

BOOK REVIEW

CONSTITUTIONAL NATIONALISM AND LEGAL EXCLUSION — EQUALITY, IDENTITY POLITICS AND DEMOCRACY IN NEPAL (1990-2007)

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BOOK: *Constitutional Nationalism and Legal Exclusion - Equality, Identity Politics and Democracy in Nepal (1990-2007)* **AUTHOR:** Mara Malagodi **YEAR:** 2013 **FORMAT:** Hardcover **EDITION:** First **PUBLISHER:** Oxford University Press **PRICE:** Rs. 895

Nepal, perhaps more than any other state in South Asia, has been witness to dramatic political change over the last decade. It moved almost overnight from a semi authoritarian monarchy to a multiparty democratic republic; from the world's only Hindu state to a secular one; from a centralized unitary state to a federal one; from an ethno-majoritarian state to one that addressed diversity through political redesign and affirmative action; and from a conservative Hindu polity to the first State in South Asia that prohibits discrimination on sexual orientation and permits gay marriage. Unlike its South Asian neighbours who largely continued with colonial institutions of the police, judiciary and the army, Nepal has sought to completely transform the institutions inherited from the Shah monarchy.

These transformations make Nepal a particularly exciting site for scholars of law and politics in South Asia, but being one of the only South Asian legal system that does not function in English, its developments have remained opaque to comparative lawyers. Mara Malagodi's detailed study of the drafting and working of the 1990 Nepali constitution, drawing on interviews, ethnography and a close reading of Nepali sources, offers important insights to these legal changes and attempts to explain the antecedents of Nepal's contemporary constitutional revolution.

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The 1990 Nepali constitution, like the contemporary constitution making process, was the culmination of a popular movement that sought to replace monarchic autocracy with a constitutional monarchy and parliamentary democracy. Why did the 1990 constitution fail to resolve the political and social crisis in Nepal? Malagodi takes constitutional texts and structures seriously, arguing that constitutions matter. This challenges conventional analysis which sees constitutions (and legislation) as superstructures, responding to changes in the domain of politics or the economy, but instead suggests that constitutions put limits to politics. She draws upon 'historical institutionalism', which relies on history as an analytical tool, focuses on the ways in which institutions structure and shape political behaviour and outcomes. Emphasizing that constitution texts create a certain path dependence, she argues that once the initial choice (of a clause or particular language) is made, there is a certain lock-in and the relevant actors adjust their strategies to respond to this.

Malagodi's hypothesis is that the movement for democracy in 1990 was also an assertion of equality by Nepal's diverse groups divided by caste, religion, ethnicity, language and gender. While the 1990 constitution formally recognized the right to equality, it also institutionalized an ethnocultural vision of the nation that reinforced various forms of social exclusion. The 1990 constitution reemphasized the privileged position of the Shah Monarchy, Hindu religion and Nepali language. Malagodi's rich textured narrative of the deliberations of the Constitution Recommendation Commission ("CRC") highlights the choices made to inscribe an ethnonationalist vision in the constitution; the rejection of affirmative action demands by tribals, the retention of the old royalist national anthem; the emphasis on the king as a symbol of 'Nepali nationalism and unity of Nepalese people'¹; limiting the rights of non-Hindu religions to propagate or preach their religion²; and the institution of Nepali (a language spoken by 48% of the population) as the language of the nation³. She argues that institutionalizing a certain form identity at the constitutional level produced reinforced exclusionary practices and marginalized many of Nepal's peoples. Through a detailed survey of Nepal's political history beginning with the establishment of the Gorkhali state in the 18th century, Malagodi investigates the genealogy of these features of the 1990 constitution. Malagodi argues that this entrenchment created a greater sense of alienation among Nepal's many communities and made it impossible for their demands to be accommodated within the constitutional setup. As recent accounts have shown, the success of the Maoist rebellion in Nepal was in part due to

¹ Art. 27(2), Constitution of Nepal, 1990.

² Art. 19, Constitution of Nepal, 1990.

³ Art. 6, Constitution of Nepal, 1990.

its ability to draw support from disaffected social groups like women, *dalits*, Madhesis (Hindi speaking residents of the terai region) and tribes.⁴

Indian constitutional lawyers will be interested in the influence Indian constitutionalism has over developments in Nepal. From Malagodi's account, it is clear that India is the source for both aspirational and aversive constitutionalism, i.e. Nepal's constitution makers consciously borrowed and rejected certain principles because of their experience in India.⁵ The violent reaction to the implementation of the Mandal Commission recommendations in India were offered by the CRC members as grounds for rejecting demands by tribals and *dalits* for Indian style affirmative action guarantees. It also highlights how intentions and logic of constitutional provisions get transformed through the process of borrowing. For instance, members of the CRC committee argued that the retention of Nepali as the official language mirrored the use of English as an official language in India, especially because the other languages were given "national status" in the constitution. However, the adoption of exclusively Nepali as the official language resembled the proposal to have Hindi as the sole official language in India, because it was the language of a dominant majority.

