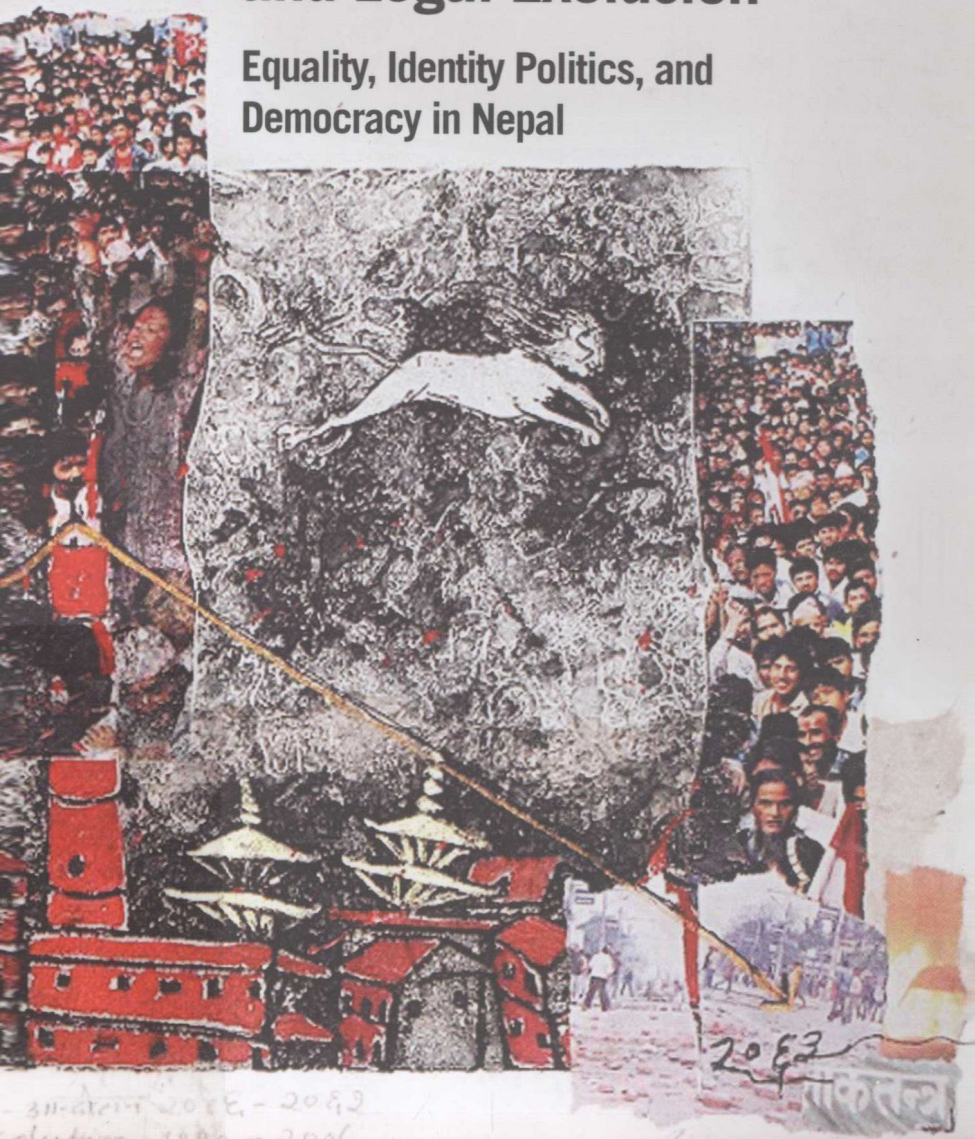


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Constitutional Nationalism and Legal Exclusion

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Democracy in Nepal

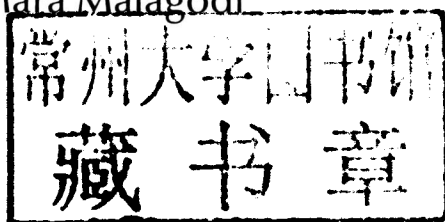


Mara Malagodi

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

Mara Malagodi



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Constitutional Nationalism and Legal Exclusion

