

Constitutionalism, state restructuring and identity politics in Nepal

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Mara Malagodi explains how the Nepali constitutional experience illuminates the intimate relationship between law and politics in processes of constitutional change.

Over a year has passed since Nepal's four-year-old Constituent Assembly (CA) was dissolved on 27 May 2012, leaving the country to this day with neither a legislature nor a constitution-drafting body in place. General elections are now scheduled for 19 November 2013; it remains to be seen however whether the polls for a new Parliament/CA will indeed take place as they have already been postponed twice, in November 2012 and June 2013.



Nepal's CA was elected in April 2008 as part of the Comprehensive Peace Agreement of 21 November 2006 between the Nepal Government and the Communist Party of Nepal (Maoist), after a 10-year-long armed insurgency launched by the Maoists in February 1996—only six years after the re-democratisation of 1990. The peace process essentially entailed two steps: the integration of Maoist combatants into the Nepal Army, which was completed by April 2012, and the drafting of a new Constitution – Nepal's seventh – by a directly elected body deputed to secure the inclusion of the country's many marginalised groups by institutional means. Radical constitutional change became the primary intended vehicle for state-restructuring and the peace process' mantra of '*nayā Nepāl banāune*' (building new Nepal).

In 1996, the Maoists submitted a list of 40 demands to the central government, including demands for ending Nepal's 'feudal' monarchical political system and reforming the economy, declaring Nepal a secular state, granting equal rights to women, ethno-linguistic minorities and Dalits, and 'promulgating a new Constitution drafted by the People's elected representatives'. The Maoists' grievances focused on a multidimensional understanding of marginalisation, encompassing both questions of class and identity; moreover, the notion of 'identity politics' was not conflated with 'ethnicity' but included other dimensions such as gender, caste, religion, and region in light of the country's profound socio-cultural diversity with over a hundred caste, ethnic and linguistic groups. In short, Nepal's People's War was not an 'ethnic conflict', but it certainly featured an 'ethnic dimension'. Identity politics and demands for recognition, however, are not new in the country and their articulation in the public sphere dates back to at least 1951. In fact, many groups have been historically well organised outside the Maoist Party, such as the Nepal

Federation of Indigenous Nationalities (NEFIN) and Madhesi Parties.

State-restructuring debates and identity politics played a key role in the CA dissolution. In fact, the 34 parties represented in the Assembly at the time of its dissolution could not find an agreement on the way to institutionalise their alleged commitment to inclusive democracy and remained divided over essential features of the new Constitution, such as federal restructuring, form of government, and affirmative action measures. For instance, Nepal committed itself to federalism through the First Amendment of the Interim Constitution in April 2007 to pacify the turmoil in the Terai and peacefully bring to an end the Madhesi Andolan. However, Nepal is only nominally federal and remains *de facto* a unitary state. All the political parties have now – more or less reluctantly – subscribed to federal devolution, but what remains embattled is whether such restructuring should employ ethnicity as its basis.

Nepal's current constitutional predicament, however, goes further. Regrettably, the demise of the CA took place before the completion of Nepal's new Constitution, leaving the country to be ruled under the 2007 Interim Constitution, with no legislature and drafting body in place, and with even more ruthless inter- and intra-party strife, shrewd political manoeuvring, and strategic bartering. Notwithstanding the fact that, constitutionally speaking, Nepal features – and always has since 1951 – a parliamentary form of government, it has been ruled for long stretches of time with no legislature in place (1951-1959; 1990-1991; 2002-2006; 2012 onwards); even if the three decades of Panchayat regime (1960-1990) are purportedly left aside, this is a deeply problematic recurrence in a parliamentary system.

