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Ter Ellingson  
*University of Washington*

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# THE NEPAL CONSTITUTION OF 1990: PRELIMINARY CONSIDERATIONS

Ter Ellingson  
University of Washington

The Nepal constitution of 23 Kartik, 2047 V.S. (November 9, 1990 A.D.) is a bold attempt to institutionalize the goals of the popular movement of the Spring of 1990. In a dramatic reversal of previous formulations, it places sovereignty in the people and makes the king the symbol of the nation, thus legally transforming the state from an absolute to a constitutional monarchy. It reinstates the system of multiparty democracy absent since the brief democratic experiment of the 1950s, and presents guarantees of new basic rights. The subsequent completion of elections and formation of a new Government according to its provisions, even with the problems and conflicts common to such fundamental political restructurings, have provided decisive steps towards transforming it from a theoretical document to a living reality.

The 1990 constitution will affect first of all the lives of the people of Nepal, but also will have its effects on the work of scholars who do research in Nepal, whether or not their fields of study center on contemporary politics. As an institutional, and in some sense revolutionary, manifestation of the worldwide pro-democracy movements of the early 1990s, the Nepal constitution should also be of interest to scholars of other areas and general theorists interested in political change and democratic movements. Its full significance and effects will not be known for some time to come; but even at an early stage of its implementation and interpretation, it raises issues that deserve preliminary consideration.

## Structure and Models

The new Nepal constitution is a complex document which includes a preamble, 133 articles grouped into 23 parts, and 3 appended schedules:

Preamble	Part 13: Auditor-General
Part 1: Preliminary	Part 14: Public Service Commission
Part 2: Citizenship	Part 15: Election Commission
Part 3: Fundamental Rights	Part 16: Attorney-General
Part 4: Directive Principles and Policies of the State	Part 17: Political Organisations
Part 5: His Majesty	Part 18: Emergency Power
Part 6: Raj Parishad	Part 19: Amendment of the Constitution
Part 7: Executive	Part 20: Miscellaneous
Part 8: Legislature	Part 21: Transitional Provisions
Part 9: Legislative Procedure	Part 22: Definitions and Interpretation
Part 10: Financial Procedure	Part 23: Short Title and Commencement
Part 11: Judiciary	Schedule 1: National Flag
Part 12: Commission for the Investigation of Abuse of Authority	Schedule 2: National Anthem
	Schedule 3: Coat-Of-Arms

The first four parts deal with primary issues and definitions of the state, sovereignty, citizenship, rights and policies. Parts 5 and 6 are concerned with the King and the council on royal affairs, known as the Raj Parishad. Parts 8-11 cover the 3 main branches of government: executive, legislative and judiciary; and parts 12-16 have to do with major investigative and administrative commissions and offices. The remaining sections, parts 17-23, relate to various issues and institutions not covered in the other parts, ranging from one-time issues concerning the transition between old and new constitutions, to technical definitions; of special note here are the provisions regarding political parties (Part 17), a crucial issue in the 1990 demonstrations that gave rise to the new constitution, and the emergency powers provisions of Part 18, providing for temporary suspensions of political rights in times of crisis.

While the organization of the constitution generally seems straightforward, the seven-article Part 1, labeled "Preliminary", at first glance might seem a random collection of subjects ranging from the vital and profound to the near-trivial:

Part 1: Preliminary

1. Constitution as the Fundamental Law
2. The Nation [=people irrespective of religion, race, caste or tribe]
3. The Sovereignty [vested in the Nepalese people]
4. The Kingdom [multiethnic, multilingual, democratic, independent, indivisible and sovereign Hindu Constitutional Monarchical Kingdom; territory of Nepal]
5. National Flag
6. Language of the Nation [Nepali = "language of the nation" and official language; all languages spoken as mother tongue in Nepal are "national languages"]
7. National Anthem etc. [national flower, national color, national animal, national bird, coat of arms, including its enlargement or reduction and color].

Some of the subjects covered here are so vitally important that blood has been shed and lives sacrificed on their behalf, both during the 1990 democracy uprising and in earlier times. And yet, none of these subjects are trivial: after all, blood has been shed and governments challenged on behalf of the national animal, the cow, as well.<sup>1</sup> While Americans may have adopted the bald eagle as their national symbol after the completion of their first constitution and waited nearly two centuries to give it protection from killing,<sup>2</sup> the many centuries of symbolic importance and protection of the cow before the adoption of any written constitution in Nepal shows both the precedence and the significance of factors that some societies might regard as "only" symbolic. Indeed, the range of discourse in these preliminary sections is of the nature not only of a voicing of universal democratic principles, but also of a dialog on the symbols which give shape, significance and legitimacy to nearly every important feature, including political institutions and processes, in a Hindu-Buddhist society (cf. Errington 1989). Their placement in a leading section of the constitution, rather than being tacked on at the end, speaks to the ongoing vitality of such symbols in a culturally unique context, as well as to a certain continuity with the cultural past.<sup>3</sup>

With its 133 articles, the Nepal constitution is considerably longer and more complex than the U.S. constitution (1789/1979), with its 7 articles and 26 amendments, and much shorter and simpler in structure than the Indian constitution (1950/1983) with its 395 articles, 10 schedules, and 3 appendices. It closely approximates the constitution of the People's Republic of China (1982/1987) in number of articles (the Chinese constitution has 138); but, owing to greater length and complexity of the articles, the Nepal constitution is perhaps two to three times longer than the Chinese. In overall comparison, the Nepal constitution falls fairly high on the scale of length and complexity, but below some others such as the Sri Lanka constitution (1978), to say nothing of the Indian constitution, which forms a widely-recognized class in itself.

Following a general rule to which the 1990 Nepal constitution is no exception, length and complexity increase with the amount of detail of administrative law and procedures superimposed on the more widespread and basic prescriptions of principles and governing structures shared by all constitutions. Thus, for example, not only do over half of the 24 articles of the section of the Nepal constitution which deal with the legislature (Part 8, Articles 44-67) concern matters of procedure, but also the entire section is followed by two more sections with an additional 16 articles (Parts 9-10, Articles 68-83) devoted entirely to procedural matters. While shorter constitutions leave administrative and procedural details to be worked out by means such as enacted laws, legal challenges and test cases, custom and consensus, longer constitutions with explicit prescriptions of such details embed them in the basic law of the land. It can be expected that in such cases, procedures are more difficult to adjust and adapt to changing circumstances, as a constitutional amendment would theoretically be required

in every case. On the other hand, constitutional encoding of such details can provide safeguards against easy abuses and arbitrary changes in procedure at the administrative level. Whether this additional protection is worth the trade-off in procedural rigidity and resistance to change remains to be seen.

