



## Holy Cows and Constitutional Nationalism in Nepal

The way in which the Nepali state has framed over the centuries the legal framework protecting the cow—Hinduism’s sacred animal—illuminates the intimate relationship between state-framed nation-building and the management of sociocultural diversity in Nepal, the only other Hindu-majority state in the world alongside India. Nepal’s 2015 Constitution, while declaring the state secular, continues to grant Hinduism a privileged place and to define the cow as Nepal’s national animal. To understand the symbolic significance of these constitutional provisions in the construction of the Nepali nation and their material impact on Nepal’s marginalized groups, it is crucial to analyze their historical development and their relationship to other parts of the constitution and to ordinary laws criminalizing cow slaughter. This article argues that cow protection has come to signify a vision of state authority that privileges the symbols of the majority over the rights of the minority—a vision channeled through the coercive instrument of law.

Keywords: constitutionalism—cow protection—exclusion—Hinduism—identity—majoritarianism—nationalism—Nepal

This article investigates the existing relationship in Nepal between the enduring constitutional depiction of the cow as “the national animal,” the centuries-old criminalization of cow slaughter, and the centrality of Hinduism in the country’s process of nation-building. The analysis of the legal protection of the cow—Hinduism’s sacred animal—is a prism through which I examine Nepal’s historical tensions between national integration and sociocultural diversity. This study thus probes into the processes of state formation and nation-building under the legitimizing umbrella of the Shah Hindu monarchy in one of the few Asian countries that was never colonized. It also examines the strategies deployed by the Nepali state to manage sociocultural diversity since the creation of modern Nepal in the late eighteenth century. I argue that the legal treatment of the cow offers key insights into the development of Nepal’s constitutional identity, the ongoing struggles over the meaning of secularism vis-à-vis the notion of *hindutva* (Hindu-ness), and the implications of majoritarian politics for the country.

Nepal’s long awaited but embattled new Constitution (the country’s seventh) was promulgated on September 20, 2015—nine years after the end of the Maoist insurgency (1996–2006). This document was originally expected to complete the peace process, “build a New Nepal,” and act as a beacon of social inclusion. However, Madhesi and Janajati groups have responded to the promulgation of the new constitution with growing anger, leading to ongoing protests in the southern plains of the Terai region bordering India. These groups contend that the document discriminates against them in the areas of federal demarcation, electoral representation, citizenship, and the privileged position of Hinduism (Bell 2015). In the document itself, alongside a textual commitment to secularism, the new constitution backtracks from the previous 2007 interim document and grants Hinduism special protection (article 4), while continuing to define the cow as Nepal’s national animal (article 9) and to feature a ban on religious conversion (article 26). This article seeks to understand the symbolic significance of these constitutional provisions in the construction of the Nepali nation and their material implications for those who do not subscribe to this version of Hindu orthodoxy. To do so the analysis focuses on the historical development of cow protection and its relationship to other parts of the constitution and to ordinary laws, together with the judicial interpretation of these provisions. In particular, special emphasis is placed on the link between Nepal’s constitutional arrangements and the longstanding criminalization of cow slaughter in the “old”

(1854), and the “new” (1963) *Muluki Ain* (Country Code), and the new Penal Code of 2018. These provisions—unlike in India—apply uniformly across Nepal’s entire territory and make no exceptions on the basis of community affiliation.

Ultimately, the article concentrates on the role of Hinduism in defining and legitimizing state authority. Religion and its symbols (including the cow) are deployed as essential components of Nepal’s state ideology. The traditional ritual focus on purity is transposed through legal means to the political sphere in the modern setting of the nation state. Thus, the analysis investigates the historical development and implementation of the constitutional provisions defining the state, nation, monarchy, national symbols, and the right to religion. Then the article examines the links among these constitutional provisions and their relationship to the wider legal system. This offers an instrumental reading of cow protection in Nepal, arguing that these legal measures are primarily aimed at legitimizing political authority and the coercive powers of the state, while reinforcing Nepal’s social hierarchy.

The present study is based on two premises. First, constitutions matter, and constitutional texts and structures both enable and set (more or less effective) limits to political conduct. Second, the *prima facie* distinction between symbolic and substantive aspects of the constitutional text is spurious with regard to subsequent interpretation and implementation. The dominant scholarly view counsels caution in adopting the method of expressivism, which treats constitutions as direct expressions of a nation’s identity (Jacobsohn 2010, 12; Tushnet 2006, 68). In this respect, the concept of constitutional identity is deployed to evaluate the role of Hinduism and its symbols (including the cow) in Nepal’s constitutional developments. Gary Jacobsohn argues that,

a constitution acquires an identity through experience. . . . Identity emerges *dialogically* and represents a mix of political aspirations and commitments that are expressive of a nation’s past, as well as the determination of those within the society who seek in some ways to transcend that past. It is changeable but resistant to its own destruction. (2010, 7)

