

A SHORT HISTORY OF JAINA LAW¹

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The nineteenth century English neologism 'Jaina law' is a product of colonial legal intervention in India from 1772 onwards. 'Jaina law' suggests uniformity where in reality there is a plurality of scriptures, ethical and legal codes, and customs of sect, caste, family and region. The contested semantics of the term reflect alternative attempts by the agents of the modern Indian legal system and by Jain reformers to restate traditional Jain concepts. Four interpretations of the modern term 'Jaina law' can be distinguished:

- (i) 'Jaina law' in the widest sense signifies the doctrine and practice of *jaina dharma*, or Jaina 'religion'.
- (ii) In a more specific sense it points to the totality of conventions (*vyavahāra*) and law codes (*vyavasthā*) in Jaina monastic and lay traditions.² Sanskrit *vyavasthā* and its Arabic and Urdu equivalent *qānūn* both designate a specific code of law or legal opinion/decision, whereas Sanskrit *dharma* can mean religion, morality, custom and law.
- (iii) The modern Indian legal system is primarily concerned with the 'personal law' of the Jaina laity. In Anglo-Indian case law, the term 'Jaina law' was used both as a designation for 'Jain scriptures' (*śāstra*) on personal law, and for the unwritten 'customary laws' of the Jains, that is the social norms of Jain castes (*jāti*) and clans (*gotra*).
- (iv) In 1955/6 Jaina personal law was submerged under the statutory 'Hindu Code', and is now only indirectly recognised by the legal system in the form of residual Jain 'customs' to be proved in court.

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² All original Prakrit terms have been sanskritized in this text.

The principal sources of Jaina law are the Prakrit Śvetāmbara and Digambara scriptures, known as *āgama* or *siddhānta*, and their extensive commentaries. Early 'Jaina law' was exclusively monastic law, which still evolves through commentary and supplementary rules, unconstrained by state interference. Śvetāmbara monastic jurisprudence combines general ethical principles (*dharma*) - five fundamental qualities (*mūla-guṇa*) and ten or more additional qualities (*uttara-guṇa*) - with specific rules (*kalpa*) of good conduct (*ācāra*), supplemented by lists of common transgressions (*anācāra* or *pratisēvanā*) and corresponding atonements (*prāyaścitta*). Atonements for self-purification should be requested voluntarily by an offender, following confession (*ālocanā*) and repentance (*pratikramaṇa*). Alternatively, penances are imposed as punishments (*daṇḍa*) by the head of the order (*ācārya*), whose judgments should take into account the circumstances and the status of the offender and make allowances for exceptions (*apavāda*). The disciplinary proceedings (*vyavahāra*) are, in theory, determined by superior knowledge (*āgama*), traditional prescriptions (*śruta*), an order (*ājñā*), a rule (*dhāraṇā*) or an accepted practice (*jīta*), the following criterion always coming into force in absence of the preceding one (Vavahāra 10.2 = Viyāhapannatti 383a = Ṭhāṇa 317b).³ In practice, only the last four criteria are relevant.⁴

The rules of tradition (*śruta*) and the procedures of adjudication (*vyavahāra*) and execution (*prasthāvana*) of penances are detailed in the *Chedasūtras* of the Śvetāmbara canon and their commentaries, the *niryuktis*, *cūrṇis*, *bhāṣyas* and *ṭīkās*. The oldest passages of these texts must have been composed not long after Mahāvīra. After the emergence of differently organized monastic orders, *gacchas* or *gaṇas*, in the medieval period, the commonly accepted disciplinary texts of the Śvetāmbara tradition were supplemented by codified customary laws of individual monastic traditions, *sāmācārī* or *maryādā*⁵ (incorporating *ājñā* and *dhāraṇā*), which are still continuously updated by the *ācāryas*. Ācārya Malayagiri (12th C.E.), in his commentary on Vavahāra 10.9, notes that consequently it is possible to follow the *dharma*, while violating the law, or *maryādā*.⁶

³ Schubring, in Schubring & Caillat 1966: 87.