*To my mentor and guru,
Professor Michael J. Hutt*

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Preface

Since its inception, Nepal's constitutional history has been inextricably intertwined with the country's tortuous process of democratization and the endeavour to engineer, by institutional means, a more equitable and inclusive polity. This objective has been nurtured, pursued, and fiercely fought for by many Nepali political actors since the formation of the anti-Rana movement during the early decades of the twentieth century. Thus, Nepal's constitutional documents, together with their history, interpretation, and implementation, represent an ideal prism through which to investigate questions of continuity and change in patterns of state formation, nation-building, democratization, political accommodation, and mobilization along identitarian lines in the country.

This book explores a specific segment of Nepal's constitutional trajectory—the 1990 constitutional experience. The analysis focuses on a momentous stage in the development of a particular aspect of Nepali constitutional praxis: the institutional management of socio-cultural diversity by the Nepali State in the context of post-Cold War re-democratization and the outcome of such strategy. The 'unity in diversity' approach adopted by Nepali State actors led to growing discontent among many social groups since 1990 and fierce opposition to the 1990 Constitution itself. This volume sheds light on the legacy of this institutional strategy and its relation to the enduring socio-political conflict that has been affecting Nepal even after the abrogation of the 1990 document in January 2007. In this regard, my investigation reveals the path-dependent importance of sedimented institutional structures and their resilience to change.

It also 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 organization, and identity.

Nepal’s difficulties in bringing about radical constitutional change since the beginning of the peace process in April 2006—during the drafting of the 2007 Interim Constitution, currently in force and throughout the life of the Constituent Assembly (CA) elected in April 2008—ought to be read as a continuation of long-standing debates in the country over the meaning of a pan-Nepali identity encompassing ethno-linguistic, religious, regional, and gender divides, and its institutional articulation. In fact, constitutional change—the primary intended vehicle for State-restructuring and ‘*nayā Nepāl banāune*’ (building new Nepal)—and the integration of the Maoist forces with the Nepal Army represented the two key goals of the peace process. However, while agreement was eventually reached on the issue of Army integration by April 2012, Nepal’s endeavours in constitution-making encountered a major impasse with the dissolution of the four-year-old CA by Prime Minister Baburam Bhattarai on 27 May 2012. The thirty-four parties represented in the CA at the time of its dissolution could not—in four years—find an agreement on the way to institutionalize their 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.

Notwithstanding the fact that by January 2010 the CA Constitutional Committee and the thematic committees had submitted their reports (which did not, however, settle the most contentious issues), by amending the 2007 Interim Constitution the CA extended its own term four times due to the lack of political consensus over fundamental features of the new document in May 2010, May 2011, August 2011, and November 2011. The Supreme Court adjudicated on the constitutional validity of such extensions in four

instances—May 2011, August 2011, November 2011, and May 2012. In the landmark judgment of 26 November 2011, the apex court stated that if the CA failed to promulgate the new Constitution by the extended deadline of May 2012, the CA would automatically expire. As a result, on 22 May 2012, when the Bhattarai Government tabled a bill supported by the four main political parties to further amend the Interim Constitution for securing another three-month extension of the CA, the Supreme Court responded on 24 May by issuing a stay order on the Bill, effectively disallowing any further CA extension. In an unforeseen turn of events, Bhattarai dissolved the Assembly on 27 May and called for fresh elections.

Regrettably, the end of the Constituent Assembly took place before the completion and promulgation of Nepal's seventh Constitution, leaving the country to be ruled under the 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. It is to be hoped that Nepali politicians will rise above the daily labours of party politics and remove through deliberation the obstacles to finalizing the new Constitution, as the success and durability of any constitutional settlement lies as much in sound institutional design as in constructive political negotiation.

MARA MALAGODI

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