In its length, complexity and detail of attention to administrative and procedural matters, the Nepal constitution seems to bear a family resemblance to the constitutions of neighboring South Asian countries influenced by the long and complex Indian constitution. For example, both the content and phrasing of the list of "fundamental rights" given in Part 3, together with the limitations placed on those rights, show considerable resemblances to the corresponding Part 3 of the Indian constitution. Some of the formulations regarding caste, including provisions for protection and affirmative action on behalf of castes victimized by past discrimination, also suggest borrowing from an Indian model. Other indications of Indian influence include, for example, the list of "directive principles and policies of the state" (Part 4, Articles 24-26; cf. India 1950/1983 Part 4, Articles 36-51), which, as in the nearly identical words of the Indian constitution, in principle "shall be fundamental to the activities and governance of the State", but which in practice "shall not be enforceable in any court."

Such resemblances notwithstanding, influences of the Indian and other neighboring constitutions are less important in the overall balance than might be expected. The Nepal constitution describes a different type of state: a constitutional monarchy rather than an elected-head-of-state republic, a "Hindu kingdom" rather than a secular state, and a society in which ethnic contrasts and interactions play at least as important a role as those of caste, to the extent that the two can be separated in Nepal's complexly distinctive social mosaic. While the original impetus behind the creation of India's constitution was to replace foreign colonial domination with an internally-based democratic alternative, the impetus toward creating the Nepal constitution was to replace one kind of internal regime with another, more democratic kind. Four decades' experience with self-government in the post-colonial world provided a much wider range of examples than had been available to the framers of the Indian constitution; and Nepal's constitution reflects the wider range of experiences and models available to its framers. Thus, for example, in direct response to the results of political experiments in the developing world, the Nepal constitution explicitly prohibits not only laws establishing a one-party state, but even participation in elections by parties advocating them (Article 112/2-3). On the other hand, apparently in response to controversies of constitutional interpretation in the industrialized world, it explicitly guarantees the right of privacy. And the guarantee of a right to information (Article 16) reflects a sophisticated awareness of the political implications of contemporary world trends that seems far less likely to have been included even a decade or two earlier.

If the Nepal constitution is not a clone of the Indian, neither is it of the Chinese nor of any other single or dominant prototype. A Communist member of the framing commission suggests that the postwar Japanese constitution was the most influential foreign model because of its example of a workable system of constitutional monarchy (private communication); but the Nepal constitution is as fundamentally different from Japan's constitution as it is from those of India, China, the U.S., or any other single country. Nor is there a single ideological model: it expresses, for example, a high degree of concern with social and economic rights and welfare of ordinary people and disadvantaged groups, while still maintaining a right to property. Reflecting a broad awareness of political, economic and ideological diversity and change in the world at large, the 1990 Nepal constitution is as complexly related to its counterparts in other nations as it is to its most direct model, the previous Nepal constitution, with which it shares fundamental similarities and differences.

### **Popular Sovereignty, Constitutionalism and Constitutional Monarchy**

The new constitution explicitly identifies sovereignty as "vested" and "inherent" in the Nepalese people. The basic formulation on the subject is contained in Part 1, Article 3:

**The Sovereignty:** The sovereignty of Nepal is vested in the Nepalese people and shall be exercised in accordance with the provisions of this Constitution. (Article 3)

This seemingly simple statement has complex and powerful implications. Some of these can be seen in a comparison of the preambles of the 1962 and 1990 constitutions, where sovereign powers formerly “inherent in” the King, “devolved on Us” by inheritance “from Our August and Revered Forefathers” are now defined as inherent in the people, with authorities to be “exercised by” the King “in accordance with the provisions of this Constitution.” The transfer of sovereignty to the people, then, is the cornerstone on which the new structure of a constitutional monarchy is to be erected.

PREAMBLE [1962 Constitution]:  
Whereas it is desirable in the best interest and for all-round progress of the kingdom of Nepal and of the Nepalese people to conduct the government of the country in consonance with the popular will; ...  
And whereas the happiness and prosperity of Our beloved subjects have always been Our only objective for the accomplishment of which we are solemnly resolved;...

NOW, THEREFORE, I, King Mahendra Bir Bikram Shah Deva, *in exercise of the sovereign powers and prerogatives inherent in Us* according to the constitutional law, custom and usage of Our country and *which devolved on Us from Our August and Revered Forefathers*, do hereby enact and promulgate this Constitution.

PREAMBLE [1990 Constitution]:  
Whereas We are convinced that *in the independent and sovereign Nepal, the source of authority is inherent in the people*, and, therefore, we have from time to time, made known our desire to conduct the government of the country in consonance with the popular will; ...

Now, therefore, *keeping in view the desire of the people that the state authority and sovereign powers shall, after the commencement of this Constitution, be exercised in accordance with the provisions of this Constitution*, I, KING BIRENDRA BIR BIKRAM SHAH DEVA, *by virtue of the State authority as exercised by Us*, do hereby Enact and Promulgate this CONSTITUTION OF THE KINGDOM OF NEPAL *by and with the advice and consent of the Council of Ministers*.

Popular sovereignty, a controversial issue in the adoption of the constitution, thus would seem to guarantee a democratic basis of government. Yet, U.S. readers, at least, may experience a moment of cognitive dissonance when projecting their experience of a constitution based on popular sovereignty that begins “We, the people...” with the Nepal constitution which begins and is promulgated via the Royal rather than the popular “we”. The British constitutional concept of legislative sovereignty is not explicitly cited in the constitution, although some provisions may seem to presuppose it — and, in general, language comparable to the U.S. constitution’s “Congress shall make no law regarding...” is not used. Rather, such sovereignty-restricting language is characteristically applied to unnamed protagonists, whether groups or individuals, in a wide range of provisions to the effect that “Questions regarding [x action by His Majesty and/or the government] shall not be raised in any court” — a seemingly fundamental and potentially crippling limitation to popular sovereignty, although its real significance will only be worked out in practice.

The meaning of popular sovereignty in the transition from an absolute to a constitutional monarchy, of course, hinges on the establishment of democratic institutions and powers, and the nature and extent to which the formerly sovereign powers of the monarch have been limited, transferred to other organs of government, and/or subjected to constitutional checks and balances. Such a process of intentional constitutional delineation

of controls and limits on the arbitrary or one-sided exercise of power, or *constitutionalism*, is an impetus behind the creation of many constitutions; in Nepal in 1990, its particular focus was on the constitutionalization of a formerly absolute monarchy. Thus, in the new constitution, the former royal “sovereign powers and prerogatives inherent in Us” have formally devolved to “the State authority as exercised by Us,” subject to “the desire of the people that the state authority and sovereign powers shall... be exercised in accordance with the provisions of this Constitution;” and the King’s status, at least in theory, has become a symbolic one:

- (2) His Majesty is the symbol of the Nepalese nationality and the unity of the Nepalese people.
- (3) His Majesty is to preserve and protect this Constitution by keeping in view the best interests and welfare of the people of Nepal. (Article 27)

Yet His Majesty’s role under the 1990 constitution is hardly restricted to symbolism. He is given explicit status as a part of two of the three branches of government, executive and legislative; and his powers extend to the judiciary branch in more than symbolic ways.

