 5%. This was not unreasonable since the court was directly involved in assisting the creditor to collect his debt, which could include requiring the debtor to hand over property which had been appraised as having a value equal to the debt. The Nepalese court system at this time, was fulfilling what Aristotle said was a key aspect of a properly functioning justice system: "There is no benefit in bringing cases before courts of justice if these have no effective conclusion; and if men cannot share a common life without a system for deciding cases, neither can they do so without a system for enforcing such decisions."<sup>306</sup>

A remarkable aspect of the courts in Kathmandu was that there was no backlog. The following observation might provoke some envy from judges in British Columbia: "Arrears of business are unknown to the courts of Nipal [sic], and the current affairs of every court leave its judges at all times abundance of spare time."<sup>307</sup> One of those assisting in the writing and publication of Hodgson's 1836 article felt that the reason for the lack of a backlog in the courts was the fact that very little, if any of the proceedings were recorded: "This is a chief cause of the quick dispatch of business which signalizes the Nèpāl Courts, and effectually prevents arrears of business:—a marked contrast to our

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<sup>306</sup> Aristotle, *supra* note 71 at 247.

<sup>307</sup> 1836 Article, *supra* note 4 at 102 (note).

own Indian system wherein an over-weening attachment to record is the source of dreadful expence and delay of justice.”<sup>308</sup>

As has been described already, a person could only be convicted of a criminal offence if he or she confessed. During the trial the accused was given the right to question his accuser and any witnesses and to lead evidence by way of defence. The accused could also insist on an ordeal in order to establish his innocence. If the judge, however, was satisfied that the accused was guilty of the crime, the judge could order the accused to be tortured until he confessed. This was always done in open court and at its most severe would involve the accused being whipped.<sup>309</sup>

### E. Conclusion

In this chapter, I have suggested we can rely, to a significant extent, on what Brian Hodgson wrote and published about the classical Nepalese legal system. He spent over 20 years in Nepal; mastered its main language; became knowledgeable about its people, culture, religion, and other languages; and, dedicated himself to studying various aspects of its natural surroundings. His work in several areas is still of value to scholars today, especially with respect to what he was able to preserve and collect in the way of drawings, specimens, and information. We have to exercise caution about what he was told about the practice in the courts of law because of the bias of his informants but it is nevertheless possible, in my opinion, to reach some conclusions about the strengths of the system. However, it must be emphasized that we have an incomplete picture. We have not heard the voices of those in the lower castes and other marginalized people. The dispute resolution practices in the rural areas must have varied widely because of Nepal's great diversity. The perspective we have is one developed in the power centre of Kathmandu filtered through a colonial mindset.

What is remarkable, though, is that we have direct information from three respondents who were intimately involved in the administration of justice in Nepal at that time. It appears they were doing their best to answer Hodgson's questions honestly – the fact that there are differences in answers to the same question is a sign that they did not collaborate in order to paint some kind of pre-agreed picture of what was happening in the courts.<sup>310</sup> These answers are a treasure, since they tell us about what was likely the last classical Hindu legal system to an extent well beyond what we have for any other such system. Ironically this last 'dharma/custom' based system was not displaced as a result of Europeans coming to Nepal. The implementation of a legal code based system appears to have resulted from Nepal's prime minister, Jang Bahadur Rana going to Europe – more about that at the end of Chapter V.

Where are we on our journey? We have arrived at our destination, where the role of custom and the panchayat in the classical Hindu and Nepalese judicial systems can now be properly analysed.

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<sup>308</sup> *Ibid.* at 97.

<sup>309</sup> See Hodgson's comments *supra* note 288 and accompanying text.

<sup>310</sup> It also indicates that the practices in the court were not uniform.

## CHAPTER V - THE ROLE OF CUSTOM AND THE PANCHAYAT IN THE CLASSICAL HINDU AND NEPALESE LEGAL TRADITIONS

### A. The role of custom in the classical Hindu legal tradition

The role of custom in the classical Hindu legal tradition explains, to a significant extent why it was able to flourish in a wide geographical area, over many culturally and linguistically diverse groups of peoples, for more than a thousand years. The place of custom is succinctly stated in the Naradasmṛti: "The four feet of legal procedure are dharma, legal procedure, custom, and the king's decree; each latter one overrules the former."<sup>311</sup> Any doubt that custom overrules dharma is eliminated by the following verse: "When there is a contradiction between a dharma text and custom, it is right to apply common sense, for custom prevails over dharma."<sup>312</sup> This is quite remarkable when one considers that what is contained in the sutras and smṛtis is seen to be inspired and authoritative and to have the divine stamp of approval. However, it does explain how the classical Hindu legal tradition was able to adapt and be accepted in so many different social settings.

The Manusmṛti is also clear about the priority of custom:

When he is engaged in a legal proceeding, he should examine the truth, the object of the dispute, himself, the witnesses, the time and place, and the form of the case. He should ordain (as law) whatever may be the usual custom of good, religious twice-born men, if it does not conflict with (the customs of) countries, families and castes.<sup>313</sup>

The sutras are not as explicit with respect to the priority of custom over dharma. We find the following passage in Gautama:

His [the king's] administration of justice shall be based on the Veda,<sup>314</sup> the Legal Treatises, the Vedic Supplements (A 2.8.10-11), Subsidiary Vedas,\* and the Purāṇa. The Laws of regions, castes, and families are also authoritative if they are not in conflict with the sacred scriptures. Farmers, merchants, herdsmen, moneylenders, and artisans exercise authority over their respective groups. He

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<sup>311</sup> Naradasmṛti (Legal Procedure) 1.10.

<sup>312</sup> Naradasmṛti (Legal Procedure) 1.34

<sup>313</sup> Manu 8.45-46; see also 8:1-3 which says that the king ought to hear cases every day "within the eighteen causes of legal action, in accordance with arguments taken from local practices and from authoritative teachings."

<sup>314</sup> However, the Vedas did not provide much guidance in the legal sphere. Menski writes: "The large Vedic literature provides much detail about this distant period but contains very little material about the actual legal systems at the time. The Vedas, therefore, as legal authors confirm, were treated as divine revelation, but did by no means 'lay down the law', as some scholars with positivist inclinations have been tempted to assert. While the Vedas have a special place and authority in terms of Hindu religion and as a source of the concepts underlying Hindu law, they could not really serve as a direct source of legal rules, and certainly not as a legal code." (*supra* note 120 at 88).



should dispense the Law after he has ascertained the facts from authoritative persons of each group.<sup>315</sup>

As Baudhayana puts it:

The Law is taught in each Veda, in accordance with which we will explain it. What is given in the tradition (A 2.15.25 n.) is the second, and the conventions of cultured people are the third.\* Now, cultured people are those who are free from envy and pride, possess just a jarful of grain, and are free from covetousness, hypocrisy, arrogance, greed, folly, and anger.<sup>316</sup>

Vasistha describes the priorities in this way: "The Law is set forth in the Vedas and the Traditional Texts (A 2.15.25 n.). When these do not address an issue, the practice of cultured people (Va 6.43; B 1.15-6) becomes authoritative."<sup>317</sup> A short while later we read: "When there are no specific rules in vedic texts, Manu has said that one may follow the Laws of one's region, caste, or family."<sup>318</sup> Still later: "Good conduct is the highest Law for all—that is certain."<sup>319</sup>

The Naradasmṛti is quite explicit that custom takes precedence over dharma and does not mention any exceptions or qualifications to the rule. The sutras, written at an earlier time, would give the Vedas and traditional texts priority. Perhaps their encounter with a wide diversity of customs led the writers of the smṛtis to carve out a much greater role for custom.

The relationship between custom and dharma was the subject of considerable debate over the centuries. Menski summarizes the outcome as follows:

Within our conceptual analysis we must therefore note the explicit, abundantly recorded recognition in the ancient shastras that people's customs and local ways of doing things must in principle be allowed to prevail, irrespective of what certain texts may be stating. There is no one religious, moral, or legal code that binds all Hindus together as a matter of dogmatic belief.<sup>320</sup>

Of course it was not just any custom which would prevail. It must be one which is well-established and accepted by members of the group. In other words, it would have to have a certain rightness, a 'dharma-like' quality about it.<sup>321</sup>

Lingat indicates that limitations were put on the application of customs:

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<sup>315</sup> Gautama 11.19-22.

<sup>316</sup> Baudhayana 1.1.1-5.

<sup>317</sup> Vasistha 1.4-5.

<sup>318</sup> Vasistha 1.17.

<sup>319</sup> Vasistha 6.1.

<sup>320</sup> Menski, *supra* note 120 at 84.

<sup>321</sup> For a full discussion of this point and the relationship between the sastras and customs generally see Lingat, *supra* note 119 at 176-207, Menski, *supra* note 120 at 121-30; Kane, *supra* note 124 at 856-884; and J. D. M. Derrett, *Religion, Law and the State in India*, *supra* note 121 at 148-170.

Yet we should observe that if the interpreters of the Middle Ages allow custom to prevail over the written law, they believe conversely that a usage in contradiction with the law is not capable of extension i.e. it can be allowed only in the group where its existence is proved. Thus an orthodox rule of custom has no chance of extending its domain. It remains a particularity, a peculiarity. By contrast, the rule of *dharma* has an unlimited power of radiation. It offers itself as a model to every group. It fills the gaps in custom and tends to insinuate itself into the customary structure. And once it is established there it is fixed thereafter; it is and remains *dharma*, the group's law.<sup>322</sup>

This remarkable tolerance for diverse customs is one of the outstanding features of the classical Hindu legal tradition. The sacred literature was not seen as a law code to be rigidly applied. In appropriate circumstances the customs of one or more of the litigants were taken into account in arriving at a decision in a dispute. Of course this must have led to difficulty at times when the litigants were from groups with different customs or where one litigant was a Brahmin and the other was from a group which followed customs different from the sastras. No doubt there were also difficulties in determining the precise nature of the relevant custom. The sastras do not attempt to address all the different issues which might arise from these difficulties. One thing was certain, however, these customs were an important and relevant factor in the administration of justice.