⁴ “[All] proceedings (vavahāra) ... are determined by superior knowledge (āgama), tradition (suya), an order (ājñā), a rule (dhāraṇā) or an accepted practice (jīya), the following criterion always coming into force in default of the preceding one” (Viy. 383a, rendered by Deleu 1970: 152).

⁵ The canonical term *sāmācārī* and the post-canonical term *maryādā* are both currently in use. On the Jaina *maryādā* literature see Flügel 2003.

⁶ Schubring, in Schubring & Caillat 1966: 87.

In contrast to the Śvetāmbaras, Digambaras never developed organized monastic orders, and have only a rudimentary literature on monastic jurisprudence. They regard their own much younger *Carañānuyoga* texts as authoritative for monastic jurisprudence.

Lay supporters of the mendicants, the *upāsakas*, supporters, or *śrāvakas*, listeners, were defined early on as part of the fourfold community (*tīrtha* or *saṅgha*) of monks, *sādhus*, nuns, *sādhvīs*, laymen, *śrāvakas*, and laywomen, *śrāvikās* (Viy 792b), on condition of vowing to observe in part (*deśa-virata*) the main ethical principles to which mendicants must be fully committed (*sarva-virata*). Categorising 'laity' as lower rank ascetics and devising rules based on monastic paradigms was the work of monks (4th to 14th century). Such rules achieve normative force through public vows, and can be individually chosen and self-imposed for specified times. In contrast to monastic law, observance is socially sanctioned *qua* status recognition, not enforced through juridical procedures.

The principal written sources for judging the proper conduct of the laity are the medieval *śrāvakācāras*, treatises containing rules of conduct (*ācāra*) for the laity (*śrāvaka*), and *nītiśāstras*, texts on statecraft, law and ethics. The word *śrāvakācāra* and its synonym *upāsakādhyayana*, lessons for the layman, are used as generic terms only by the Digambaras who claim that the original *Upāsakādhyayana* is lost,⁷ while the Śvetāmbaras preserved the *Uvāsagadasāo* (Sanskrit *Upāsakadaśāḥ* or *Upāsakādhyayana*), the only canonical text exclusively devoted to the concerns of the laity. The Sanskrit term *nīti-śāstra* is used as a designation for both texts on statecraft and political ethics (*rājā-nīti*) and for texts on morality and rules for ethical conduct in everyday life (*sāmānya-nīti*).⁸ Together, the *śrāvakācāras* and the *nītiśāstras* form the Jaina equivalent of the Hindu *dharmasāstras*.⁹ But their focus is more on ethics and ritual than on statecraft and personal law, which are traditionally kept outside the religious law and left to local custom, *deśācāra*, which Jains are advised to observe if there is no conflict with the *dharma*.

Jaina texts on kingship, statecraft and personal law were composed in contexts where individual Jain mendicants exercised personal influence over one or other 'Hindu' king or

⁷ Williams 1963: xi. Chapters VI-VIII of Somadeva's *Yaśastilaka*, for instance, on *samyaktva* and lay ethics are styled *Upāsakādhyayana* (Handiqui 1949/1968: 246).

⁸ Hertel 1922: 5.

⁹ Glasenapp 1925/1999:111f./131f., 325-30/360-65; Williams 1963: xi.