Articles 35 and 44 give the king formal status as a part of both the executive and legislative branches:

The executive power of the Kingdom of Nepal shall, pursuant to this Constitution and other laws, be vested in His Majesty and the Council of Ministers. (Article 35/1)

There shall be a Legislature, to be called Parliament, which shall consist of His Majesty and two Houses, namely the House of Representatives and the National Assembly. (Article 44)

Although the language of these formulations seems to imply equal status and balance of powers between the king and elected officials, subsequent clauses make it clear that real checks and limitations have been placed on royal powers:

Except as otherwise expressly provided as to be exercised exclusively by His Majesty or at His discretion or on the recommendation of any institution or official, the powers of His Majesty under this Constitution shall be exercised upon the recommendation and advice and with the consent of the Council of Ministers. Such recommendation, advice and consent shall be submitted through the Prime Minister. (Article 35/2)

Thus, the king’s “exercised” executive powers are subordinated to the “inherent” authority of popular sovereignty, regulated and limited by the recommendation, advice and consent of elected representatives. Although the king appoints the Council of Ministers, he does so upon the recommendation of the Prime Minister, who must be the leader of the majority party in the House of Representatives, and who is directly responsible to it (Article 36). In general, the king’s executive powers are carefully circumscribed in Part 7, and the primacy of elective representative government clearly spelled out in clauses covering a broad range of contingencies. It is possible to envision problems if some king, in the future, should be inclined to undemocratically exploit potential loopholes such as the ability to temporarily appoint unelected persons as Deputy Prime Minister or other ministers, their eligibility for appointment as Prime Minister at the death or resignation of a current Prime Minister, the dissolution of Parliament pending elections, or other circumstances. Such a case, however unlikely it might be, would in any event require special circumstances and complex manipulations of legal subtleties that would seem less tempting than more direct forms of action. But, barring the catastrophic, and assuming a normally functioning state and society, the implementation of popular sovereignty and representative government and the constitutionalization of monarchical powers seem as straightforwardly and firmly established as under any parliamentary system.

The king’s legislative role is more complex. First of all, although the House of Representatives is elected by popular vote, the National Assembly includes members elected by the House of Representatives, regional representatives elected by an electoral college of local authorities, and members appointed by the king himself:

- (1) The National Assembly shall consist of sixty members as follows: -
  - (a) ten members to be nominated by His Majesty from amongst persons of high reputation who have rendered prominent service in various fields of national life. (Article 46)

Under the Panchayat system established by the 1962 constitution (Article 34), the king nominated 20% of the members of the National Panchayat; in the new system, he appoints 17% (10 out of 60) of the members of one of the two houses. Nevertheless, popular objections to the absolutism of the old system did not focus so much on these direct appointees, but rather on the larger number chosen by local authorities who were themselves viewed as subject to royal manipulation. Under the old system, these constituted the other 80% of the national legislature. In the new system, they are fifteen members, or 25%, of one house (Article 46/1c), while a majority of 58% of that house, or 35 members out of 60, are chosen by the elected House of Representatives. Obviously, the potential for strong royal influence on the legislature is present, but not for overriding the votes of elected representatives. Moreover, although both houses must vote on legislation and work out differences in joint committees, the House of Representatives may override the rejection of a bill by the National Assembly, which includes the royal and local appointees, by a second majority vote, and pass it directly to the king without the agreement of the other house (Article 69/7).

The king must give assent to bills in order for them to become law, but he does not have veto power. He may send a bill back for further discussion; but if it is again passed, he must give his assent within thirty days (Article 71/3-4). Likewise, the king may promulgate ordinances on his own initiative when he thinks immediate action is necessary while the houses of Parliament are not in session; but Parliament may vote such ordinances out of existence as soon as they meet in session, and even without such a vote, the ordinances become void within six months (Article 72). Thus, in overall balance the king's legislative powers seem clearly delimited and subordinated to democratic institutions.

Although the king is not formally defined as part of the judiciary, as he is with the executive and legislative branches, he has the power to appoint judges; and, although he must do so with the advice of various councils, their members include judges he has previously appointed, allowing for the possibility of a growth of cumulative influence over the years as other council members change with the succession of changing elected governments. He is supreme commander of the military, whose courts lie outside of the democratic safeguards imposed on appointments to and decisions of the civil courts. Moreover, he has sweeping powers to nullify the decisions of an otherwise independent judiciary:

His Majesty shall have the power to grant pardons and to suspend, commute or remit any sentence passed by any court, special court, military court or by any other judicial, quasi-judicial or administrative authority or institution. (Article 122)

The most obvious untouched remnant of absolute power left to the king is that of absolute legal immunity: "No question shall be raised in any court about any act performed by His Majesty" (Article 31). However, such immunity is hardly a unique privilege of the king; it also extends to Ministers, Parliament and various government offices and commissions in matters such as the government's failure to implement the "fundamental" constitutionally mandated directive principles and policies (Article 24), recommendations or advice given by the Council of Ministers "or any other institution or official" (Article 35), nonobservance of rules governing the conduct of government business (Article 41), irregular proceedings in Parliament (Article 62), allocation of election seats (Article 105), and, perhaps most ominously, the suspension of fundamental rights during proclamations of emergency (Article 115). Thus, to the extent that the constitution may contain potential weak spots and dangers for popular sovereignty and democracy, they may lie in immunity from recourse against abuses from forces in the government that are not confined to a possible future resurgence of absolutism in the monarchy itself. On the other hand, it is difficult to imagine how any government could function without some kinds of immunities to safeguard against harassment and malicious interference. Like the U.S. constitution's provisions for legislative immunities (Article I, Section 6: "...they shall not be questioned in any other place."), other democratic countries provide legal immunities either within the text of constitutional documents or elsewhere in the written and unwritten matrix of constitutional principles and practices. In Nepal, as elsewhere, their potential for democratic or undemocratic implementation will be worked out within this larger matrix.