### **B. The role of the panchayat in the classical Hindu legal tradition**

The importance of group decision-making was well-recognised in the sacred literature. Gautama tells us that, in doubtful cases, the following strategy should be adopted:

In matters that are unclear, one should follow what is endorsed by a minimum of ten persons who are cultured, skilled in reasoning, and free from greed. A legal assembly is said to consist of a minimum of ten members—four who have mastered the four Vedas; three belonging to the three orders enumerated first; and three who know three different Legal Treatises. When such persons are unavailable, however, one should follow in doubtful cases what is recommended by a learned and cultured Brahmin who knows the Veda, because such a man is incapable of hurting or favoring creatures.<sup>323</sup>

Groups of knowledgeable people were asked to resolve boundary disputes:

When there is a dispute regarding a house or a field, the testimony of neighbours provides the proof. When neighbours provide contradictory evidence, written documents provide the proof. When conflicting documents are produced, the

<sup>322</sup> Lingat, *supra* note 119 at 204 [footnote omitted].

<sup>323</sup> Gautama 28.48-51. See also, in a similar vein: Baudhayana 1.17-9 and Vasistha 3.20.

proof is based on the testimony of aged inhabitants of the town or village and that of the guilds.<sup>324</sup>

In Kautilya's *Arthashastra*, written sometime during the period 300 B.C. to 100 A.D.,<sup>325</sup> we are told: "In all disputes regarding the boundary between any two villages, neighbours or elders of five or ten villages (*pañchagrāmi daśagrāmivā*) shall investigate the case on the evidence to be furnished from natural or artificial boundary marks"<sup>326</sup> Later he writes: "Disputes concerning fields shall be decided by the elders of the neighbourhood or of the village."<sup>327</sup>

In the *Naradasmṛti*, group decision-making is specifically recognised: "Local groups, guilds, assemblies, an appointed judge, and the king: these are the venues for legal proceedings. They are mentioned in ascending order of importance."<sup>328</sup> What is contained in the *Manusmṛti* mirrors what is set out in the sutras:<sup>329</sup>

Whatever law is agreed upon by an assembly of ten people or more, or even three people or more, who persist in their proper occupations, that law should not be disputed. An assembly of ten people or more should consist of three people each of whom knows one of the three Vedas, a logician, a ritual theologian, an etymologist, a man who can recite the law, and three men from (each of) the first three stages of life. An assembly of three people or more, to make decisions in doubtful questions of law, should consist of a man who knows the *Rg Veda*, a man who knows the *Yajur Veda*, and a man who knows the *Sāma Veda*.<sup>330</sup>

Kane mentions a variety of groups which might be called upon to decide disputes while noting that practices varied depending on time and place.<sup>331</sup> The fact that a person should be judged by his peers was recognised from the time of the sutras: "Farmers, merchants, herdsmen, moneylenders, and artisans exercise authority over their respective groups. He [the king] should dispense the Law after he has ascertained the facts from authoritative persons of each group."<sup>332</sup>

Lingat writes that, in areas controlled by Muslims following their invasion, the following occurred:

<sup>324</sup> Vasistha 16.13-15.

<sup>325</sup> Kane, *supra* note 124 at xvii.

<sup>326</sup> *Kautilya's Arthashastra*, trans. by R. Shamasastry 8<sup>th</sup> ed. (Mysore: Mysore Printing and Publishing House, 1967) at 193 [footnote omitted].

<sup>327</sup> *Ibid.* at 194 [footnote omitted].

<sup>328</sup> *Naradasmṛti* (Legal Procedure) 1.7.

<sup>329</sup> *supra* note 323 and accompanying text.

<sup>330</sup> *Manusmṛti* 12.110-112.

<sup>331</sup> Kane, *supra* note 124 at 280-85. He also mentions on page 282: "Besides these courts it appears from Kautilya that the village headman (*grāmika* or *grāmakūta*) exercised certain summary powers such as driving out of the village a thief or an adulterer (III. 10) and that he could try some offences..."

<sup>332</sup> Guatama 11.21-22.

Early on, as internal politics suggested, the Muslim authorities left local bodies a large measure of autonomy, not different from that which they enjoyed under the Hindu rulers. In judicial matters, the control of the central authorities was only exercised gently, especially because litigants felt some embarrassment in appealing before a Kādi's court. As a result the bodies which the *śāstras* call *kula*, *śreṇi*, etc. took on a great importance, even though their jurisdiction was reduced to what we may call civil matters and to penal questions of minor importance. Village assemblies or caste tribunals, under the name *panchayat*, became the ordinary courts for Hindus, gradually usurping the attributes of the state courts and passing judgments from which there was no appeal. Whether it was arbitration by a Brahmin, the decision of a caste tribunal, or that of a *panchayat*, the law applied was that of the local community, a law based above all on tradition and precedent, attached more or less laxly to one or other of the schools of interpretations. What occurred was a sort of localisation, if not sclerosis, of law, an arrested development which was henceforth embedded in custom. The Hindu law was no longer that ocean of texts, incessantly conned over and brewed over by the interpreters. It was fragmented into a series of islands placed under the government, direct or indirect, of a particular classical treatise or association of treatises. Against this legalisation, i.e. conversion into law, of the juridical doctrine of the interpreter-jurists, which was so contrary to the whole spirit of the Hindu law, the last of the interpreters protested with commendable vigour.<sup>333</sup>

Menski advises: "Actually, rather little is known about the realities of legal administration prior to British rule in India...As practically everywhere in Asia, it seems, avoidance of recourse to formal dispute settlement processes was seen as a virtue in itself."<sup>334</sup> However, Derrett takes a stab at it:

Legal conditions in ancient India were various: caste and even tribal discipline, kings and judges, *gurus* and penance-committees (on whom more below), all with overlapping and concurrent, rarely exclusive, jurisdictions, provided a comprehensive discipline which, until foreign powers intervened, sufficed. The want of professional lawyers and of a distinct intellectual cadre of jurists was not felt to be a lack since the enormous variety of practices, the infinite irregularity of custom, would leave little room for imperatives, whilst it gave the greatest stimulus to the development of precepts, granted that while it would be the jurist's duty to propound these, quoting if necessary the texts on which he chose to rely, it

<sup>333</sup> Lingat, *supra* note 119 at 262-63.

<sup>334</sup> Menski, *supra* note 120 at 155 [footnote omitted]. See also Varadachariar, *supra* note 123 where he says, at page 232: "Turning now to the testimony of history, it must be admitted with regret that historical materials are very scanty." And later at page: 245: "Of the nature of judicial records or the details of judicial procedure, we learn very little from the inscriptions." And on page 63: "...the administration of justice seems largely to have been the work of village Assemblies or other popular or communal bodies, whether with or without the authority of the King and whether with or without his presence, or the presence of some public officer."

would be for judges to decide each case. We do indeed have many opinions of śāstris in our hands, showing how they went about their work.<sup>335</sup>

He also says elsewhere:

There is general agreement that before the British period in India disputes were settled at the village level, and passed to higher authority only when they could not be settled there, or the disputes were between villages or their major landholders, or between larger units or castes... In ancient times, no doubt, a satisfactory, and not too costly, system of local justice existed, so that high-level dispute settlement alone concerned the courts of kings and princes and the minds of the most experienced jurists and appointed judges.<sup>336</sup>

The classical Hindu legal tradition recognised that there were many types of disputes which were best left to those who were knowledgeable about the circumstances in which the dispute arose and the customs which normally would govern. One finds no hint in the sacred literature that anyone felt the need to develop a comprehensive legal code for all situations. Rather, the sastras call for a situational approach, one which takes into account all relevant circumstances, including whatever texts might be applicable or customs which may be in place. The driving force was not a rigid application of law, but rather a search for wisdom, truth, and the right outcome; in a word, for dharma.

I will now examine the classical Nepalese legal system and the extent to which it mirrored the classical Hindu legal system with respect the role occupied by custom and the panchayat.

### C. The role of custom in Nepal's classical legal system

In his 1836 article, Hodgson makes this succinct statement about the role of the sastras and custom in the Nepalese legal system at that time:

Custom or precedent is the law in many cases; the *Dharmashāstra*, or sacred canons, in many more; and the decision of numerous cases depends almost equally on both.

Infringements of the law of caste fall under the *Shāstras*. Other matters are almost entirely governed by the *Dēs Achār*, or customary law of the province of *Gorkhá*.

The customs of the *Bauddha* portion of *Newárs* are peculiar to themselves; but in general the *Newárs* and *Párbattiahs* both acknowledge and are subject to the same *Dharmashāstra*, although in some points there are appropriate usages for each.<sup>337</sup>

<sup>335</sup> Derrett, *Studies in Hindu Law*, *supra* note 121 at 22 [footnote omitted].

<sup>336</sup> J. Duncan M. Derrett, "The Judicial Panchayat: The future of an Ancient Indian Rural Institution", *supra* note 121 at 131-32.

<sup>337</sup> 1836 Article, *supra* note 4 at 123-24.

As has been mentioned above, this summary is based on the responses which Hodgson received from the three legal experts to whom he posed various questions about Nepal's legal system. These answers are set out in greater detail in Hodgson's 1834 article.<sup>338</sup> In what follows in this section, I will compare the responses given by each of the three respondents in order to try to shed some more light on the role of custom.