local official. The majority of the texts were created by monks of the Digambara tradition which had a sustained influence on the ruling dynasties in the Deccan between the 8th-12th centuries. The most significant Jaina works on statecraft are the *Ādipurāṇa* of Ācārya Jinasena (ca. 770-850 C.E.) and the *Nītivākyāmṛtam* (ca. 950 C.E.) and the *Yaśastilaka* (959 C.E.)¹⁰ of Ācārya Somadeva Sūri. Both authors were associated with the rulers of the Rāṣṭrakūṭa empire. The *Ādipurāṇa* belongs to the genre of universal history. It tells the life story of the first Jina, the legendary first king and law-giver Ṛṣabha, in the manner of a Jaina *Mahābhārata*, and for the first time offers blueprints for Jain social rituals and Jain kingship through the Jainization of Brāhmanical prototypes. The *Nītivākyāmṛtam*, by contrast, is an entirely secular text on statecraft modelled on the *Ārthasāstra* of Kauṭilya (ca. 3rd century B.C.E. - 1st century C.E.) with barely noticeable emphasis on Jaina morality.¹¹ The most influential medieval Śvetāmbara text concerning the laity is the *Yogaśāstra* and its auto-commentary by Hemacandra (12th C.E.) who was closely linked with King Kumārapāla of the western Cālukya dynasty in Gujarat. The first Śvetāmbara text detailing life-cycle rituals is the *Ācāradinakara* of Vardhamānasūri of the Kharatara Gaccha (1411 C.E.).

While Jaina concepts of kingship and statecraft were never systematically implemented and considered obsolete already under Muslim rule, Jaina ethics is still evolving. Scripted liturgical and life-cycle rituals left their mark both on the ritual culture of the Jainas and on the customs of contemporary 'Jaina castes' which, though purely 'secular' from a purely doctrinal perspective, emerged in the medieval period generally through the conversion of local rulers by Jaina monks. Compilations of 'Jaina law' texts produced by modern Jaina reformers in the 19th and early 20th centuries focused exclusively on the only legal domain which was initially exempted from codified Anglo-Hindu law, that is the rules of Jaina 'personal law' concerning the role of property in contexts of marriage, adoption, succession, inheritance, and partition. At the centre of concern was the division of property, or *dāya-vibhāgam*. Medieval Digambara texts with chapters on 'personal law' are the *Bhadrabāhu Saṃhitā* (ca. 8th-15th century C.E.), the *Vardhamānanīti* of Amitagati (ca. 1011 C.E.), the *Jina Saṃhitā* of Vasunandi Indranandi

¹⁰ See Handiqui 1949: 98ff. on the YC as an “illustrative commentary on some of the topics dealt with in the formal treatises on the *nītisāstra* including Somadeva’s own *Nītivākyāmṛta*.”

¹¹ See Botto’s 1961 comparison of the *Nītivākyāmṛtam* and the *Ārthasāstra*. I am grateful to Maria Schetelich for pointing me to Botto’s work.

(10th century C.E.),¹² and the *Traivarṇikācāra* of Somasena (1610 C.E.).¹³ The pioneering *Bhadrabāhu Saṃhitā* was cited by all later texts, even by treatises of Śvetāmbara authors such as the *Arhannīti* of Hemācārya (12th-14th century C.E.).¹⁴ They usually follow the example of Brāhmaṇical works such as the *Manusmṛti* (ca. 2nd century B.C.E. - 1st century C.E.), which in parts is influenced by earlier Jain teaching as Derrett (1980: 44) for instance on Manu 6.46 has shown. The Jain texts also contain many original conceptions especially on the rights of widows to inherit and to adopt a son, coloured throughout by the Jain value of non-violence.

The lasting impact of the statutes of medieval codified Jaina personal laws on the customs of Jaina castes is evident in numerous reported cases of the 19th and 20th centuries. These cases cannot be dismissed as modern fabrications, despite their somewhat artificial identification of modern customs with ancient *śāstric* prescriptions, which was typical for early 19th century Anglo-Indian law.¹⁵ Already the earliest reported case on 'Jaina law', *Maharaja Govind Nath Ray v. Gulab Chand* (1833 5 S.D.A. [Śadra Dīvān-i 'Adālat] Calcutta Sel. Rep. 276), concludes that "according to *Jaina Sastras*, a sonless widow may adopt a son, just as her husband" (citing an untraceable passage in the *Ācāradinakara*). The leading case is *Bhagawandas Tejmal v. Rajmal Bhagawandas Tejmal v. Rajmal* (1873 10 Bom HC 241), a succession dispute within a Marwari Jaina Agravāl family involving a widow's right of adoption. Adjudicated by C. J. Westropp at the Bombay High Court, the decision was confirmed by the Privy Council in *Sheosingh Rain v. Dakho* (1878 ILR Allahabad 688). The final judgment distinguished between 'Jaina law' and 'custom', but affirmed Westropp's view that the Jains come under Hindu law unless they are able to provide evidence for the prevalence of different customs:

¹² J. L. Jaini 1916: 9 received a manuscript of this text from Paṇḍit Fateh Chand of Delhi.

¹³ Williams 1963: 31 writes that the book provides a picture "of a very hinduized Jaina community in the early seventeenth century. It advocates many practices which in Jugalkiśor Mukhtār's definition are contrary to Jainism. Its scope goes very much beyond the limits of other *Śrāvākācāras* and contains a considerable amount of information on the Jaina law of personal status." The same criticism has been expressed by Mahāprajāna 2000: 7, also of another Digambara text called Dharmarāsikā.

¹⁴ The Sanskrit text published in 1906 in Ahmedabad under the title *Laḡhu-Arhannīti* claims to be an extract of the untraceable Prakrit-text *Bṛhad-Arhannīti-Śāstra* of Hemacandra Sūri (12th century C.E.). See Winternitz 1920: 349, n. 1/1983: 547, n. 1; Glasenapp 1925/1999: 111/132.

¹⁵ Menski 2003: 74.

"But when among Hindus (and Jains are Hindu Dissenters) some custom, different from the normal Hindu law of the country, in which the property is located, and the parties resident, is alleged to exist, the burden of proving the antiquity and invariability of the custom is placed on the party averring its existence" (Bhagawandas Tejmal v. Rajmal 1873 10 Bom HC 260).

Reform oriented 'liberal' Jain lawyers resisted the imposition of Anglo-Hindu law, which from 1858 was extensively codified, and the progressive juridical demotion of the notion of a scripture based uniform 'Jaina law', mirroring *śāstric* 'Hindu law', and its replacement with secular unscripted local 'customs' of caste. They persistently demanded the "right for a personal law based on our scriptures" (Alaspurkara 1945: 1). For the purpose of unifying 'the Jaina community' to strengthen its political influence, the fiction of a long forgotten originally unified 'Jaina law' was upheld:

"The Jainas, if they are not now, have been a united body of men and women, at least in the Past. They had a law of their own. It is not altogether lost. It is buried in the mass of our literature and traditions; but it is there all right" (J. L. Jaini 1916: vii-viii).

"All the Jainas are governed by one law. The law books to which they owe and profess allegiance are the same. The spiritual precepts which form the backbone of their moral and mundane conduct spring from the same theological and metaphysical beliefs and considerations" (J. L. Jaini 1916: 94);

"It is well to recognise that the Jainas are not a bagful of castes and sects with diversified cultures, conceptions and creeds. There is one doctrine, one religion, one culture, one community of the Jainas, and also one Law" (C. R. Jain 1941: 19f.).

Because no textual evidence was accessible to the courts during the period of codification of Hindu law, Jaina law was treated merely as a 'deviation' from standard 'Hindu law'. 'Jainism/Jinism' was not even recognised as an independent 'religion' until 1879 when Hermann Jacobi in the introduction of his edition of the *Kalpasūtra of Bhadrabāhu* furnished for the first time textual proof that the ancient Buddhist scriptures already depicted the *nirgranthas* as a separate 'heretical' (*tīrthyā*) group. Officially, the category

'Jain' was used for the first time in the Census of India of 1881.