The most sweeping powers allocated to the King are those relating to a proclamation of emergency:

Emergency Power: (1) If a grave crisis arises in regard to the sovereignty or integrity of the Kingdom of Nepal or the security of any part thereof, whether by war, external aggression, armed rebellion or extreme economic disarray, His Majesty may, by Proclamation, declare or order a State of Emergency... (7) After the State of Emergency has been declared... His Majesty may issue such Orders as are necessary.... Orders so issued shall be operative with the same force and effect as law so long as the State of Emergency is in operation. (Article 115)

As was the case under the 1962 constitution (Article 81), this article does not require the King to consult with Parliament, the Prime Minister or any elected official before issuing such a proclamation. On the other hand, while the old constitution only stipulated that the King could subsequently consult parliamentary officials regarding termination of a state of emergency "if he so desires," the 1990 constitution requires an automatic review by Parliament within a specified time limit:

(2) Every Proclamation or Order issued under clause (1) above shall be laid before a meeting of the House of Representatives for approval within three months from the date of issuance.  
(3) If a Proclamation or Order laid for approval pursuant to clause (2) is approved by a two-thirds majority of the House of Representatives present at that meeting, such Proclamation or Order shall continue in force for a period of six months from the date of issuance. (Article 115)

Thus, although the King's emergency powers are virtually unlimited at the time of a proclamation of emergency, they are temporary and subject to overrule by elected representatives in the long run. There is no provision for the extension of a state of emergency beyond one year, although here, as in other situations, tampering and abuse could be imagined. As with most such questions, the real significance of the Emergency Power article will only be seen in actual practice; but its potential effects on democracy and rights are crucial, and it deserves careful attention (see page 15 000 below).

In overall balance, the constitutional monarchy established by the 1990 constitution may seem rather strongly inclined in the direction of monarchy, but not uniquely so. If we compare, for example, the constitution of Norway (Norway 1814/1962), we find virtually the same guarantee of legal immunity as in the Nepal constitution:

The King's person shall be sacred; he cannot be blamed or accused. (Norway 1814/1962: Article 5)

Moreover, the Norwegian constitution gives the King an apparent monopoly over power in the executive branch, seemingly in disregard of elected representatives:

The King himself chooses a Council of Norwegian citizens... The Council shall consist of a Prime Minister and at least seven other members.... The King shall apportion the business among the members of the Council of State, as he deems suitable. On extraordinary occasions, the King may summon other Norwegian citizens to take a seat in the Council of State, ...but no member of the [Parliament] may be summoned thus. (Norway 1814/1962: Article 12)

Nevertheless, as the editor of the English edition of the Norwegian constitution (1814/1962: 19) informs us, "Since 1884 the King has always chosen Councils which have enjoyed the confidence of the Storting [Parliament]. It must be considered a firm constitutional custom that a Government is bound to resign if the Storting makes clear that it desires a change of government." The instance clearly shows that in actual practice, unwritten practice may carry equal or greater constitutional weight than written provisions, and that "constitutions" extend further than their documentary manifestations, an issue we shall return to below. With regard to the issue of constitutional monarchy, the Norwegian case shows that a strong dose of monarchism in a constitution's written provisions is not necessarily a bar to popular sovereignty or the democratic control



of monarchical powers in the full constitutional matrix of written and unwritten provisions and procedures, established principles and institutions and changing circumstances — for there are few who would maintain that the royalist language written into the Norwegian constitution has produced a correspondingly undemocratic state. The Nepal constitution, with less strong but still appreciable monarchist tendencies counterbalanced by stronger constitutionalist and democratic provisions, is likewise embedded in a larger constitutional matrix that will shape the ultimate significance of its written provisions in ways yet to be revealed.

## Rights

The 1990 constitution establishes new rights for the people of Nepal, and preserves others guaranteed under the 1962 constitution. The thirteen articles of Part 3 provide for the protection of certain “Fundamental Rights”: the rights to equality (Article 11), freedom (12), press and publication (13), regarding criminal justice (14), against preventive detention (15), to information (16), property (17), cultural and educational right (18), to religion (19), against exploitation (20), against exile (21), to privacy (22), and the right to constitutional remedy of abuses (23). Some of these articles include specifications of further rights. For example, Article 12, which begins by prohibiting unlawful deprivation of personal liberty and capital punishment, goes on to guarantee five freedoms: (a) freedom of opinion and expression; (b) freedom to assemble peaceably and without arms; (c) freedom to form unions and associations; (d) freedom to move throughout the Kingdom and reside in any part thereof; and (e) freedom to practise any profession, or to carry on any occupation, industry, or trade.

Other rights are mentioned elsewhere in the constitution. For example, Article 26/6 says that “The State shall pursue a policy of increasing the participation of the labour force, the chief socio-economic force of the country... ensuring the right to work, and thus protecting its rights and interests.” Some rights are not explicitly designated as such, but are nevertheless implied and established by prohibitions of their infringement. One of the most important of such rights, established in Part 17 and especially Article 119, is that of citizens to form political parties and participate in elections.

This right to form political parties, of course, is a cornerstone of the 1990 constitution, the struggle for which was a primary cause of its coming into existence. The establishment of such a right in the 1990 constitution required the elimination of the 1962 constitution’s Article 11/2a, a prohibition on political parties, somewhat paradoxically inserted into the old constitution’s bill of rights. This section of the old constitution, also labelled “Part 3,” was called “Fundamental Duties and Rights,” and began with Article 9, “Fundamental Duties of the Citizen,” which required “devotion to the Nation and loyalty to the State,” along with exercising one’s own rights with regard to law and the rights of others, as duties of every citizen. This article on duties was dropped, making Part 3 of the new constitution purely a bill of rights.

Many of the rights guaranteed in the 1990 constitution are carried over from the 1962 constitution. These include the rights to equality (old constitution Article 10, new 11); freedom, including a further specification of five freedoms as in the new constitution (old Article 11, new 12); a right against exile (old 12, new 21); against exploitation (old 13, new 20); to religion (old 14, new 19); property (old 15, new 17); and constitutional remedies (old 16, new 23). Fundamental rights not specified as such in the old constitution, but added to the new, include freedom of the press (new Article 13); the right against preventive detention (15); the right “to demand and receive information on any matter of public importance” (16); the cultural and educational rights of “every community residing within the Kingdom of Nepal” (18), and the right to privacy (22).

Important changes have also been made in the provisions of some of the articles carried over from the 1962 constitution dealing with these fundamental rights. For example, a provision for affirmative action legislation to “protect or promote the interests of” the disadvantaged has been inserted into Article 11, along with a prohibition of caste discrimination against untouchables and a guarantee of equal pay for the same work by men and women (11/3-5). Article 12/1 gains a prohibition on capital punishment, and Article 12/2e substitutes a guarantee of “freedom to choose any profession, occupation, trade or to start any industry” for the old constitution’s freedom to acquire, enjoy or dispose of property (old article 11/2e), a right guaranteed elsewhere

in both documents. Article 14 establishes as a separate right the freedom from police and judicial abuses formerly included as subsections of the right to freedom (old Article 11/3-8); and it adds a new prohibition on torture and other cruel, inhuman or degrading treatment (Clause 4). Article 19, Clause (2) adds guarantees of rights of religious communities to those previously granted to individuals; and Article 20/4 protects children against hazardous employment. All in all, the 1990 constitution provides for substantial gains in human rights over and above those guaranteed in the 1962 constitution.