Hodgson posed this question to each of his three respondents: "How much of the law depends on custom and how much on the Shastras?"<sup>339</sup> Respondent I states that "Many of the decisions of the Courts are founded on customary law only – many also, on written and sacred canons."<sup>340</sup> Respondent II indicates that "Custom rules many causes-the Dharmasastra many more- and the decision of numerous cases depends almost equally on both."<sup>341</sup> Respondent III gives a much lengthier answer:

There is no code of laws – no written body of public enactments. If a question turn upon the caste of a Brahman or Rajput, the reference is had to the Gûrû (Raj Gûrû) who consults the sastra and enjoins the ceremonies needful for the recovery of the caste; or, the punishment of his [sic] who has lost it. In [sic] a question before the Courts affect a Parbattia, or Newâr or Bhotiah, it is referred to the customs established in the time of Jaythiti Mall Raja, for each separate tribe. Dhoonga-Chooayee being performed as directed by those customs. Since the Gorkhâli conquest of Nepal proper the ordeal by immersion in the Queen's tank has become the prevalent mode of settling knotty points.<sup>342</sup>

Respondents I and II are asked this follow-up question: "In general, what sort of causes are governed by the sastras and what by customary law?"<sup>343</sup> Respondent I replies as follows: "Infringements of the law of caste, in any and every way, fall under the Shaster; other matters are almost entirely governed by customary law (dês-âchâr)."<sup>344</sup> Respondent II's answer is in substance the same: "Infringements of the laws of caste and all cases involving such infringement are, quoad such involvement, or wholly, when wholly of a religious complexion, governed by the sastras. All other matters are ruled by the Dês âchâr or customary law of the province of Gorkha."<sup>345</sup>

Respondent I indicates that the courts 'constantly' refer to certain sastras to deal with issues of inheritance, adoption, and wills.<sup>346</sup> He states that all tribes agree with respect to how the issues of inheritance are dealt with, that such law is in writing, and is studied by

<sup>338</sup> 1834 article, *supra* note 133 at 231-34 (question and answer numbers 77-79 and 87-89).

<sup>339</sup> British library records, *supra* note 232 at 6-92 (question 85), 6-112 (question 86); and 6-127 (question 7). There are minor variations between the questions which do not affect its substance.

<sup>340</sup> *Ibid.* at 6-92.

<sup>341</sup> *Ibid.* at 6-112.

<sup>342</sup> *Ibid.* at 6-127.

<sup>343</sup> *Ibid.* at 6-92 and 6-112. The only difference between the two questions is that, in the question to Respondent I, 'sastra' is spelt 'Shasters'.

<sup>344</sup> *Ibid.* at 6-92.

<sup>345</sup> *Ibid.* at 6-112.

<sup>346</sup> *Ibid.* at 6-93.

the Bicharis.<sup>347</sup> However, Respondent II paints a different picture. He says that if a dispute arises with regards to inheritance or adoption "such dispute is settled by calling together several elders of the tribe to which the deceased belonged and taking the judgment of the elders upon the usage of that tribe – which usage governs the Court's decree."<sup>348</sup> Respondent II goes on to say that "resort is never had" to the sastras "save in cases involving breach of canons of religion."<sup>349</sup> Respondent III's answers are similar to the answers of Respondent II. Respondent III indicates that the customs of the tribes are not reduced to writing and that Bicharis are generally knowledgeable about the customs of the various tribes. In cases of difficulty the 'opinions of elders' of the tribe will be sought.<sup>350</sup> Later this same Respondent notes that there is "great difference between the customs of the plains and hills" because of the Muslim influence in the plains area. He laments that "Hindooism is destroyed below: the customs are moslem and the distinction in castes is lost" but in Nepal things are different: "Here, all the distinctions of caste are religiously preserved by the Courts - who punish according to caste - never destroying the life of a Brahmin - but only degrading and expatriating him."<sup>351</sup>

Hodgson does not discuss the apparent difference in responses between his Respondents on the matter of whether the principles governing inheritance are in writing. Although the differences in responses are pointed out in his 1834 article,<sup>352</sup> in his 1836 article, Hodgson does not indicate to what extent, if any, the inheritance laws are in writing. He does not express any opinion on this issue. Hodgson must have felt that his investigations either did not or could not explain why this difference arose.

In my opinion, it seems more likely that not all customs of the various tribes relating to inheritance were in writing. I expect that such customs would have varied significantly amongst the tribes, especially between the Hindu and non-Hindu groups. Further, the Respondents may not have been very knowledgeable about what was happening outside the valley. Only the more serious criminal matters and those involving loss of caste were referred to the Kathmandu courts. Issues relating to inheritance presumably would have been dealt with in the provincial and village courts, with perhaps a rare appeal to the courts in Kathmandu or eventually to the council of ministers.

In spite of these contradictory responses, it appears it is still safe to conclude that the court did rely on the testimony of elders of a tribe to determine the nature of the applicable custom which would apply in a less than obvious case. There probably was something in writing, to which at least some judges referred in certain inheritance cases. We know for sure they looked to the sastras for guidance in cases involving caste issues.

There were many different ethnic groups in Nepal at the time. No judge could be expected to be fully knowledgeable about the customs of each group. Evidence from

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<sup>347</sup> *Ibid.* at 6-93.

<sup>348</sup> *Ibid.* at 6-113.

<sup>349</sup> *Ibid.* at 6-113.

<sup>350</sup> *Ibid.* at 6-128.

<sup>351</sup> *Ibid.* at 135-36.

<sup>352</sup> 1834 article, *supra* note 133 at 233.

elders regarding the customs of a particular group governing for example marriage, dowry, or ownership of property may well have been needed when a difficult issue arose. No suggestion is made that the Hindus were insisting that all the different ethnic groups, whether from a Buddhist or other background, follow the practices laid out in the sastras for all areas of their life. No doubt anyone who killed a Brahmin would be dealt with under the sastras and punished with death. Likewise any other conduct which infringed on the rights and privileges of the Brahmins would likely have been governed by the sacred canons. However, there is no evidence that the sastras would be applied in other cases where, for example, the issues arose between members of an ethnic group who did not follow the sastras.

The weight of evidence points to custom being a key feature of Nepal's legal system at this time and that different customs were being applied, depending on the tribal origin of the parties and the nature of their dispute. Although the judges felt competent to deal with many issues without assistance, it appears that the evidence of elders was sought to resolve thorny issues where the customs of an ethnic group applied. Accordingly, the Nepalese legal system at this time was showing evidence of fluidity and flexibility in dealing with the diversity of its population. The sastras were fixed and governed in cases of caste issues. However, everything else would have had ample capacity to change with the times and adapt to the variety of different circumstances which would exist in a country which contained such a broad mix of religions, ethnicity, language, and social practices. It seems each ethnic group had the reasonable expectation that customs and practices integral to their culture would be respected and applied, provided they did not infringe on the privileges and rights of Hindu higher castes. For groups living separately in the hills, presumably this would mean that most if not all of their customs could be enforced in the official court system. It would only be a matter of leading evidence of such customs through the tribal elders.

In conclusion, the Nepalese legal system at this time was evidencing the same kind of approach to diversity which is reflected in the classical Hindu legal tradition. Custom, within its own legitimate sphere of application, was prevailing over dharma as contemplated by the *Naradasmṛti*.<sup>353</sup> Tribal groups, for the most part, could expect that their customs would be respected and applied in the courts in appropriate circumstances. However, the days of such an approach were numbered. Ironically, it was about to be done away with by something which has been almost universally applauded as a sign of progress and commendable law-making – the promulgation of the country's first comprehensive legal code, the *Ain* in 1854. This code would have the effect of marginalising any custom which was not enshrined in it. The law applied in the courts went from being flexible and adaptive to being rigid and unresponsive to change and diversity.

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<sup>353</sup> *Naradasmṛti* (Legal Procedure) 1.34.



#### D. The role of the panchayat in Nepal's classical legal system

In his book, *Development of Panchayats in Nepal*,<sup>354</sup> U. N. Sinha has provided a comprehensive history of the Nepalese panchayat based on inscriptions, records, and other sources.

In the chapter entitled, "The Powers and Functions of Panchayats in Ancient Nepal", he describes the panchayats in this way:

The panchayats were corporate bodies with powers to own and sell property for public purposes. They exercised practically all powers of the state within their sphere of activities. They possessed extreme judicial powers, were trustees for public charities and managed the religious temples, rest houses, public parks, and had powers vested in them for this purpose. They regulated markets, imposed taxes and sometimes levied extra tolls for specific objects of public utility. Some of the regulations passed by them were subject to Royal confirmation. On the other hand, any Royal charter affecting the status of a village had to be sent for the approval, to the village assembly before it was sent to the record office.

A general survey of the inscriptions of Licchavi period<sup>355</sup> confirms, that the powers granted to the panchayats were very liberal. The state had the supreme authority, no doubt, but the general tendency was to curb the powers of the state officials in order to allow a broad canvas for the activities of local institutions. Thus the panchayats enjoyed all the residuary powers, left out by the central government after defining its own field of action.<sup>356</sup>

Later on, in dealing with the jurisdiction of the panchayat courts, he writes: "There seems to be no doubt about the panchayat courts possessing complete civil jurisdiction, because in addition to the above mentioned authorities, some of the inscriptions of Licchavi period lead us to the same conclusions."<sup>357</sup>

Why such a concentration of power in Nepal at the village level? Sinha offers the following explanation:

The early Hindu society was marked by its community life. This was the main reason for the development of associate life in all its aspects, religion, learning, politics and economics. It was her elaborate system of local government, that has been responsible for the preservation of independence and individuality of Hindu culture. It was due to this character of Hindu society that the village became the basic unit of administration in Nepal and has continued to exist as a core of community life since times immemorial, in spite of political upheavals and changing political ideals of the dynasties that came in power. The winding chains

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<sup>354</sup> *supra* note 131.

<sup>355</sup> approximately 300 A.D. to 900 A.D.

<sup>356</sup> *Ibid.* at 34 [footnote omitted].