While the constitutional understanding offered by expressivist interpretative methods may yield a static view of constitutional identity, it is not irrelevant. In this respect, Jacobsohn also proposes a dialogical intermediate position:

I argue for a more fluid concept of identity, in which constitutional assertions of self-identity are part of an ongoing process entailing adaptation and adjustment as circumstances dictate. It is not fluidity without boundaries, however, and textual commitments such as are embodied in Preambles often set the topography upon which the mapping of constitutional identity occurs. (2010, 13)

The study of cow protection in Nepal reveals the profound and unresolved tensions between an “acquiescent constitutionalism,” namely constitutional drafting, interpretation, and implementation intended to conform with the general configuration of the society (Jacobsohn 2010, 11), and a “transformative constitutionalism,” whereby the express purpose of the constitution is to separate the future from the past in ways that will have transformative effects on social behavior (Jacobsohn 2010, 10). While they are both “adaptive processes” seeking

to “adjust constitutional identity to shifting facts on the ground,” their interplay in Nepal discloses the prevalence of acquiescence and the predilection for path-dependent continuities and self-reinforcing patterns of social exclusion legitimized and enforced by legal means.

### **Looking across the border: Nepal and India compared**

The bordering nations of Nepal and India are the only two countries in the world where the overwhelming majority of the population are followers of Hinduism. In Nepal, according to the 2011 Census, 81.3 percent of the total population is Hindu (Government of Nepal 2011), while in India the 2011 Census recorded 79.8 percent (Government of India 2011). Nonetheless, Hinduism in India and Nepal—very much like Islam in Pakistan—cannot be regarded as a blanket marker of sociocultural homogeneity, as profound differences exist within this Hindu majority. In fact, both countries feature a great degree of sociocultural diversity in terms of caste, ethnicity, language, sect, region, class, ideology, gender, and sexuality—identity markers that have often acquired political salience regardless of the common “Hindu banner.”<sup>1</sup> Moreover, in both countries roughly 20 percent of the population is not Hindu. For instance, India’s Muslims constitute approximately 14.2 percent of the entire population, namely about 170 million people, making India the country with the third largest Muslim population in the world. It is in this historical context of deep pluralism and politicized identities that the legal protection of the cow as Hinduism’s sacred animal and the meaning of secularism ought to be framed and understood.

While my article focuses on Nepal, a comparison with India brings into sharper focus the embattled relationship among secularism, the legal treatment of religious matters (such as cow protection), and the constitutional framing of national identity in both countries. The comparison between Nepal and India with regard to the legal treatment of the religious and cultural identity markers of the Hindu majority is important for two sets of reasons. First, from a historical perspective, Nepal’s national identity has been forged in binary opposition to India since the eighteenth century, particularly with regard to Nepal’s claim of having retained its status of a “true Hindu Kingdom,” while India had been “polluted” by waves of invasions that resulted in the installation of non-Hindu rulers, first the Muslims and then the Christians. Second, from a legal perspective, India is the jurisdiction that has singlehandedly influenced Nepal’s legal developments the most, from the emulation of the various bouts of legal codification in the nineteenth century to the adoption of public interest litigation in the early 1990s.

Significantly, both of the current constitutions of India (1950) and Nepal (2015) now define the state as secular but do grant a privileged position to the cow, even if the link between the cow and Hinduism is not explicit in either document. However, it is important to highlight that the respective constitutional commitments to secularism and modalities of cow protection in India and Nepal have emerged from radically different historical and political trajectories. As John Breuilly (1993, 1) argued, “nationalism is, above and beyond all else, about politics and politics is about power. Power, in the modern world, is principally about control of the state.”

As a result, nationalism is about obtaining and using state power. While Nepal is an example of “state-framed nationalism” (Brubaker 1999) deployed by political leaders to consolidate their grasp on state power, India instead represents an instance of “oppositional anti-colonial nationalism,” where the creation of a nationalist movement sought to seize power from the British colonizers and appropriate the colonial state. These different historical trajectories are clearly reflected in India and Nepal’s constitution-making processes and constitutional outcomes.