However, the establishment of new rights and strengthening of old ones does not represent an unqualified gain. In the majority of cases, the provision for a right is followed by some kind of restrictions or limitations on that right, some more extensive than others. For example, Article 20, the Right against Exploitation, states:

(1) Traffic in human beings, slavery, serfdom or forced labour in any form is prohibited. Any contravention of this provision shall be punishable by law;... (2) No minor shall be employed in work in any factory or mine, or be engaged in any other hazardous work. (Article 20)

This statement of the right is followed by a simple qualification:

Provided that nothing herein shall be a bar to providing by law for compulsory service for public purposes. (*Ibid.*)

On the other hand, the complexly formulated "Right to Freedom" (Article 12), with its embedded list of freedoms (see above), contains a list of qualifications considerably longer than the list of freedoms they qualify:

Provided that - (1) nothing in sub-clause (a) [the freedom of opinion and expression] shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty and integrity of the Kingdom of Nepal, or which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes or communities, or on any act of sedition, defamation, contempt of court or incitement to an offence; or on any act which may be contrary to decent public behaviour or morality; (2) nothing in sub-clause (b) [the freedom to assemble] shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty, integrity or law and order situation of the Kingdom of Nepal; (3) nothing in sub-clause (c) [the freedom to form unions and associations] shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty and integrity of the Kingdom of Nepal, which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes or communities, which may instigate violence, or which may be contrary to public morality; (4) nothing in sub-clause (d) [the freedom to move] shall be deemed to prevent the making of laws which are in the interest of the general public, or which are made to impose reasonable restrictions on any act which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes or communities; (5) nothing in sub-clause (e) [the freedom to practice any profession, occupation, industry, or trade] shall be deemed to prevent the making of laws to impose restriction on any act which may be contrary to public health or morality, to confer on the State the exclusive right to undertake specified industries, businesses or services; or to impose any condition or qualification for carrying on any industry, trade, profession or occupation. (Article 12)

These detailed restrictions on specific rights are a new feature in the 1990 constitution, replacing a long list of qualifications and restrictions applicable to rights in general inserted at the end of Part 3 of the old constitution (Nepal 1962/1976: Article 17). Despite the use of language broad enough to create a certain potential for abuse, in most cases these qualifications and limitations on rights seem reasonable safeguards against potential dangers to individuals, communities or the people at large, or necessities for maintaining a functioning government; and most such restrictions, in fact, are common practice in democratic societies. Nevertheless, there are considerable contrasts between countries in the constitutional formulation of the balance between rights and restrictions. In the U.S. constitution, for example, rights are generally stated in

absolute form, without qualifications, with limitations established outside the written constitution by enacted laws, case law and precedents, and customary practice. It might legitimately be asked whether such an absolute, unqualified statement of rights may create expectations and encourage practices which strengthen those rights and place the burden on those who would limit them; or whether, on the other hand, the automatic inclusion of qualifications and limitations in statements of rights might weaken them and encourage their suppression.

The evidence from comparative cases is inconclusive, but suggests otherwise. The U.S. constitution, while tending towards unqualified statements of rights, nevertheless specifies some restrictions, including a provision for suspending *habeas corpus* "...when in cases of rebellion or invasion the public safety may require it" (Article I, Section 9);<sup>4</sup> and several amendments in the Bill of Rights (Amendments 1-10) specify similar exceptions or include "except as prescribed by law" clauses. The constitution of Canada takes the somewhat different approach, resembling that of the 1962 Nepal constitution, of listing specific rights without qualifications in its "Canadian Charter of Rights and Customs" (Canada 1982/1983: Part I), but frames this list between an opening statement that such rights are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (Section 1), and a concluding provision that the national Parliament or a provincial legislature may enact laws which "shall operate notwithstanding a provision included in" the Charter of Rights itself (Section 33). Despite the seemingly crippling language of Section 33, it seems unlikely that Canadians are any less secure in their constitutional rights than citizens of the U.S., with its more absolute language. On the other hand, the constitution of the People's Republic of China (China 1982/1987: Chapter 2, Articles 33-56) includes some unqualified statements of rights in absolute terms reminiscent of the U.S. Constitution:

Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration (Article 35; cf. U.S. constitution 1789/1979, Amendment 1)

But in actual practice, the implementation and exercise of such rights is not absolute in either country, and in fact differs to almost the greatest extent imaginable in the two countries. It would seem that the presence or absence of qualifications in constitutional statements of rights is at best a secondary factor which, if it has significant impact on practice, operates in the context of much more important factors in the larger constitutional matrix of written and unwritten principles and practices. Thus, although unqualified statements of rights may produce a more positive impression of their strength and importance in a particular society, while frequent qualifications and limits as in the new Nepal constitution may evoke the impression of a distrust or uneasiness about rights, nevertheless the highly qualified rights of the Nepal constitution may, in the process of implementation and interpretation over the course of time, prove as strong and important, or even more so, than those stated in more absolute terms elsewhere.

One factor which may prove crucial in this process, because of the danger it seems to present, is the issue of suspension of rights during a state of emergency (see also page 9 000 above). Article 115 allows for broad suspensions of rights in such emergencies:

If a grave crisis arises in regard to the sovereignty or integrity of the Kingdom of Nepal or the security of any part thereof, whether by war, external aggression, armed rebellion or extreme economic disarray, His Majesty may, by Proclamation, declare or order a State of Emergency....(8) His Majesty may, at the time of making a Proclamation or Order of a State of Emergency pursuant to clause (1), suspend sub-clauses (a), (b), (d) and (e) of clause (2) of Article 12, clause (1) of Article 13 and Articles 15, 16, 17, 22 and 23 of this Constitution for as long as the Proclamation is in operation: Provided that the right to the remedy of *habeas corpus* under Article 23 shall not be suspended. (Article 115)

In the 1962 constitution's emergency powers provisions (Article 81), the King could suspend "all or any" articles of the constitution. In the 1990 constitution, the rights subject to suspension under emergency proclamations are limited in number; they include: Article 12, the right to freedom's Clause 2a, freedom of opinion and expression; 2b, freedom to assemble peaceably and without arms; 2d, freedom to move throughout the Kingdom and reside anywhere; and 2e, freedom to practice any profession, occupation, industry, or trade;

as well as the press and publication right, guaranteeing freedom from censorship (Article 13); the right against preventive detention (15); the right to information (16); the right to property (17); the right to privacy (22); and the right to constitutional remedy against official oppression and abuses (23). Individuals do, however, have recourse within three months of termination of a proclamation of emergency to seek compensation in court for "any damage... inflicted upon any person by an act of any official which was done in contravention of law or in bad faith" during the emergency. Except under these narrowly-defined circumstances, there is no legal remedy for deprivation of rights:

(9) In circumstances where His Majesty has suspended any Article of this Constitution..., no petition may lie, nor question be raised in any court for the enforcement of the fundamental right conferred by such Article. (Article 115)

If the cumulative weight of restrictions and potential revocability of rights suggests a certain air of authoritarianism, and the impression that the constitution's "fundamental" rights are somewhat more insubstantial and precarious than might be hoped for, it is no accident that much of this impression comes from the Emergency Power article. Such provisions for emergencies are both part of the necessary crisis-handling mechanisms of democracies, and, as worldwide experience has shown, part of the most effective political weaponry of aspiring autocrats and tyrants. It is obvious that the occasional use of emergency powers elsewhere to topple democracies does not make them any more a candidate for elimination than other institutions that have brought down democracies, such as armies or elections. Nevertheless, because emergency powers are by nature authoritarian and rights-restricting, their use in democracies would seem to call for special safeguards against misuse. In the lengths to which the Nepal constitution has gone to protect the government against disruptions by its own citizens, both in emergencies and in the restriction of rights under everyday non-crisis conditions, it is difficult to imagine what place those rights now occupy on the continuum between political/legal efficacy and quasi-mythical ideological symbolism. This issue remains one of the more perplexing and crucial questions in the transition to the new constitution.