<sup>357</sup> *Ibid.* at 40-41.

of mountains and impregnable forests developed a spirit of isolation with small political units and infinite variety of local conditions. The communications were slower and harder than in the plains of India. Therefore the village had to play a vital role in the administration of local affairs and they existed as self-governing units in Nepal since early period.<sup>358</sup>

Nepal is also one of the most linguistically and culturally diverse areas of the world, with approximately 100 different ethnic groups living within its borders. Accordingly, there is certainly the need for caution in making generalizations about various aspects of life in Nepal, especially before 1951 when records and sources as to how life was carried on at the local level are quite limited. Nevertheless, there is no dispute about the existence and importance of the panchayat in Nepal's early history. These panchayats functioned in different ways with varying degrees of success. They must have taken on different shapes, sizes, and characteristics depending on the ethnicity, culture, and religious beliefs of a particular village.

Sinha concludes that the roots of the panchayat are firmly planted in the Hindu sacred literature:

A great deal of importance was attached to the local courts, because they confirmed with the concept of on-the-spot justice laid down by the great law-givers. According to *Sukraniti*, the best judges of the merit of cases are those who either live closer to the accused persons or to the places of occurrence of dispute. "Foresters are to be tried with the help of foresters, merchants by merchants, soldiers by soldiers and in villages by persons who live with both parties." Proceeding on the same idea Brihaspati prescribes: "for a person roaming in the forest, a court should be held in the forest, for warriors in the camp, and for the merchants in the caravan." Yajnavalkya while dealing with the cases of boundary disputes further emphasizes the importance of local justice. He suggests that "persons in surrounding villages, aged men and other (competent persons), cowherds, persons who frequent the forest should determine the boundary" or "persons from neighbouring village in number four, eight or ten should settle the boundary lines." Kautilya gives a very clear picture of the local justice by stating: "all disputes between any two villages should be settled by neighbours or elders of five or ten villages and disputes arising in the same village by the elders of the neighbourhood or of the village (Grama-Vridhdhas)."<sup>359</sup>

The panchayat continued to play an important, but more limited role during the medieval period of Nepal's history:

The inscriptions of Licchavi period mention a number of functions assigned to the village panchayat and town corporations at that period. The evidence of the medieval age indicates that the panchayats probably lost much of their autonomy during this period. Nevertheless, they continued to play an important role in the

<sup>358</sup> *Ibid.* at 1 [footnote omitted].

<sup>359</sup> *Ibid.* at 39 [footnotes omitted].

life of the community and at official level they were entrusted with the function of the administration of justice, throughout the age.<sup>360</sup>

The first mention of the panchayat in the European literature is contained in *An Account of the Kingdom of Nepal*<sup>361</sup>, by Francis Hamilton, who visited Nepal in 1802-03. He writes:

In the parts east of the Kali, for each small territory or manor called a Gang, or, where these were small, for every two or three, there was an officer called an Umra Mukudum or Mahato, and over from ten to twenty gangs there was a higher officer named Desali or Chaudhuri, assisted by a Mujumdar or accountant. In cases of disputes or petty offences, one or other of those officers, called a kind of jury, (Pangchayit,) and endeavoured to settle the affair, so as to avoid farther trouble; but, if one or other of the parties was dissatisfied, he might go the Raja's court. There an officer, called a Bichari in the east, and Darogah in the west, received an account of the affair from the parties, or from the inferior officers, and endeavoured to settle it. If, however, the cause was important, or required severe punishment, or if either of the parties insisted on it, the matter was referred by the Bichari to the minister of the Raja, called Karyi in the east, and Vazir in the west, either verbally or by petition, according to its importance. The minister communicated the affair to the Raja, who ordered the Bichari to try it by a Pangchayit. This kind of jury made a report, saying, that the parties were guilty of such or such a crime. The Raja then ordered whatever punishment he thought fit, but, in doing so, usually consulted an officer called Dharm'adhikar, or owner of justice, who pointed out the law.<sup>362</sup>

The beginning of that paragraph seems to indicate that the description of what followed is limited to a certain geographical area. Later on, however, there is a reference to what government officials, who are involved in the dispute resolution process, are called in the east and west. Accordingly, it appears safe to conclude that the dispute resolution process which is described in that paragraph is typical of the country as a whole. However, there is no suggestion in the article that Hamilton is trying to describe, in a comprehensive way, how disputes are resolved in Nepal. This appears to be only a brief summary of what he observed and was told about the process.

Further, I do not think this process was limited to criminal disputes, as the last two sentences might suggest. Rather, I believe the reference to a jury concluding a crime had taken place is simply being offered as an example of what the panchayat might have to deal with. We know from the sources referred to by Sinha,<sup>363</sup> that the panchayat had full civil jurisdiction. It dealt with all kinds of disputes.

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<sup>360</sup> *Ibid.* at 81 [footnote omitted].

<sup>361</sup> *supra* note 132.

<sup>362</sup> *Ibid.* at 102.

<sup>363</sup> *supra* note 131 at 81.

It should also be noted that there was no state process, at that time, under which criminals were charged and prosecuted. It was up to private citizens to make a complaint. These were normally only brought in the clearest of cases since the complainant would be punished if the charge was not sustained.<sup>364</sup>

It is also apparent that the panchayat could be asked to adjudicate a dispute in at least two ways: as a court of first instance at the village level by the consent of the parties or, in some cases, to assist the King in dealing with a more serious dispute. The panchayat however, not only had the responsibility of adjudicating the dispute, it also sought to mediate a settlement. Apparently, these dual roles were not seen as inconsistent. Not only that, the Bichari appears to have had the same dual role in the process. This shows the importance placed on settling disputes in the Nepali culture at that time. Resort to the adjudicative process was only as a last resort. There was no need for a litigant to adopt a different course if mediation failed. The same mediator could decide the outcome of the case.

The panchayat also took on an investigative role at times:

In the most important of these districts, especially towards a weak frontier, were stationed military officers called Foujdars, who had authority to determine many small suits without appeal, but always with the assistance of a Pangchayit. In the less important stations, the officers managing taluks or pergunahs were on the hills named Negis, and on the plains Adhikars. These also decided causes by means of a Pangchayit; but there was an appeal to the chief's court, in which he sat in person, assisted by his principal officers, the Darogah or judge, and the Dharm'adhiakar or chancellor. These often decided the causes without a Pangchayit; but this was only when the parties were obstinate, and would not consent to the use of this kind of jury. The facts in criminal prosecutions were often investigated on the spot, and the chief and his chancellor judged from their report, what punishment was due.<sup>365</sup>

We later have another glimpse of the role of the panchayat from Hodgson's 1834 article.<sup>366</sup>

QUESTION XVIII.---How far, and in what cases, do the *Sadar* courts use *Pancháyets*?---in civil and criminal cases, or in the former only?

ANSWER.---Both civil and criminal cases are referred to *Pancháyets*, in any or every instance, at the discretion of the court or the wish of the parties. [The answer of another respondent is as follows:---"With the exception of cases of life destroyed, all matters may be referred to a *Pancháyet*, at the desire of the parties; but cases of assault and battery are not usually referred to *Pancháyets*"]

<sup>364</sup> 1834 Article, *supra* note 133 at 247-48.

<sup>365</sup> Hamilton, *supra* note 132 at 114.

<sup>366</sup> 1834 Article, *supra* note 133.

QUESTION XIX.---Are the persons composing the *Pancháyet* appointed by the parties to the suit, or by the Government? or does each party nominate its own members and the Government add a president or casting-vote, or how?

ANSWER.---The members of the *Pancháyet* are never appointed by the Government, but by the judge (*dit'ha*), at the solicitation of the parties; and no man can sit on a *Pancháyet* without the consent of both parties. [Another reply adds, that the judge takes from the parties an obligation to abide by the award of the *Pancháyet* when given, and that the court or Government never volunteers to appoint a *Pancháyet*; but if the parties expressly solicit it by a petition, declaring that they can get no satisfaction from their own nominees, the Government will then appoint a *Pancháyet* to sit on the case. A third respondent says generally, in answer to the query, "The parties each name five members, and the Government adds five to their ten."]

QUESTION XX.—What means are adpoted to hasten the decision of the *Pancháyet*, if it be very dilatory?

ANSWER.---In such cases the matter is taken out of the hands of the *Pancháyet*, and decided by the court which appointed it to sit. [The answer given by another of the respondents states that there never can be needless delay in the decision of causes by *Pancháyets*, as these tribunals assemble in the courts out of which they issue, and officers of the court are appointed to see that the members attend regularly and constantly.]

QUESTION XXI.---With what powers are the *Pancháyets* invested to enforce the attendance of parties and witnesses, and the production of papers, and to give validity to their decrees?

ANSWER.---The *Pancháyet* has no authority of its own to summon or compel the attendance of any person, to make an unwilling witness depose, or to secure the production of necessary papers; all such executive aid being afforded by the court appointing the *Pancháyet*; and, in like manner, the decision of the *Pancháyet* is referred to the court to be carried into effect. The *Pancháyet* cannot give orders, far less enforce them, but communicates its judgment to the court, by which it is put in execution.

QUESTION XXII.---Are all the *Panch* required to be unanimous, or is a simple majority sufficient? And what course is adopted if there be one or two resolute dissentients?

ANSWER.---The whole of the *Panch* must be unanimous.

QUESTION XXIII.---Are there any persons at Kathmandu who are regularly employed as members or presidents of *Pancháyets*, or are persons indiscriminately selected for each occasion?