Rai Bahadur Jagmander Lal Jaini, Law Member and President,
Legislative Council, Indore (Source: *Jaina Gazette* 1927)

The problem that relevant scriptural evidence for Jain social customs was not readily available in print before the second decade of the 20th century, and only accessible for the courts through 'expert' witnesses, was partly due to the opposition of 'orthodox' Jains who in view of the "large number of differences in our social customs" were against the creation of a uniform Jaina Law and of "a central guiding and directing body working all

over the country" (Latthe¹⁶ 1906: 31f.);¹⁷ particularly in view of the fact that in *Harnabh Pershad v. Mandil Das* 27 C. 379 (1899) "the homogeneity of the Jainas was recognised by holding that Jaina customs of one place were relevant as evidence of the existence of the same custom amongst Jainas of other places" (J. L. Jaini 1916: 22).¹⁸ In 1904, members of the Young Jain Men's Association (later All-India Jain Association) and the Digambara All-India Jaina Mahāsabhā reiterated earlier suggestions to collect "materials from Jain Shastras for compiling a Jain Law like the Hindu Law" (M. S. Jaini 1904: i), i.e. as a "code of Jain customs" (J. L. Jaini 1905: 144). Already in 1886, Paṇḍit Padmarāja published *A Treatise on Jain Law and Usages*. But it contained merely selections from medieval Digambara codifications of local customs which reflected southern Indian practices, for instance of cross-cousin marriage. Only in 1910 a Jaina Law Committee was formed by the Mahāsabhā to formulate a common legal code and to claim rights and privileges for 'the Jain community as a whole' in the new Legislative Assembly.¹⁹ Barrister Jagminder Lal Jaini's (1881-1927) landmark translation of the *Bhadrabāhu Saṃhitā* was published in 1916. After the Montague Declaration in 1917, the Jain Political Association was set up by the same circle of predominately Digambara Jain intellectuals to create a unitary political representation for the Jains.²⁰ Following the

¹⁶ Āṇṇāsāheb Bahādur Laṭṭhe (1878-1950), a lawyer, was the Dīvān of Chhatrapati Shahu (1874-1922), Mahārāja of Kolhapur. He was a major leader of the Non-Brahman Movement, and founder of the Dakṣiṇ Bhārat Jain Sabhā.

¹⁷ "Our common religion is the basis of our common aspirations and what little work is possible in the direction of evolving common social life over and above this basis, is being done by our Mahasabha, our J.Y.M. Association and your esteemed Gazette. Reforms which are completely involved with family life must, I think, be left to individual evolution, for a long time to come" (Latthe 1906: 32).

¹⁸ At the time, presumptions of homogeneity were also imposed by the lay leaders of the new sectarian Jain Conferences. The newly invented self-designation 'Sthānakavāsī', for instance, was originally intended to incorporate also the Loṅkāgaccha traditions and the Terāpanth: "It is no doubt very gratifying that Loka-Gachha, Tera Panthi, Sadhumargi, Daya-Dharmi – all these have realised that they are one and the same as Swetamber Sthanakvasi Jainas (and this is really so) and they heartily participate in this great movement. The most prominent men of the Loka Gachh of Bengal also exhibit their readiness and willingness to lend every support to this pious cause" (Swetambara Sthanakvasi Jain Conference 1905: Appendix 1). See Flügel 2005.

¹⁹ "A large No. of responsible persons solved the problem, wherein various manuscripts, old and new, and other pontiffs of the religion were consulted" (Jain Mitra Mandal 1927: 47).