### **Ethnicity, Caste, Language, Religion**

One of the most pervasive problems of modern world politics has been the difficulty of reconciling 19th-century European ideals of the ethnic and cultural homogeneity in the "nation-state" with 20th-century realities of multiethnic and multicultural polities.<sup>5</sup> In the decades following the mid-20th-century wave of decolonization, many writers assumed this problem to be particularly characteristic of the newly independent nations of the Third World, stemming from the "artificial" creation of boundaries by colonial powers. Experience in recent decades suggests that both ethnic and cultural diversity and their associated problems are important political factors in both industrialized and Third World countries, neither simply nor characteristically associated with previously colonized states, because homogeneity is rarely if ever found at levels beyond the smallest locality, and hence "nations" and states are never contiguous.

Thus, the problem for all modern states becomes one of creating and maintaining a sense of "national" unity in a polity that is inherently transnational, that is, multiethnic and multicultural. Nepal has confronted this problem explicitly since the formation of a multiethnic state by Prithivi Narayan Shah in the 1760s, and implicitly during the growth of the culturally diverse Kathmandu Valley civilization in the preceding centuries (cf. Höfer 1979 for a detailed historical analysis of earlier legal codes, and the issues involved). In the latest attempt at formulating a definition of national identity, Article 2 of the 1990 constitution defines "the nation" as:

Having common aspirations and united by a bond of allegiance to national independence and integrity of Nepal, the Nepalese people irrespective of religion, race, caste or tribe, collectively constitute the nation. (Article 2)

The wording of the same article in the 1962 constitution was similar, except that it had the people "united by the common bond of allegiance to the Crown" (Nepal 1962: Article 2). The change is obviously part of the process of constitutionalizing the monarchy and transferring sovereignty to the people. Article 4 goes on to define the nature of the kingdom - i.e., the state:

Nepal is a multiethnic, multilingual, democratic, independent, indivisible, sovereign, Hindu and Constitutional Monarchical Kingdom. (Article 4)

Here, besides the insertion of "Constitutional", we have three new terms not included in the 1962 constitution's definition of the state: "multiethnic", "multilingual", and "democratic". The incorporation of diversity into the basic definition of the state reflects, on a larger scale, the worldwide 1990s trend away from melting-pot ideologies in response to unsatisfactory experiments with assimilationist and hegemonist treatment of minorities and attempts to suppress or eliminate diversity. More directly, it reflects Nepal's own experience with past attempts to impose a "national" identity based on the cultural and linguistic heritage of only a few of the many cultural-linguistic minorities who together constitute the population of the country. Issues arising from sometimes draconian implementations of such policies against other ethnic-cultural groups played a major role in the accumulation of tensions that led to the pro-democracy outbreaks of 1990; indeed, they were one of the problems for which democracy was demanded as a solution. Thus, along with democracy and constitutionalism themselves, issues of diversity relating to ethnic, caste, linguistic, religious and other "communities" are crucial factors in the new constitution.

The 1990 constitution's term Bahujātīya, translated as "multiethnic" in the official translation, is itself embedded in the complexities of Nepal's diverse mosaic of ethnic, caste and other communities. Article 11 presents us with this set of glosses for terms relating to such communities:

(1) All citizens shall be equal before law. No person shall be denied equal protection of the laws. (2) No discrimination shall be made against any citizen in the application of general laws on grounds of religion (dharma), race (varṇa), sex (liṅga), caste (jāt), tribe (jāti) or ideological conviction (vaicārik) or any of them. (3) The State shall not discriminate among citizens on grounds of religion, race, sex, caste, tribe, or ideological conviction or any of these. (Article 11/2)

In everyday parlance, jāt can be used to refer to either caste or ethnic groups. This usage, more than the technical definitions of Article 11, reflects the complex interplay of identities and ideologies resulting from the historical imposition of caste concepts and practices upon an ethnically diverse polity. As various scholars have pointed out, ethnic groups lack the traditional occupational specializations and class-specific morality contrasts of true castes, and, hence, lack the hierarchy-generating distinctions of habitual pure or impure conduct, that lie at the basis of the Hindu caste system; they have no inherent place in the system, as they are foreign to it. And yet, if the polity is to be ideologically, socially and politically "Hindu," they must somehow be included in the system. Moreover, since the historical basis of the "Hindu" polity includes the conquest and subjugation of some Hindus, as well as non-Hindus, by Hindus of other ethnic groups, the construction of a countrywide rationalized caste system has also required the reshuffling of preexisting caste identities and hierarchies to assure caste dominance by members of that caste with the proper ethnic and cultural ties to the dominant ethnic group. Hence, the various attempts over the centuries to assimilate non-Hindu ethnic groups to the system by reification of customary behaviors (drinking alcohol, eating beef), and the resulting confusions and contradictions, such as the treatment of Newars sometimes considered as a single subordinate caste, and sometimes with recognition of the complex stratification of the Newars' own traditional caste hierarchies (cf. Höfer 1979, especially Chapters 2-4, 7, and 11). Given such complexity and internal contradictions, the collapse of the system may be unsurprising; but new constitutional initiatives built on the base of such a complex heritage, combined with an impetus to democracy (cf. Article 11's reference to "ideological conviction") and egalitarianism, raise an even more complex set of issues that can only be touched on here.