ANSWER.---There are no permanent individual members of the *Pancháyet*; but in all cases wherein *Parbattias* are concerned, it is necessary to choose the *panch*-men out of the following distinguished tribes, viz.:---*Arjál Khandal* or *Khanal*, *Pandé*, *Parat'h*, *Bóhara*, and *Rana*; one person being selected from each tribe. And among the *Néwárs* a similar regulation is observed, the tribes from which the individuals are chosen being the *Maiké*, *Bhanil*, *Achar*, and *Srisht*. In matters affecting persons who are neither *Parbattias* nor *Néwárs*, there is no restriction as to the selection of the *panch*-men by the respective parties.

QUESTION XXIV.---Are the *Pancháyets* allowed travelling expenses or diet so long as they attend, or not? If allowed, by whom are these expenses paid? Does each party defray its own, or how?

ANSWER.---Persons who sit on *Pancháyets* are never paid any sum, either as compensation for travelling expenses, loss of time, or on any other account whatsoever...<sup>367</sup>

QUESTION LIV.---Are tradesmen allowed to adduce their entries in their books to prove debts to them? and must the shopman or enterer of the items be produced to prove the entries?

ANSWER—The value of entries in merchants' books, and in general mercantile affairs, are referred by the court to a *Pancháyet* of merchants.<sup>368</sup>

A section in Hodgon's 1836 article is devoted to the functioning of the panchayats, which draws on the information contained in the answers quoted above, but also provides some additional information from the handwritten questions and answers<sup>369</sup> and Hodgson's own observations and conclusions. The additional information in the 1836 article is the following:

1. We are told that that there are two kinds of panchayats, "domestic and public, the latter being called to settle suits come before the courts; the former to settle matters never brought under the court's cognizance. Domestic *Panchayats* are very popular, especially among merchants whose wealth attracts the cupidity of the courts, and the community of whom can, on the other hand, always furnish intelligent referees or *Panch* men."<sup>370</sup>

<sup>367</sup> 1834 Article, *supra* note 133 at 216-18.

<sup>368</sup> *Ibid.* at 227.

<sup>369</sup> See *supra* note 232.

<sup>370</sup> 1836 article, *supra* note 4 at 121-22.

2. Later we are told that the panchayat "acts the part of a jury when men of note are accused, the government nominating the *Panch* men. In civil actions too the parties, tired of litigating, will sometimes desire the court or the government to nominate a *Panchayat* to hear and decide without appeal. Ordinarily *Panchayats* are chosen purely by the parties, and half the judicial business of the kingdom is performed by them to the satisfaction alike of the parties, the public and the government. The function of the *Panch* men appears to me to be essentially that of jurors. They find the verdict, and the court, out of which they issue and in which they assemble, merely enforces their finding."<sup>371</sup>
3. Hodgson adds that the decision of the Panchayat need not always be unanimous. In some cases a "very large majority will suffice."<sup>372</sup>
4. We are also advised that the panchayat plays the role of a witness in at least one situation: where property is being alienated, with the consent of the heirs, to an adopted child.<sup>373</sup>
5. Hodgson further tells us that Panchayats are primarily used in civil actions.<sup>374</sup>
6. Hodgson reports that "old, learned, honest and experienced men" were preferred as panch men.<sup>375</sup>

Unlike Hamilton, Hodgson makes no mention of the panchayats mediating or investigating disputes. No question, however, posed by Hodgson, seeks this information directly or indirectly. We are also not told at what locations a panchayat might be convened. Again there was no question soliciting this information.

The following significant points can be drawn from the writings of Hodgson and Hamilton:

1. Panchayats operated as arbitration boards in the private sector, outside the supervision of the courts. It appears that merchants did not trust the court to properly decide cases which arose between them. This might suggest that the Ditha and Bicharis simply lacked the necessary expertise. It might also indicate that the merchants at least feared they would be victimized by corruption.
2. Unfortunately we are told very little as to how, and in what circumstances the panchayats functioned in the private sector as arbitration boards. Presumably the parties signed agreements under which the panchayat would have operated. As far as I know, none of these agreements have been preserved. If panchayats were indeed as popular as Hodgson suggest, perhaps there is a good chance that some

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<sup>371</sup> *Ibid.* at 122.

<sup>372</sup> *Ibid.* at 123. But compare question and answer XXII from the 1834 Article set out on page 89, above.

<sup>373</sup> *Ibid.* at 124.

<sup>374</sup> *Ibid.* at 112.

<sup>375</sup> *Ibid.* at 123.

of these agreements might turn up somewhere, or at least some record from one of their proceedings.

3. When the panchayat functioned within the court, it was not acting as an arbitration board but as a jury. It had to rely on the court's power in the area of procedure. For example, it did not have powers of its own to summon witnesses. It also could not enforce its decision. Again it had to look to the court in that regard. Its deliberations were supervised by the court.
4. Unfortunately we are not told how the panchayat went about its deliberations. Did the judge pose certain questions to the panchayat? Could they rely on knowledge about the dispute which they had acquired elsewhere? Could the judge and the parties listen in to their deliberations? Were they really as resistant to corruption as Casinath's account seems to suggest?<sup>376</sup>
5. The panchayat was not necessarily a jury of your peers. If you were a low caste person among the Parbattias or Newars, you were going to be judged by members of the higher castes. This would not be good news if the opposing party was from a high caste. If you were a woman, you would be judged by men. Again, not comforting if a man was accusing you of some misconduct.

As quoted above, in his 1836 Article, Hodgson tells us that panchayats perform "half the judicial business of the kingdom" and that their performance is "to the satisfaction alike of the parties, the public and the government."<sup>377</sup> Therefore, one might expect that its role would be enshrined in the portion of the new legal code which set out the procedure to be followed in lawsuits. However, no mention is made of it in this context.

### C. Jang Bahadur Rana and the Ain

Jang Bahadur Rana came to power in September, 1846, following what has become known as the Kot Massacre. The Queen had summoned all the leading political figures of Nepal to the Kot,<sup>378</sup> after she had learned that her political ally, Gagan Singh had been assassinated. Jang Bahadur, his brothers, and Jang's body guard arrived at the Kot fully armed. The other nobles came with just their swords and a few followers, having hurriedly dressed after being summoned by the queen's messengers late at night. There is uncertainty about the precise sequence of events, but no doubt about the outcome: Jang, his brothers, and bodyguards emerged relatively unscathed after killing about 30 noblemen. Opinions differ about Jang's role in the massacre. Daniel Wright, whose book was published in 1877 and who was a friend of Jang Bahadur, suggests that the event was carefully planned: "There is no doubt that the whole affair was arranged beforehand, and that written orders were given by the Rani to Jang Bahadur."<sup>379</sup> Whelpton reaches a different conclusion: "The most plausible hypothesis, therefore,

<sup>376</sup> See pages 65 to 67, above.

<sup>377</sup> 1836 Article, *supra* note 4 at 122.

<sup>378</sup> A building containing the military arsenal which was located near the Royal Palace in Kathmandu.

<sup>379</sup> Wright, *supra* note 139 at 57.



remains that Jang was basically reacting to events on the night of 14<sup>th</sup> September and that the massacre was not pre-planned.”<sup>380</sup>

Jang was appointed prime minister by the Queen and quickly took steps to consolidate his power. By 1850, Jang felt secure enough in his position to travel to Europe, where his arrival with his entourage created quite a sensation. There was extensive press coverage of his visit and Jang was the hit of the social season.<sup>381</sup> He was still a young man – only 32 years of age<sup>382</sup> and took full advantage of the opportunity to acquaint himself with various aspects of life in England and France. Jang even considered remaining in England as Nepal’s ambassador. After his return to Nepal, some alleged that Jang had lost his caste as a result of accepting food and drink from Europeans.<sup>383</sup> Even the sea voyage itself provided a basis for this allegation.<sup>384</sup> Some high ranking officials allegedly plotted to assassinate Jang, using this loss of caste as their justification. Although they were found guilty of treason, Jang, at his mother’s urging, did not order that the conspirators be put to death. Instead he banished them from the country.<sup>385</sup> Recently it has been suggested that Jang fabricated this plot and used it as an excuse to rid himself of some rivals.<sup>386</sup>

Jang’s reign extended from 1846 to 1877, during which time he instituted a rule of hereditary succession. As a result, a member of the Rana family would continue to rule Nepal until the regime was finally deposed following the revolution of 1951. During the era of Rana rule, Rana family members and their relatives occupied all the important posts in the government and military. As time went on, there was certainly no shortage of relatives – Jang is reputed to have fathered close to 100 children by his several wives.<sup>387</sup> The Rana prime minister was the supreme ruler. His word was regarded as law and he had the final say in any judicial matter. The king had no real power and only exercised a ceremonial role in the functioning of the state.

Known as an outstanding hunter,<sup>388</sup> Jang is said to have enjoyed a good reputation among the military because of his various acts of daring. He apparently also enjoyed a good reputation among the peasants, at least in the early part of his reign. We are told that, on one occasion, some peasants complained to Jang about two officials, one of whom was a favourite of Jang’s. The peasants alleged that these officials had defrauded them of 25,000 rupees. The officials adamantly denied any wrongdoing. After Jang looked into it, he was persuaded that the peasant’s complaint was valid and ordered his officials to

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<sup>380</sup> Whelpton, *Jang Bahadur in Europe*, *supra* note 140 at 83 [footnote omitted].

<sup>381</sup> *Ibid.* at 105: “However even when all the problems encountered have been taken into consideration there can be no doubt that Jang’s European journey was a great success. The extent to which he and his companions caught the popular imagination is amply illustrated in the following pages.”

<sup>382</sup> *Ibid.* at 10. Jang Bahadur Rana was born on June 18, 1817 (*ibid.* at 75).

<sup>383</sup> Oldfield, *supra* note 139 at 389.

<sup>384</sup> See Baudhayana 2.2.1-2: “Next, the sins causing loss of caste: undertaking a sea voyage...”

<sup>385</sup> Oldfield, *supra* note 139 at 393.

<sup>386</sup> See Sever, *Aspects of Modern Nepalese History*, *supra* note 129 at 162-63.