In India, secularism was a tool for nation-building, to bring together the many diverse groups that form Indian society after the success of the anticolonial movement (Bajpai 2011, 94–96). This strategy reflected the All-India National Congress’s longstanding viewpoint that the people of India were Indians irrespective of their religion—the idea at the core of the Indian national liberation struggle and a key pillar of state-building, which was formulated in stark opposition to the notion of Pakistan as the homeland for Indian Muslims (Austin 1966, 4). As a result, the Constitution remained neutral toward the various religions practiced in the country and did not feature any ethno-cultural characterization of the nation. At the same time, the term “secular” did not appear anywhere in the document. In the 1973 *Kesavananda Bharati* case, however, Chief Justice Sikri stated in his opinion that secularism is one of the five pillars of the Indian Constitution’s basic structure.<sup>2</sup> Ironically, India’s explicit constitutional commitment to secularism took place only in 1976 during Indira Gandhi’s emergency with the 42nd Amendment of the Constitution, which Granville Austin (1999, 370–90) characterized as “sacrificing democracy to power.” While the 42nd Amendment was later repealed almost in its entirety, the insertion of the adjective “secular” in the preamble endured.

India’s Constitution deals with the issue of cow protection in article 48 on animal husbandry, which encourages the preservation of cows, calves, and milch and draught cattle. The proviso was placed in the chapter on the directive principles of state policy, which is not enforceable in a court of law. Notably, the framers of the Constitution couched the protection of Hinduism’s sacred animal in the modernist language of science, not in religious terms. The legal battle over cow protection then shifted to the State legislatures and the courts, which have historically struggled to reconcile majoritarian religious demands with the protection of minorities, in a legal discourse unable to disentangle pseudo-scientific arguments for improving stockbreeding from essentially communal majoritarian politics.

At the time of Independence, India retained the British colonial legal system and judicial structure almost intact. This included the personal law systems under which the domains of family, inheritance, and succession law are regulated separately for the Hindu, Muslim, Christian, and Parsi communities on the basis of their respective religious laws. Significantly, Hindu law also applies to the Buddhist, Jain, and Sikh communities.<sup>3</sup> Criminal law, instead, has been regulated through uniform legislation since colonial times, when the most important statute was introduced, the Indian Penal Code 1860. The wave of Hindu revivalism in British India in the late nineteenth century led to the formation of the Cow Protection Society in 1882. In this context, Anthony Parel (1969, 182) argued that the cow became the political symbol of the Hindu Right’s version of Indian nationalism. After independence, constitution-

makers decided to leave the regulation of cow slaughter to the State legislatures (article 246; schedule 7, list II, entry 15), and the majority of Indian States now feature a partial or complete ban on cow slaughter. India, however, has witnessed a number of failed attempts by the Hindu Right to introduce a nation-wide ban (Chigateri 2012 140). The electoral success of the Hindu Right in the 2014 general elections has led to a disquieting rise in communal violence, and a number of incidents revolve around the issue of cow protection and have taken on clear anti-Muslim and anti-Dalit communal forms.<sup>4</sup>

Nepal, unlike India, was never colonized, and its creation as the modern state entity we know today resulted from the late-eighteenth-century military campaigns of King Prithvi Narayan Shah of Gorkha, who vowed to make Nepal into “a true Hindustan.” As a result, the processes of state- and nation-building pivoted around the assertion of the authority of the Hindu monarch to legitimize his rule over the conquered territories as the upholder of the *dhārmik* (cosmic) order, also through the protection of cows (Michaels 1997). Since the late 1950s during Nepal’s first bout of democratization, the country’s constitutions reflected this ethno-cultural vision of the Nepali nation as “a pure Hindu Kingdom” based upon the notions of Hinduism, Hindu monarchy, and the Nepali language (Onta 1996)—a way of imagining the Nepali nation that has developed over the centuries in opposition to India. From the 1959 constitution, through the 1962 Panchayat constitution, and up until the 1990 democratic constitution, Hinduism held a privileged position in the document, while the cow was institutionalized as the national animal, and freedom of religion was limited to religion as “handed down since ancient times,” which was accompanied by a constitutional ban on proselytism. While the post-civil war 2007 interim constitution marked a radical break with the country’s constitutional past by declaring Nepal a secular state and severing the ties with the Shah monarchy, the restricted right to religion and the cow as the national animal endured. The 2015 constitution took a step back from 2007. While declaring the state as “secular,” the document granted special protection to Hinduism (*sanātana*) and preserved the cow as Nepal’s national animal alongside a limited right to religion.

Unlike India, Nepal features a uniform legal system. As discussed in greater detail in the following paragraphs, the promulgation of the *Muluki Ain* in 1854 introduced a uniform legal code spanning civil and criminal law provisions designed to impose a single caste hierarchy across the country and slot the many conquered groups, whether Hindu or not, into a single “national hierarchy.” Chapter 66 of the *Ain* provided that the offence of intentionally killing a cow carried a mandatory sentence of life imprisonment (Höfer 1979, 204). In 1963, a new version of the *Ain* was issued, and it remained the backbone of Nepal’s legal system until 2018, when new separate versions of the Penal Code and the Civil Code were introduced. Chapter 7 on quadrupeds in part 4 of the 1963 *Muluki Ain* retained the criminalization of cow slaughter, but the sentence for intentionally killing a cow was reduced to twelve-year imprisonment. Similarly, Section 289 of the new Penal Code further reduced it to three-year imprisonment.