The tension between caste ideology and practices of dominance/subordination, on the one hand, and democracy, egalitarianism and the protection of rights such as equal treatment and non-discrimination, on the other, finds expression in affirmative action provisions, some shared with the 1962 constitution and the Indian constitution, and others new:

Provided that special provisions may be made by law for the protection and advancement of the interests of women, children, the aged or those who are physically or mentally incapacitated or those who belong to a class which is economically, socially or educationally

backward. (4) No person shall, on the basis of caste, be discriminated against as untouchable, be denied access to any public place, or be deprived of the use of public utilities. Any contravention of this provision shall be punishable by law. (5) No discrimination in regard to remuneration shall be made between men and women for the same work. (Article 11)

In contrast to such provisions, with their emphasis on the rights of individuals belonging to groups that have suffered negative impacts of past practices, Article 18 introduces new provisions regarding the rights of “communities” as a whole, expressed in positive terms:

(1) Each community residing within the Kingdom of Nepal shall have the right to preserve and promote its language, script and culture. (2) Each community shall have the right to operate schools up to the primary level in its own mother tongue for imparting education to its children. (Article 18)

Such provisions serve as an antidote to the oppressive policies of the past and a safeguard against their future resurgence, and provide a specific basis for the “multiethnic, multilingual” definition of the kingdom in Article 4. The written provisions in themselves would seem to do little towards the realization of a linguistically and ethnically diverse state, insofar as they refer specifically to private groups and institutions. However, reports of the return of long-suppressed languages to state school curricula and media broadcasts would suggest that, at least in regard to linguistic diversity issues, the unwritten range of constitutional principles and practices are developing in accord with the pluralist intent expressed in these provisions of the written constitution. Whether an adequate basis has been established for maintaining the balance between, on the one hand, the danger of regression into oppressiveness and, on the other hand, the risk of mutation of diversity into divisiveness and conflict, is as unsettled a question with Nepal as it is with other countries faced with the late 20th century resurgence of ethnic nationalism.

Another obviously unsettled issue is that of religious diversity. Articles 2 and 11, among others, make reference to equal treatment of religions and the right to practice one’s own religion, a right spelled out in more detail in Article 19:

(1) Every person shall have the freedom to profess and practise his own religion as handed down to him from ancient times having due regard to traditional practices; provided that no person shall be entitled to convert another person from one religion to another. (2) Every religious denomination shall have the right to maintain its independent existence and for this purpose to manage and protect its religious places and trusts. (Article 19)

Yet there is at least an inherent logical contradiction between such provisions as Article 2’s definition of the nation as constituted by “the Nepalese people irrespective of religion...” and Article 4’s definition of the state as a “Hindu kingdom”, irrespective of the religious diversity of the Nepalese people. Does this contradiction in the identities of the nation and the state undermine either the integrity of the state itself, or the religious freedom of its people? The answer is not entirely clear. While “separation of church and state” as in the U.S. constitution provides a strong support for religious freedom, it is by no means the only available choice for democratic countries. England, for example, has its Established Church headed by the King or Queen, as does Norway. The Constitution of Sri Lanka (1978), while guaranteeing freedom of religion (Articles 10, 14), nevertheless gives Buddhism “the foremost place” and requires the state “to protect and foster” it (Article 9). Church-state relations and the conflicts that may arise out of them take many forms and degrees of severity, and no simple relationship seems to exist between the latter and written constitutional provisions. Thus, the seemingly hands-off language of the U.S. constitution has not prevented problems such as widespread suppression of American Indian religious practices, or conflicts over attempts to restrict Santeria and other religions from practicing ritual sacrifice — an attack on religious freedom to which some traditional Nepal Hindus would likewise be vulnerable were they to attempt to practice their religion in the U.S. And some constitutionally-defined “secular” states such as India have not been strangers either to religious conflict or to accusations of state complicity and partiality.

Nevertheless, the establishment of a religion also establishes an inevitable formal inequality which implies some risk of discrimination, of whatever degree of mildness or severity; and which undercuts national unity, necessarily based on perceptions of common heritage and aspirations, to the extent that those outside the established religion feel themselves excluded from or peripheral to a defining characteristic of national identity. Could such problems be averted by including a provision similar to this one in the Indian constitution?

Explanation II. - ...the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly. (India 1950/1983: Article 25)

A similar provision for Nepal might read:

Reference to Hindus shall be construed as including a reference to persons professing the Buddhist, Shamanist or other religions existing in Nepal over the course of many centuries, and references to Hindu religion and religious institutions shall be construed accordingly.

Such a provision might have the effect of extending protection to Nepal's other widely-followed indigenous South Asian religions. On the other hand, it might also easily evoke feelings of being subsumed in a kind of Hinducentric hegemony, despite the long history of Hinduism, Buddhism, and shamanism alike as inclusive rather than exclusive religions, able to coexist well with other religions. And of course it would not solve the problem of a religion such as Islam, also present in Nepal for many centuries, or of more recent introductions such as Christianity.

The latter religion, along with Theravada Buddhism and perhaps other traditions as well, have felt the effect of anti-missionary provisions included in previous codes and expressed in this constitution as a prohibition on Dharma parivartana garāuna, causing another person's religion to be changed or converted to one's own. This prohibition was added after the draft constitution, in conformity with earlier anti-proselytizing and anti-missionary laws. In the past, such prohibitions were sometimes interpreted broadly enough to justify action against those who changed their own religious affiliations to another religion. Such actions were brought to bear not only on Nepalese citizens from various religious traditions who converted to Christianity, but also in some cases against those who converted from at least nominally "Hindu" backgrounds to Buddhism. Retention of the prohibition thus raises the question of whether a relic of the anti-democratic past has been enshrined in the constitution, or whether, on the other hand, the equality of religions could ever be implemented with enough fairness to allow for its application to expansionist and missionary-oriented Hindu religious movements.

In the case of religions and other areas, it might be useful to think of rights and freedoms as definable in two modes: parametric and quantum. Parametric interpretations of rights are based on parameters assumed universally and equally applicable: e.g., all religions are afforded equal protection and freedom. Quantum interpretations of rights take cognizance of the embodiment of rights and their definitions in specific human instances, where ideals of universal equality are conditioned by the real differences and inequalities of historical, political and economic conditions: e.g., that the institutional bases of some religions might enjoy vastly greater political and economic power than others, and that an apparently equal contest for the loyalties of given individuals and communities might be no contest at all when that power can be brought to bear. What from the standpoint of one religion might appear an unfair restriction or unequal treatment might well appear from others' viewpoints to be an attempt to ensure that the barefoot runner does not have to race the man in the Cadillac. In such cases, as with other forms of affirmative action, fair treatment might require a measure of inequality, if it could be judiciously applied to even out an unfair advantage held by one side. But if such measures were taken in Nepal, for example, to help local Hinduism compete with international missionary religions, could or should they also be used to help religions such as Buddhism or shamanism compete with whatever unequal advantages might be enjoyed by the established religion of the "Hindu kingdom"?

Perhaps it is only realistic in the late twentieth century to recognize that some religions receive massive financing and support from international sources, public as well as private, and that traditions with local bases in poorer countries may require protection and support in order to compete successfully with transnational religious conglomerates, or even to survive their onslaught. On the other hand, religious converts do not

thereby renounce their Nepalese identity, and their inclusion in "the nation" seems as desirable as with any other community if the state and nation are to be truly diverse, non-discriminatory, and grounded in the identity of the Nepalese people.