<sup>387</sup> Wright, *supra* note 139 at 68.

<sup>388</sup> See Landon, *supra* note 129 at 110: “Jang Bahadur had but one great interest outside his political life. He was a mighty hunter before the Lord.”

repay the money.<sup>389</sup> This kind of even-handedness is perhaps one reason why Daniel Wright made the following remarks with respect to the legal system of the time:

Lawyers are not held in much estimation in Nepal. The chief justice gets a salary of some two hundred rupees a month, so that the inducements for bribery and corruption are great.

As an appeal can always be made to the Council (which practically means Sir Jang Bahadur), justice is on the whole pretty fairly administered.<sup>390</sup>

Even though Jang may have been a fair-minded judge, his regime was not one that promised any hope for advancement of the peasantry. The role of government during the Rana regime of 1846-1951 was to maximize revenues for the treasury, the surplus of which the Ranas regarded as their own. They used these monies to build lavish palaces and to import various kinds of luxuries.<sup>391</sup> Meanwhile, little if any money was spent on development.<sup>392</sup> We find these laconic remarks in Wright's book about the state of education in the country:

The subject of schools and colleges in Nepāl may be treated as briefly as that of snakes in Ireland. There are none. Sir Jung Bahādur and some of the wealthier class have tutors, either Europeans or Bengālī Bābūs, to teach their children English; but there is no public provision for education of any sort. Every man teaches his own children, or employs the family priest or Pandit for the purpose. The lower classes are simply without education of any kind whatever.<sup>393</sup>

Very little changed for the peasants, who made up the vast majority of the population, during these 105 years. Theirs was the hopeless grind of trying to coax a living from the land, made all the harder by having to hand over a substantial part of what they produced to maintain the Ranas in their extravagant lifestyles. Not surprisingly, the seeds of discontent from the injustice of the situation would eventually lead to the overthrow of the regime.

D. R. Regmi was one of the critics of the Rana regime during its later stages. One of Regmi's books, first published in 1950<sup>394</sup> denounces the injustices of Rana rule, including that found in the judicial system:

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<sup>389</sup> Oliphant, *supra* note 139 at 126-27. See also Whelpton, *Jang Bahadur in Europe*, *supra* note 140 at 121: "Warning his brother to deal severely with any official who oppressed the peasantry, he [Jang] attributes the downfall of Bhimsen Thapa, Mathbar Singh and Gagan Singh to God's anger at their tolerating such oppression." [footnote omitted]. Landon also concludes (*supra* note 129) at 111: "At the same time it is curious to note that he [Jang] was always ready to listen to the other side of a question which was put before him by his own servants, and he was ready to admit when they had right on their side."

<sup>390</sup> Wright, *supra* note 139 at 44.

<sup>391</sup> Mahesh C. Regmi, *Thatched Huts and Stucco Palaces: Peasants and Landlords in 19<sup>th</sup> Century Nepal*, *supra* note 129 at 177-79.

<sup>392</sup> Sever, *Aspects of Modern Nepalese History*, *supra* note 129 at 191-92.

<sup>393</sup> Wright, *supra* note 139 at 31.

<sup>394</sup> D. R. Regmi, *A Century of Family Autocracy in Nepal*, *supra* note 129.

Incidentally we may refer to the judicial system of the country. It is this which is conspicuous for its injustice and deformity. Nowhere in the world justice is so barbarously administered. There is no judiciary worth the name, as all departments concerned to dispense justice are neither independent nor are equipped to deserve such position in the circumstances. They are just like other offices of the Rana Government and the analogy may appear in the system of the most backward Indian States existing in the British period. The courts have both executive and judicial functions. There is no proper procedure of trial and hearing and pleading and trial do not exist on an ascertained basis.<sup>395</sup>

Later the author writes: "Nobody in Nepal has any knowledge of judicial trial as understood in civilised countries. There is not only no habeas-corpus, but there is total absence of the rule of law."<sup>396</sup>

Even though the rule of law may not have been the norm during the Rana period, there was law. As has been mentioned, the Ain (which I will now refer to as the 'MA'),<sup>397</sup> the country's first comprehensive legal code was promulgated in 1854.<sup>398</sup> After Jang's return from Europe in 1850, he formed a council and handed them the task of drafting a comprehensive code of laws for the country. This council was made up of over 200 members drawn from a wide cross-section of the upper echelons of society. In the MA's preamble, it is stated to have the following object: "Prior to this, officers in various courts and offices of this country, while deciding cases, awarded different punishments to different persons for the same offences. There was no uniformity in that respect. Henceforth, the punishment awarded to all people, high and low, must be uniform and in accordance with the crime and the caste of the person."<sup>399</sup>

The MA is of great length and complexity. One of the first printed versions was over 1000 pages long.<sup>400</sup> Since few among the peasantry could read, it would have been passed on by word of mouth to them, if at all. Wright appears to be unaware of the MA. He observes that the "old savage code of punishments, involving mutilation, stripes, etc. etc., was abolished by Sir Jung Bahādur on his return from England."<sup>401</sup> However, he makes no mention of the MA.

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<sup>395</sup> *Ibid.* at 11.

<sup>396</sup> *Ibid.* at 20.

<sup>397</sup> It was not until the publication of a later version that it became known as the Muluki Ain or the 'law of the land'. However, I will refer to the Ain hereafter as 'MA' to correspond to how Hofer refers to it: see *supra* note 143.

<sup>398</sup> There had been previous efforts to codify the law, although they were prior to the Shah conquests of the 1700s. As Hofer points out, the Newari king, Jayasthiti Malla had promulgated a legal code and later, in the 16<sup>th</sup> century one of the kings of Gorkha, Ram Sah, had handed down a code containing 26 principles. See Hofer, *supra* note 143 at 175-77.

<sup>399</sup> Quoted in Sever, *Aspects of Modern Nepalese History*, *supra* note 129 at 44 [footnote omitted].

<sup>400</sup> Hofer, *supra* note 143 at page xxi of the Introduction written by Prayag Raj Sharma.

<sup>401</sup> Wright, *supra* note 139 at 44.

The MA was ambitious in its scope and intent. This was to be a code for every member of the population, setting out the law which would govern depending on your caste.<sup>402</sup> Containing 163 chapters, it sought to “integrate three historically and regionally autonomous caste hierarchies, i.e., that of the Parbatiya, the Newār and of the Terai people, as well as a number of ethnic groups into an all-embracing ‘national’ hierarchy of castes.”<sup>403</sup> There were five caste groups set out in the Ain: the ‘wearers of the holy cord’, the ‘non-enslavable alcohol-drinkers’, the ‘enslavable alcohol-drinkers’, the impure but ‘touchable’ castes, and the impure and ‘untouchable’ castes.<sup>404</sup> There was little if any mobility possible between caste rankings.<sup>405</sup> Europeans and Muslims were also included in this caste structure. They fell within the ‘impure but touchable’ grouping. Ethnic groups are included within these groupings, but they are not identified as such. Hofer points out that the word ‘jat’ is used in the MA for both caste and ethnic groups.<sup>406</sup> Later he indicates that: “It is a positive fact that it was Western research and administration which introduced the distinction between caste and ethnic group in South Asia. In Nepal, too, the distinction has occurred only in the modern, post-1951 legislation.”<sup>407</sup>

As is the case in the dharmasastras, the underlying concern with the myriad of prohibitions and requirements in the MA is maintaining caste purity. Accordingly, depending on your caste, it may be an offence to simply accept food or drink from a member of a lower caste. Sexual conduct is also of prime concern, since a breach of the rules can not only result in the pollution of the offender but also of other members of the offender’s caste. Hofer points out that: “More than one-third of the MA deals with sexual relations, both inter-caste and intra-caste.”<sup>408</sup> A breach of these provisions could lead to harsh punishments. It was even a capital offence in certain circumstances for a lower caste male to have sexual relations with a female of a higher caste.

Although converting to another religion was expressly prohibited by the MA, a person was free to practice his own religion provided this did not hinder those practicing other religions. There were certain exceptions. For example everyone was prohibited from killing a cow, no matter what their religious customs might be. Other subjects covered by the MA included marriage, adoption, divorce, inheritance, legal procedure, property rights, and debt. It was intended to cover every conceivable situation which might be brought before a court of law, but, as Hofer points out, as a result of Nepal’s diversity, some groups were missed entirely and others were only given cursory treatment. However, it was open to groups to petition the government and in fact the Tamangs were able to have themselves included in the hierarchy by amendments to the MA passed in 1932.<sup>409</sup>

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<sup>402</sup> Hofer, *supra* note 143 at 129.

<sup>403</sup> *Ibid.* at 8.

<sup>404</sup> *Ibid.* at 8-10.

<sup>405</sup> *Ibid.* at 162.

<sup>406</sup> *Ibid.* at 10.

<sup>407</sup> *Ibid.* at 110.

<sup>408</sup> *Ibid.* at 35.

<sup>409</sup> *Ibid.* at 125.