The directly representative element of democracy has been consistently thwarted as also illustrated by the fact that the last local elections took place in 1997. As a result, executive posts are occupied by political appointees with no direct accountability to the electorate at both levels of governance, central and local. Additionally, the current Cabinet is headed by the Supreme Court's Chief Justice, only on temporary leave from his judicial post, whom the Nepali media refer to as the 'Chairman of the Interim Election Committee', carefully avoiding the expression 'Prime Minister'. While the choice of the long-winded periphrasis is seemingly deployed to obscure the rather blatant violation of the constitutional doctrine of the separation of powers, it also points towards the transient nature of the arrangement as a component of a delicate phase of interim transitional politics. In this context, Nepali political parties, especially the biggest four, represent the main vehicle—and main obstacle—to resolve Nepal's constitutional impasse.

Many in Nepal are disappointed with the lack of progress in terms of state-restructuring since the beginning of the peace-process, to the point that commentators have hinted to a ‘counter-revolution by stealth’ and ‘Nepal being at a permanent crossroad’. However, institutionally speaking, two important changes have occurred: first, the Interim Constitution has toned down the ethno-cultural definition of the Nepali nation, otherwise present in the 1990 Constitution, opening up the constitutional symbolic space to inclusion of the multiple overlapping identities present in Nepal; second, a modicum of recognition has been enshrined in Nepal’s legal system both in relation to parliamentary representation with the adoption of a mixed electoral system for the CA elections, where part of the CA seats were allocated on the basis of proportional representation (13 per cent Dalits, 37.8 per cent marginalised groups, 4 per cent backward regions, 31.2 per cent Madhesi, and 30.2 per cent Other Groups) and the amendments made between 2007 and 2009 to a number of Acts regulating public sector employment (civil service, police, army, government-owned corporations) that introduced reservations for the same categories of Nepalis, bearing striking similarities with the Indian approach to positive discrimination with its focus on state institutions.

The Nepali constitutional experience thus illuminates the intimate relationship between law and politics in processes of constitutional change. In particular, the recent reconfiguration of law primarily as ‘right’ places tremendous expectations on the emancipatory potential of law in redressing historical injustices and securing political change by legal means.

However, especially when law is called upon to support identity-based claims, deep-seated conflict over institutional choices is symptomatic of diametrically opposed and competing visions of the polity, its organisation, and identity. Such conditions make it problematic for political actors to agree on the drafting of a single constitutional text, especially one that is at once expected to resolve longstanding conflicts, embody a variety of competing perspectives, and function as a permanent political settlement expressed in legal terms. Thus, in a moment of constitutional politics where every aspect of the new constitutional settlement seems to be up for grabs and open to negotiation, it will be crucial that political actors exercise a degree of restraint and flexibility, and also to maintain realistic expectations about what a constitution can and cannot be reasonably expected to do.

About the Author

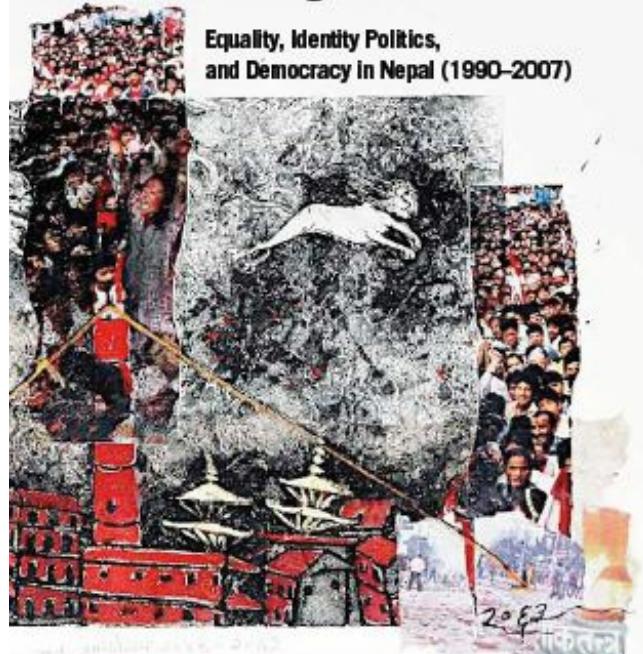
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Constitutional Nationalism and Legal Exclusion

Equality, Identity Politics, and Democracy in Nepal (1990–2007)



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