## Conclusion

Written constitutions such as the Nepal constitution of 1990, the U. S. constitution, and similar documents are only a part of the fundamental principles of governance of their respective polities. The term "constitution" in the usage of political science and political anthropology covers a ground that extends beyond these written documents, defining the fundamental law of a sociopolitical entity even in the complete absence of written constitutional documents. The classic case for political science is the British constitution, a complex of traditions extending from Magna Carta through centuries of parliamentary acts, unwritten common-law traditions, case-law decisions and legal precedents which together constitute a fundamental law as binding as any written constitutional document, although a unified document called a "constitution" is entirely absent. In anthropological usage, the "constitution" of ethnopolitical entities such as the Ashanti (Rattray 1929), Yoruba (Lloyd 1954) or Cheyenne (Hoebel 1954) is almost invariably unwritten, although the principles of fundamental law contained in its oral traditions and practices may be perhaps more binding and less open to dispute and ambiguity of interpretation than the written constitutions of larger nation-states. In the broadest anthropological sense, the constitution of a given group or polity is coextensive with its culture, or at least with those parts of culture taken as normative by its members.

If a written constitution exists for a given polity, it is simply the documentary tip of a much more extensive constitutional iceberg, which may depict the actual constitution in various ranges from relatively accurate to highly misleading. The Bill of Rights of the U.S. constitution, for example, depicts rights in absolute terms ("Congress shall make no law regarding...") which in actual practice (that is, in the actual U.S. constitution as opposed to its documentary codification) become qualified and limited by precedent, case law, and ideological cultural consensus: "Freedom of speech does not guarantee the right to shout 'Fire!' in a crowded theatre." The guarantees of freedom of religion in the Soviet and the Chinese (PRC) constitutions have not always led to rights as unambiguous and unrestricted in practice as the straightforward language of the respective documents would seem to imply; nor has the closing qualifier to the Bill of Rights in the Canadian constitution, which seems to give the government power to take away all the rights guaranteed in the preceding clauses, in practice led to a wholesale suppression of rights. Constitutions and their language may be highly important in symbolic terms, but the meanings of the symbols they invoke must be determined with respect to a wider range of constitutional practices and traditions than the written documents themselves are capable of embodying.

It is the growth and development of this wider matrix of written and unwritten principles and practices that will determine, as it does in every case, the significance of Nepal's 1990 constitution and the issues it raises. An introductory survey such as this one, based on the constitutional document itself embedded in historical and comparative contexts, but without sufficient development of implementation and interpretation to reveal the larger patterns and trends of the matrix, can only represent a highly simplified preliminary sketch of the issues involved. For the moment, such a sketch may be useful in identifying basic issues and potential paths of development; but the real meaning and interest of the 1990 constitution will only be shown by the shape that it takes in the hands of the newly elected representatives, political leaders, and ultimately the people of Nepal.



## NOTES

- <sup>1</sup> In the late 1980s, the Government submitted a revised list of import duties and tariffs for approval by the National Panchayat. The discovery that the list of duties on imported foods included the word "beef" created such a furor of denouncements of the Government that a new list, minus the offending term, was hastily submitted in its place.
- <sup>2</sup> The eagle was adopted as the U.S. symbol in 1782, after the adoption of the country's first constitution, the Articles of Confederation of 1781; but its status as national symbol was not referred to in the 1789 constitution. Legal protection began in 1940, and was further strengthened by the Endangered Species Act of 1973.
- <sup>3</sup> Regarding symbols and continuities, those interested in Nepal's heritage of Hindu and Buddhist Tantrism may note that the new constitution includes provisions on the "Method of Making the Sun" and the "Method of Making the Moon" (Schedule 1).
- <sup>4</sup> Compare Article 115/8 of the Nepal constitution, which explicitly forbids such a suspension of *habeas corpus* even under a proclamation of emergency.
- <sup>5</sup> In traditional European usage, "nations," related to *natus*, "birth," referred to peoples sharing a common heritage, and was used much like the modern "ethnic groups," whether or not groups so designated exercised absolute sovereignty over their territory. During the 18th and particularly the 19th century, the ideal that nations *should* be states and vice versa - that is, that peoples should be independent and sovereign - became widespread, and played a role in various revolutions and independence movements. The strength of the nation-state ideal gradually led to popular usage that assumes the identity of the two terms, and perhaps creates the expectation, retrospectively, that all states are *ipso facto* nations.

## References Cited

Ellingson, Ter

1990 "Tibetan Monastic Constitutions." In *Reflections on Tibetan Culture: Essays in Memory of Turrell V. Wylie*. Lawrence Epstein and Richard Sherburne, eds., Lewiston: Edwin Mellen Press.

Errington, Shelly

1989 *Meaning and Power in a Southeast Asian Realm*. Princeton: Princeton University Press.

Hoebel, E. Adamson

1954 *The Law of Primitive Man*. Cambridge: Harvard University Press.

Höfer, András

1979 *The Caste Hierarchy and the State in Nepal: A Study of the Muluki Ain of 1854*. Innsbruck: Universitätsverlag Wagner.

India Constitution

1950 *The Constitution of India (As Modified up to the 15th August, 1983)*. Government of India, Ministry of Law, Justice and Company Affairs, 1983.

Lloyd, Peter C.

1954 "The Traditional Political System of the Yoruba," *Southwestern Journal of Anthropology* 10: 366-384.

Nepal Constitution

1962 *The Constitution of Nepal (As Amended by the first and second amendments of the Constitution)*. Kathmandu: His Majesty's Government of Nepal Ministry of Law and Justice, Law Books Management Committee, 1976.

1990 *The Constitution of the Kingdom of Nepal 2047 (1990)*. Kathmandu: His Majesty's Government Ministry of Law, Justice & Parliamentary Affairs, Law Books Management Board, 1992.

Norway Constitution

1814 *The Constitution of Norway*. Edited by Tonnes Andeanæs, Oslo: Norwegian Universities Press, 1962.

People's Republic of China Constitution

1982 *Constitution of the People's Republic of China (Adopted at the Fifth Session of the Fifth National People's Congress and Promulgated for Implementation by the Proclamation of the National People's Congress on December 4, 1982)*. Beijing: Foreign Languages Press, 1987.

People's Republic of China Constitution

1982 *Constitution of the People's Republic of China (Adopted at the Fifth Session of the Fifth National People's Congress and Promulgated for Implementation by the Proclamation of the National People's Congress on December 4, 1982)*. Beijing: Foreign Languages Press, 1987.

Rattray, R. S.

1929 *Ashanti Law and Constitution*. Oxford: Clarendon Press.

Sri Lanka Constitution

1978 *The Constitution of the Democratic Socialist Republic of Sri Lanka (Certified on 31st August, 1978)*. Colombo: Government Publications Bureau, Department of Government Printing, Sri Lanka.

United States Constitution

1789 *The Declaration of Independence and the Constitution of the United States of America*. Washington D.C.: U.S. Government Printing Office, 1979.