How does Hofer assess the role of custom under the MA? He states that one of the tasks was to try to sanction "all the customs and traditions" of the various caste and ethnic groups.<sup>410</sup> Hofer concludes that the drafters of the MA showed great tolerance in their approach:

The legal protection granted to everybody to follow his forefathers' traditions and the recognition of these traditions as *dharma hunyā* (here 'incumbent'), is in line with the precept of the *dharmaśāstra*, according to which the king should not only respect but also actively maintain the traditions of his subjects. In fact, the MA is tolerant as was possible and necessary under the circumstances given at the time of its promulgation. It is flexible enough to make compromises with the immense empirical diversity, sometimes even at the risk of ambiguities or anomalies, as is shown by the examples of the Newār or the Muslims. That this flexibility was, however, preceded by some dilemmas will be shown in the next chapter.<sup>411</sup>

If a custom had not become enshrined in the MA (of which Hofer cites examples), then it lost the status it might have enjoyed under the classical Hindu legal tradition and indeed, under the legal system as it existed in Nepal prior to the promulgation of the MA:

The autonomy of customary law and religion is considerably restricted by the MA. Customary law and the precepts of religion are only applicable if they have become *ain*, law. Jurisdiction is chiefly a privilege of the State. That the MA assigns local jurisdiction and police powers also to persons who are not office-holders in the state bureaucracy itself cannot be taken as an indication of caste or village autonomy in judicial matters. (In practice, this fact may merely enhance a flexible interpretation of the law in petty cases.)<sup>412</sup>

The fact that the MA is an offshoot of the classical Hindu legal tradition is beyond doubt: "The MA's laws embrace in letter and spirit the values and ideologies taught by the Hindu *dharmaśāstric* texts."<sup>413</sup> Hofer comes to the same conclusion:

The texts that might have served as sources for the MA have not yet been analysed. The MA only sporadically refers to the classical Indian legal works, the *dharmaśāstra*. When it does so it gives no further details. As to its character and claim, the MA is certainly related to the *Arthaśāstra* of Kautilya. Contrary to the *smṛti*, the *Arthaśāstra*, too, hardly contains religious or moral precepts, but is, as Kangle emphasises, a systematic legal code giving detailed prescriptions with regard to public, criminal and civil law as well as to social life in general. Nevertheless, the *Arthaśāstra* seems to refer to a particular, historically and geographically discernable society to a much lesser extent than the MA.<sup>414</sup>

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<sup>410</sup> *Ibid.* at 151.

<sup>411</sup> *Ibid.* at 147 [footnote omitted].

<sup>412</sup> *Ibid.* at 185.

<sup>413</sup> *Ibid.* at xvii of the Introduction written by Prayag Raj Sharma.

<sup>414</sup> *Ibid.* at 3 [footnotes omitted].

The MA did not provide for the continued use of a panchayat, either as an arbitration board or as a kind of jury.<sup>415</sup> The only time the word appears is in relation to the service of a summons on a defendant, where it occupied the role of a witness.<sup>416</sup> It appears that the use of the panchayat to decide issues largely died out during the Rana regime. Although attempts were made to revive its use, at the local level, during the later stages of the regime, they did not enjoy much success.<sup>417</sup>

Not much is known about what inspired Jang to promulgate a legal code. Some suggest his exposure to the Napoleonic code in France might have been a factor,<sup>418</sup> although there is no similarity between the two, apart from their intent to be comprehensive in their scope.<sup>419</sup> Hofer wonders whether some influence may have been felt from India.<sup>420</sup> Others have pointed out that it was a way for Jang to further legitimize and consolidate his hold on power. The dharmasastras clearly indicate that the power to rule and administer justice is vested in the king. Although the king had delegated that power to Jang already in writing, it certainly helped to have this lengthy and formal document, signed by all members of the council and the present and future king, as confirmation of Jang's right to rule.

I have seen no reference to any primary source documentation relating to the debate and discussion which preceded the finalization of MA.<sup>421</sup> I do not know to what extent, if any, those proceedings were recorded. It would certainly be interesting to review whatever source documentation might be available in order to see what they reveal about the concerns, motivations, and issues the council grappled with. Was there a debate about whether the panchayat should have been made a part of the judicial procedure in the MA? Did some members of the council feel that greater recognition ought to have been given for indigenous dispute resolution mechanisms and the customs of such groups?

As far as I am aware, no scholar has studied this primary source material, if any, and written about it in English.<sup>422</sup> There may well be some such literature in Nepali, but

<sup>415</sup> Email communication from M. K. Dangol dated February 20, 2005.

<sup>416</sup> *Ibid.*

<sup>417</sup> Sinha, *supra* note 131 at 91ff. See also *supra* note 94 and accompanying text.

<sup>418</sup> Whelpton, *Jang Bahadur in Europe*, *supra* note 140 at 123.

<sup>419</sup> See Hofer, *supra* note 143 at page xx of the Introduction where Prayag Raj Sharma concludes: "The Code of Napoleon is the most unlikely source of inspiration, therefore, for the MA. The only point of comparability between the two perhaps lies in their being one comprehensive compilation." See also, Krishna Kant Adhikari, *Nepal Under Jang Bahadur 1846-1877*, *supra* note 130 at 276: "The *Ain* did indeed incorporate a number of reforms in certain areas of social life and in the criminal law...but no direct impact of the British or any other European legal system can be traced in the *Ain* itself or in Nepalese judicial practices."

<sup>420</sup> See Hofer, *supra* note 143 at 3: "Finally, one wonders to what extent British legislation in India might have influenced the concept of the MA as a whole."

<sup>421</sup> Hofer (*supra* note 143 at 4) points out: "Historical research is complicated by the fact that records of deliberations and substantiations by the editorial council are passed over by the MA." Hofer makes no mention of any primary source material relating to the drafting of the MA. It appears that no preliminary drafts of the MA have survived.

<sup>422</sup> However, Hofer, in his Preface to the Second Edition (*ibid.* at xxx) makes reference to a two volume study, written in French: Jean Fezas, *Le Code Nepalais (Ain) de 1853* (Turin: Unione Accademica

again, I have seen no reference to it or any indication that a search has been made for such material. Perhaps there are letters, memos, or other documents around which would shed some light on the deliberations of the council. There may even be some oral history available. This whole area may well be fertile ground for further study.

Whatever the nature of the deliberations leading up to it, the MA represented a fundamental change in the nature of the legal system of Nepal. It was the instrument by which Nepalese society transitioned from the rule of the sastras and customs to one of at least the nominal rule of law. It is true that the MA was not a western code of laws, but it was western in this sense: it was meant to be applied in a positivist fashion. In other words the task was now to determine the facts, identify the applicable section of the MA, and apply the law reflected in that section to the facts. This was no longer the quest for dharma reflected in the verse of the Naradasmṛti: "Just as a hunter would pursue the tracks of a wounded deer by traces of blood in the forest, so he (the judge) should pursue the tracks of dharma."<sup>423</sup> Gone was the pursuit of dharma - the right result based on a careful look at all the circumstances. Gone was the holy cloak which was wrapped around dispute resolution, with its insistence on the need for penetrating wisdom and inspired perception. Here now was the dry task of the secular judge, who still had to be careful, discerning, and right, but whose duties were part of a job within the administration of the state, not a holy mission under the scrutiny of the divine. Was this simply a change in color of the fabric of Nepalese society or was it the start of a tear, which would over time lead to a tragic ripping of the tapestry?

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Nazionale, 2000). Hofer says, at page xxx, that the book "renders the entire contents of four manuscript versions of the Code of 1854 in abundantly annotated transliteration and includes an introduction of nearly 50 pages on the contents, predecessors and sources of the Code, the circumstances of its composition and application." Perhaps there is some reference in this work to primary source material.

<sup>423</sup> Naradasmṛti (Legal Procedure) 1.32 and see pages 49 to 50, above.

## CHAPTER VI - CONCLUSION

Menski tells us that "rather little is known about the realities of legal administration prior to British rule in India"<sup>424</sup> - a time when judicial systems in India were heavily influenced by the principles in the sastras. I expect that how the administration of justice was carried out in these systems would have varied from place to place and from time to time, including the way in which custom was applied and group decision-making was invoked. What is rather surprising is that the classical Nepalese legal system has received very little attention from Hindu law scholars outside Nepal. It is surprising because this was a system where the classical Hindu legal tradition held sway and where little influence had been felt from the British and Moslem conquerors in the south. Here, in Nepal, was an example of how the principles in the sastras were applied in the courts. Here was a demonstration of how custom was fitted into such a system and where the tradition of group decision-making was embraced.

But for Hodgson's writings, we would probably know as little about the classical Nepalese judicial system as we do about the practical workings of legal systems in India prior to British rule. As a result of Hodgson's efforts we have the benefit of direct statements from those actually involved in the Nepalese system. Of course, these statements are not free from bias. The respondents had a stake in portraying the system as an effective and fair one. They would have wanted to impress their British friend. It is also difficult for us Westerners to appreciate and understand the hierarchical and status-conscious culture which must have been reflected in the administration of justice at that time. We will never have the perspective of the vast majority of the population, who laboured under the oppressive burden of poverty and the marginalization created by the caste structure. Nevertheless, I think it is possible to safely draw some conclusions about the system, guarded though they must be because of those weaknesses. Although Nepalese culture has changed since the first half of the 19<sup>th</sup> Century, it still maintains its strong Hindu roots. Accordingly, what was working back then may have some value in dealing with access to justice issues now.

What was working during the classical phase of the Nepalese justice system? The evidence points to the fact that the panchayat worked effectively, both as a jury and as an arbitration board. When it functioned as an arbitration board, it reflected the teaching of the sastras - that those who are knowledgeable about the situation should be the ones who make a decision when a dispute arises. When it functioned as a jury, the panchayat embodied the sastric principle that elderly, wise, and discerning people should be involved in resolving important issues. We can only guess, at least until further study is done, as to why the MA did not recognise, affirm, and provide for the continuation of this practice. Why get rid of something which was trusted and ingrained in the culture? Why create a system where a single judge would decide most matters? Answers to these questions can involve little more than speculation at this point. What is more important is

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<sup>424</sup> Menski, *supra* note 120 at 155 [footnote omitted].



the question as to whether the panchayat, functioning in a jury-type role and an expanded role of custom would assist in improving access to justice in Nepal today.