²⁰ According to J. L. Jaini, the various initiatives were manifestations of a 'Jaina enlightenment': "It is as if yesterday that after the red day of the Mutiny, India slept like a psychologised baby under the spell of British domination and the Jainas like other sections of the Indian nation had no consciousness of their

publication of Hari Singh Gour's (1869-1949) *The Hindu Code* in 1919, the Jaina Mītra Maṇḍal in Delhi, also a Digambara organization, created the Jain Law Society under the leadership of the Barristers Jagminder Lal Jaini (1881-1927) and Champat Ray Jain (1867-1942) to refute the "misrepresentations" of Jainism in this text,²¹ whose second edition was amended accordingly. In due course the society intended, after due search of the *sāstric* literature, to give a definite shape to Jaina Law. The result of this collective effort was C. R. Jain's (1926) compilation *Jaina law* with (reprints of) text translations of treatises on personal law by both Digambara and Śvetāmbara authors, which almost certainly influenced the outcome of the landmark judgment *Gateppa v. Eramma* (1927 AIR Madras 228) which concluded that Jains are not 'Hindu dissenters' but followers of an independent religion. The Census is still the only government institution which recognises Jains as an independent group.

The legal status of the Jaina laity continued to be disputed until Indian Independence. However, the Privy Council decision on *Bhagawandas Tejmal v. Rajmal* effectively sealed the legal position of the Jainas in India today. Its decision that the Jainas come under codified 'Hindu law' dominated the case law until 1955/6 when 'Jaina law' was officially subsumed under the new statutory 'Hindu Code' (which grants the same rights to widows as the Jaina texts centuries ago) with the dispensation that Hindu law is to be applied to Jainas in the absence of proof of special customs.²² Article 25 (2) b Explanation II of the *Constitution of India* recognises Jains, Sikhs and Buddhists as separate religious groups, but subsumes them into 'Hindu' law, as do Sections 2 of the *Hindu Marriage Act* of 1955 and the *Hindu Succession Act* of 1956, as well as the *Hindu Minority and Guardianship Act* and the *Hindu Adoptions and Maintenance Act* of 1956.

rights, position, past or prospects. But it is pleasant to notice and emphasize that with every awakening or half awakening of India, the Jainas kept admirable pace. The nation had its Congress and Social and Educational Conferences, the Jainas at once had their All-India Digambara Jaina Mahasabha, Svetambar and Sthanakvasi Conferences, Boarding Houses, Schools, newspapers, memorials, etc., etc., the whole paraphernalia of modern so-called enlightenment and progress." (J. L. Jaini 1921: 2f.).

²¹ See J. L. Jaini's 1921 pamphlet, which states: "Further the assumption that Hindu Law applies to Jainas is absolutely illegal, as it is against statute law. (See 21 George III C. 70 S. 17; Sir William Jones on 19th March 1788 in *Digest of Hindu Law* by Colebrooke, in preface pp. v-vi.; 37 George III C. 142; Sir M. E. Smith in 4 Calcutta (Indian Law Reports) at p. 751; 29 Allahabad (I.L.R.) 495.)" (J. L. Jaini 1921: 8). "Dr Gour has erred in not distinguishing between caste and religion" (ib.).

²² See the publication of the Jain Seva Mandal Nagpur 1945 for Jain discussions and objections to the *Draft Hindu Code*.



Assembly of the *All India Jain Conference* 14 March 1925, Śravaṇabelāgōḷa (Source: *Jaina Gazette* 1925)

Despite their different religious beliefs and practices, for all practical purposes 'Jainas' are treated as 'Hindus' by the Indian state. Jainas were not even granted religious 'minority' status after the introduction of the National Commission of Minorities Act of 1992, except on the basis of differential state legislation. The controversial judgement of *Bal Patil v Union of India* (AIR 2005 SC 3172) states:

"'Hinduism' can be called a general religion and common faith of India whereas 'Jainism' is a special religion formed on the basis of quintessence of Hindu religion."

The process in modern Indian legal history of narrowing the semantic range of the modern term 'Jaina law' from 'Jain scriptures' down to 'Jain personal law' and finally 'Jain custom' may thus culminate not only in the official obliteration of Jaina legal culture, which continues to thrive outside the formal legal system²³ in monastic law, ethics and custom, but also of Jaina 'religion'.

²³ Cf. Menski 2006.

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