Malagodi examines how these entrenched exclusions operated in practice through two decades of constitutional litigation around these questions before the Supreme Court of Nepal. Consciously drawing on the Indian experience, the 1990 constitution not only provided for the Supreme Court's power of judicial review but also adopted the idea of the 'basic structure'.⁶ The 1990 constitution identified the Preamble as enshrining constitutional principles that were not subject to amendment, which included multi-party democracy and a constitutional monarchy. The constitution also included a wide set of constitutional remedies, and clearly influenced by the PIL experience in South Asia, provided explicitly that the Supreme Court had writ jurisdiction "for the enforcement of any other legal right for which there is no remedy, or for which the remedy is found inadequate or ineffective...and for the settlement of any constitutional questions raised in public interest".⁷ Malagodi's narrative on the Nepali Supreme Court shows how it sought to bolster its own authority and legitimacy when faced with a restive public and an increasingly authoritarian executive. Though Malagodi concludes that the judiciary was weakened when faced with a belligerent executive, her own account demonstrates moments where the judiciary was able to make its mark.⁸ Recent scholarship

⁴ For an account, see PRASHANT JHA, *BATTLES OF THE NEW REPUBLIC: A CONTEMPORARY HISTORY OF NEPAL* (2014).

⁵ Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models*, 1(2) INT'L J. CONST. L. 296-324 (2003).

⁶ Richard Stith, *Unconstitutional Constitutional Amendments: The Extraordinary Power of Nepal's Supreme Court*, 11 AM. U. J. INT'L L. & POL'Y 47 (1996).

⁷ Art. 88(2), Constitution of Nepal, 1990.

⁸ CONSTITUTIONS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Alberto Simpser eds., 2013).

on the judiciary in authoritarian states has argued that judges are strategic actors who seek to maximize their authority by picking their battles with the executive. The Nepali Supreme Court (uniquely in South Asia) held that fundamental rights and writ remedies could not be suspended during an emergency. They shocked King Gyanendra out of his complacency by declaring the Anti-Corruption Commission (which was being used to target political opponents) as unconstitutional and violative of the basic structure. The latter decision came at a time when the Supreme Court was being criticized domestically and internationally for being supportive of the royalist takeover.

Malagodi's survey of case law on the "entrenched exclusion" clauses makes visible a constitutional landscape that would be familiar to lawyers across South Asia. Cases include challenges to bans on temple entry for dalits, the prosecution of Christian missionaries for propagating their religions, challenges by women's groups against discriminatory personal and citizenship laws and challenges by minority language groups against education policies. Malagodi argues that while the constitution makers had claimed that many of these "ethnonationalist" provisions had merely symbolic value, the judiciary interpreted them to bring about exclusionary outcomes. Constitutional texts have lives beyond the intention of their framers.

While Malagodi argues that a majority of the cases entrench ethnonationalist exclusions, a closer reading offers a more variegated picture. In some cases, like the decision of the Supreme Court to prosecute Christian missionaries and to restrict the constitutional protection of religion only to religions that had been hand down since ancient times such as Hinduism, the ethnonationalism is apparent. However, in cases where the Supreme Court made interventions for gender equality by demanding the recognition of marital rape or a reform of Hindu law, it is more complicated. Malagodi notes that in both these cases, the judiciary sought to refer to the more progressive norms of ancient Hindu society to justify its decisions. However, judges have a limited set of resources to draw upon that also enjoy popular legitimacy. The interpretive move of securing gender equality by appealing to a different reading of religious texts has been a common practice by courts in South and South East Asia.⁹

Malagodi describes her project as a constitutional ethnography of the 1990 constitution, i.e. a study of the central legal elements of politics that are capable of recovering the *lived* details of the politico-legal landscape.¹⁰ Yet, the glimpse that Malagodi offers of the Nepali constitutional landscape is partial and leaves the reader curious to know more. Malagodi has interviewed leading

⁹ Rohit De, *Mumtaz Bibi's Broken Heart: The Many Lives of the Dissolution of Muslim Marriages Act*, 46(1) IND. ECON. & SOC. HIST. REV. 105-130 (2009).

¹⁰ Kim Lane Scheppele, *Constitutional Ethnography: an Introduction*, 38(3) L. & SOC. REV. 389-406 (2004).

politicians and members of the CRC making the creation of the constitutional text the most legible. However, as Upendra Baxi has argued constitutional texts work in tandem with constitutional practice (the interpretation of the constitution by the courts) and constitutional insurgencies (citizen readings of the constitution).¹¹ After the richness of the earlier section, Malagodi's analysis of the Supreme Court remains conventional relying largely on case law and newspaper coverage, leaving the readers curious about the habitus of the judges and lawyers. Moreover, we know little about reception or how the average citizen (including those who brought the cases before the court) perceived the constitution. Malagodi emphasizes that constitutional texts set the limits to what is possible, but given how malleable constitutional texts have been in the hands of judges in India, Pakistan and Bangladesh, the fidelity of the Nepali Supreme Court continues to raise questions.

Secondly, Malagodi emphasizes social exclusion at the cost of looking at economic and structural inequalities in Nepal. The Maoist insurgency was strengthened by the alienation of various minorities, but at its core were economic questions of land redistribution and ownership. Similarly, the question of caste gets subsumed under religious exclusion. However, the assertion by lower castes groups in Nepal has been dramatic and in the face of entrenched discrimination, resulting in interesting legal innovations that would enrich comparative law.¹²

As the whole, through her deep engagement with Nepali history and Nepali language sources, Malagodi has done an invaluable service in bringing Nepal into the conversation of comparative constitutional law. As the developments of the last two years suggest, it will be a rich field for scholars of constitutional theory and practice.¹³

¹¹ Upendra Baxi, *Constitutionalism as a Site of State Formative Practices*, 21 CARDOZO L. REV. 1183 (1999).

¹² See S. Shneiderman & T. Middleton, *Reservations, Federalism and the Politics of Recognition in Nepal*, 43(19) ECON. & POL. WKLY. 39-45 (2008).

¹³ There is a small but growing body of literature on the subject. See Menaka Guruswamy, *Integration of the Army and New Constitutionalism in Nepal*, 45(9) ECON. & POL. WKLY. 28-31 (2010).