The use of a jury has some exciting potential. Caste consciousness still prevails strongly in the rural areas of Nepal. What would happen if Brahmins serve on juries with low caste dalits? Would this perhaps help to loosen some of the bonds of the caste hierarchy? What would be the effect of women and men serving together on juries? Would this help to lessen gender discrimination and promote greater equality between the sexes? Would the panchayat-as-jury be better able to resist the temptation of allowing power and influence to corrupt the decision-making process? If the panchayat-as-jury could be as brave in resisting corruption as Casinath reported it to be in his case,<sup>425</sup> then the Nepalese may well have something they can trust as a decision-making body.

The lack of recognition of the legitimate aspirations of ethnic groups is one of the root causes of the present civil war in Nepal. Once the present crisis is resolved, Nepal will be at a cross-roads. Should it choose the path of legal pluralism? Should it recognise and legitimize, within some principled framework, the variety of dispute resolution systems and customs which presently exist among ethnic groups? Could the role that custom played in the classical Hindu and Nepalese legal traditions provide a model or at least some clues as to how to graft in many branches to the trunk of the main legal system? What status should be given to well-established customs which are not contrary to the principles of a liberal democracy?<sup>426</sup> Would it help to bring unity to the country if each ethnic group knew that those customs which are integral to their culture would be applied in appropriate circumstances? Of course these questions, as well as the questions relating to whether trial by jury should be introduced, only the Nepalese themselves can appropriately answer.

The promulgation of the MA has been almost universally applauded by scholars and commentators as a progressive step and a significant achievement.<sup>427</sup> However, I question this conclusion. As Lingat observed, legislation is "fatal to Hindu concepts".<sup>428</sup> Here was a culture which had been governed, both in the administrative and legal areas, by the interplay of sastric principles and customs for many centuries. In short order, it was transported into the alien world where law is being applied in a positivist fashion. Nevertheless, one can argue that the way justice was administered prior to the MA did

<sup>425</sup> See pages 65 to 67, above.

<sup>426</sup> For a discussion of the Canadian experience see Mark D. Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999) 44 McGill Law Journal 711.

<sup>427</sup> See, for example, Adhikari, *Nepal under Jang Bahadur* *supra* note 129 at 274 where he says: "The codification of the law in the Ain was his [Jang Bahadur] greatest achievement..." See also Mahesh Regmi, *Thatched Huts and Stucco Palaces*, *supra* note 129 at 27: "The code is, without doubt, one of the outstanding achievements of Rana rule."; and, Sever, *Aspects of Modern Nepalese History*, *supra* note 129 at 43: "It [the Ain] was Jang Bahadur's greatest and most lasting achievement." On the other hand, Deepak Thapa in *Kingdom under Siege*, *supra* note 34, is critical of the Ain because he feels it marginalized ethnic groups: "The codification of the social do's and don'ts in the *Muluki Ain* of 1854 led to the inferior placement of ethnic groups in the social hierarchy by law, and raised the status of the Hindu 'upper castes'." (pages 75-76).

<sup>428</sup> Lingat, *supra* note 119 at 265.

reflect a positivist approach to a certain extent. It appears there was great pride that sastric principles were rigidly adhered to and applied, contrary to what was happening in India. It did not always have the flavour that Menski suggests was characteristic of the classical Hindu legal tradition, where flexibility and situation specific decision-making was the norm.<sup>429</sup>

However, law is not dharma and dharma is at the root of the classical Hindu legal tradition. Law has much more limited objectives. It seeks to regulate conduct by threat of punishment or sanction to achieve secular goals of peace, order, and good government. On the other hand, the stakes are much higher with dharma. If you fail to carry out your dharma, the consequences can be of the utmost severity: eternal damnation and a rebirth into a wretched existence. Your failure can not only impact your own destiny, but also those of your family, ancestors, and relatives. In the Nepalese context during the first half of the 18<sup>th</sup> century, dharma was your religious duty reinforced by the way it was embraced in the culture. But there was a tolerance within dharma, which called for the recognition of well-established customs in families, communities, and groups.

Little is known of what was happening at the local level during the 97 years of Rana rule following the promulgation of the MA. There is evidence that, in some areas, little if any changes were made in the way disputes were resolved.<sup>430</sup> On the other hand, it appears that customs of ethnic groups were giving way to the principles in the MA.<sup>431</sup> Prior to the MA the sastric principles would be hovering, offering ethnic groups a choice between their customs and those of the dominant group in the society. There would have been a strong attraction to adopt the practices of those in power and this process of sanskritization was happening over the centuries. An ethnic group, however, was not compelled by force of law to adopt Hindu customs. They did have a choice. Once the MA was in force, they no longer had that choice to the extent their customs were not enshrined in the MA. They now had to adhere to the Hindu principles enshrined in the MA if they were to obey the law.

In my opinion, the MA had at least two weaknesses: firstly, it deprived custom of its integral role in the culture; and, secondly, it failed to recognise and incorporate the panchayat, one of the strongest features of the classical Nepalese legal system, as part of its dispute resolution mechanisms in the courts and at the local level.

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<sup>429</sup> See *supra* note 184.

<sup>430</sup> See *Arbitration Board Study*, *supra* note 91. After reporting the outcome of a study done of certain areas in three districts, the authors concluded that: "There are many informal and indigenous dispute settlement mechanisms operating in the study districts." (page 23).

<sup>431</sup> See, for example, Kate Gilbert, *Legal Rights and Social Strategies: An ethnographic history of family law in modern Nepal*, (Doctor of Philosophy Thesis, Yale University, 1993) at 464: where she concludes, with respect to whether there are differences between groups in the area of family law: "After years of research, I found that the real issue was the absence of ethnic difference." She goes on to say, on page 465: "If I had to reduce that story to a single sentence it would be the tale of how ethnic difference has ceased to be protected under Nepalese law, and how "the family" came to be the arena of government action within which the uniform Nepalese citizen is emerging." See also Leonard Adam, "The Social Organization and Customary Law of the Nepalese Tribes" *supra* note 147. The author concludes that, in spite of the many different ethnic groups in the country, one can speak of a Nepalese law, since it appears to be accepted and applied across ethnic boundaries.

Since 1981, Nepal has had legislation allowing for private arbitrations. The most recent version, passed in 1999, is modeled on the UNCITRAL MODEL LAW.<sup>432</sup> Accordingly, disputants can submit their disputes to arbitration by agreement, as they could through a panchayat in Hodgson's time. If the arbitration provisions of *Local Self-Governance Act*<sup>433</sup> are implemented, then it will be mandatory to resolve certain kinds of disputes at the local level by way of three person arbitration panels. What is missing then, from the present situation?

As far as I can determine there has been no consideration given to reintroducing the panchayat's jury-type role into the Nepalese justice system, nor have I come across any such suggestion in the literature which I have reviewed. It is interesting to note that Japan has passed legislation under which 'mixed-juries'<sup>434</sup> will decide cases dealing with serious crimes beginning in 2009.<sup>435</sup> South Korea plans an earlier start – in 2007, when juries will be used to decide criminal matters.<sup>436</sup> Just what kind of jury system, if any, would be appropriate in Nepal is an issue which would have to be debated, discussed, and decided, for the most part, by Nepal's legal community. What we do know is that, at one point in Nepal's history a jury was an integral part of the court process, where it appeared to be resistant to improper influence and was respected within and outside the legal community. The use of a jury certainly fits with the great tradition of group decision-making in Nepal and may provide opportunities for dealing with other challenges faced by the country.

I am not suggesting a return to a dharma/custom based system. What I am suggesting is that two of the apparent strengths of that system, the role of custom and the panchayat-as-jury, may be worth considering, adapting, and implementing in Nepal's legal system today. Such a process might assist in building a firm foundation for freedom, justice, democracy, and human rights, where equality and harmony between individuals and groups are the norm.

A last word about the present constitution – an obviously well-drafted and comprehensive document. This was the result of a sincere effort by a group of nine highly skilled, well-intentioned, and knowledgeable men, who were assisting the country seize an opportunity for democracy. Although they engaged in impressive wide-spread consultation, time was not available to elect representatives to be involved in the process. If they had opted for

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<sup>432</sup> I.C. Sharma, "Recent Development in Arbitration in Nepal" (1999) 13:1&2 Nepal Law Review 104 at 105.

<sup>433</sup> See pages 22 to 23, above.

<sup>434</sup> A 'mixed-jury' is one which is made up of judges and laypersons.

<sup>435</sup> See Robert M. Bloom, "Jury Trials in Japan" (March 16, 2005). Boston College Legal Studies Research Paper No. 66. <http://ssrn.com/abstract=688185> where the author describes the nature of the Japanese legislation and discusses the experience with mixed juries in other countries such as Italy, France, and Germany.

<sup>436</sup> See article by Arirang TV entitled "Court to Introduce Jury System in 2007" at <http://english.chosun.com/w21data/html/news/200412/200412150012.html> This is also based on a talk given at the Faculty of Law, University of British Columbia on March 30, 2005 by Kyong-Whan Ahn, Professor and Dean of the College of Law, Seoul National University.

that procedure the opportunity for democracy might have been lost. The constitution was promulgated by the King, without the stamp of approval of elected representatives from different groups and segments of the population.

How to have a constitution with the kind of wide-spread support which could unite the country? Having regard to tradition, what is needed is the stamp of approval following a group decision-making process that has fully involved all segments of the population. If everyone has a voice, through representatives and otherwise, and if such representatives have drafted and approved a constitution, it might have the resilience to repel any attack on the democratic process from whatever quarter.

What is the dharma of Nepal? What is right at this time, in this situation? These questions can best be answered by engaging the country as a whole and drawing into one decision-making group those who are truly representative of Nepal's diversity. Using that approach, the fabric of the nation might be repaired and the beauty of the tapestry may well be restored. I believe such a group decision-making process is worth a try, especially since the success of other options would simply involve the triumph of brute force. It is hard to be optimistic when one considers the divisions that the bitter civil war has inevitably created. Perhaps there is still enough good will, however, to craft a solution using a non-violent approach.

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