The analysis of the modalities and concomitants of cow protection by legal means in India and Nepal illuminates comparative constitutional law debates over

constitutional identity and communal majoritarianism directed both at disciplining the Hindu majority and dominating the non-Hindu minorities. The position of Hinduism as the majority religion in the constitutional frameworks of India and Nepal and its relation to competing visions of the nation have been the object of intense political and legal struggle for decades in both countries. However, the electoral success of the Hindu Right at the center in India in 2014 and 2019—together with a disquieting rise in communal violence often associated with cow protection—and the promulgation of Nepal’s long-awaited but extremely embattled new constitution in September 2015 have reignited debates about the place of Hinduism in their constitutional systems. The recent waves of Hindu revivalism in India and Nepal call for profound reflections on the intimate relationship between the role of religion in constitutional documents and the treatment of sociocultural difference in both jurisdictions. In this respect, the thorny issue of cow protection is a useful prism to analyze legal responses to the surge in ethno-cultural majoritarian demands in both jurisdictions aimed at erasing difference and nonconformity. These renewed efforts to enforce the rules of cow protection both by legal and extralegal coercive means in India and Nepal have come to symbolize the increasingly violent attempts to impose a nation-wide uniform, majoritarian, hegemonic, and communal ideology on those who do not subscribe to it, either by choice or by birth.

### **Cow protection and the law in Nepal**

Nepal was never colonized. As a result, the Nepali state has played a central role in the construction of the Nepali nation since the creation of modern Nepal through the military conquests of King Prithvi Narayan Shah in the late eighteenth century and his successors. In this respect, the dynastic continuity of the Shah monarchy, which lasted uninterrupted for over two centuries until Nepal was proclaimed a republic on May 28, 2008 by the first Constituent Assembly, was pivotal to the construction and legitimization of political authority in the country. I argue that the centrality of the Shah Hindu king in Nepal’s governmental arrangements shaped the modalities of the legitimization of political authority even after the demise of the monarchy. In this respect, law fulfilled a crucial function in crafting, disseminating, and imposing an authoritative version of “Nepaliness.”

*Nepal’s foundations: The Shah (1769–1846) and Rana (1846–1951) periods*

King Prithvi Narayan Shah of Gorkha, a small kingdom lying westward of the Kathmandu Valley, initiated a series of military campaigns to expand Gorkhali sovereignty to the many petty kingdoms in the middle Himalayan range. Prithvi Narayan’s successors continued the territorial conquests up until the Gorkhali defeat by the East India Company in the Anglo-Nepalese War (1814–1816). Therefore, the legitimation of political authority in the newly created state revolved around the symbolism and mystique of the Shah Hindu monarchy. Prithvi Narayan Shah envisioned the transformation of his extended realm into “a garden of all sorts of people” (*sabāi jātko phulbāri*), an “*asal hindusthān*, a true Hindu kingdom of the four *varṇas* and thirty-six castes” (Stiller 1968, 44). The concept of a “true Hindu kingdom”

implied a contraposition to an “untrue” or “polluted” Hindu kingdom, which was India. Writing in 1774, Prithvi Narayan Shah referred to India as “Mughlana” following the establishment of the Delhi Sultanate, and later on of the Mughal Empire. The formation of Muslim kingdoms in the Gangetic plains, the defeat of Hindu rulers, and the migration of Hindu chieftains toward the shelter offered by the Himalayas all gave to the “Hindu category” a specific *raison d’être* in the Himalayan region that was to become the modern state of Nepal.

Hinduism’s ritual dichotomy of “purity/impurity” progressively acquired a clearly political connotation in Nepal. It was not the presence of non-Hindu subjects that undermined the “purity” and *dhārmik* order of a Hindu kingdom but rather having a non-Hindu ruler. Hinduism then became politically instrumental to the Shah kings to portray themselves as a “civilizing center” in the eyes of the conquered people and an “uncontaminated and culturally distinct periphery” vis-à-vis its Indian neighbor to the south (Burghart 1996, 263). For the Shah king it was of crucial importance to safeguard the ritual purity of his kingdom, and in this respect cow protection played a central role in upholding the *dhārmik* order. For instance, Prithvi Narayan’s political testament—the *Divya Upadeś* (Divine Message)—records the reasons by which he was entitled to rule over Nepal:

[Two astrologers to Prithvi Narayan Shah]: You, oh Prince, have held at all times great respect for cows (*gau*), Brahmins, guests, holy men, gods, goddesses. Also, in your hands lies the blessing of Saraswati. You will one day be King of Nepal. (Stiller 1968, 39)

These coordinates established the *rightful* political authority of the government, and cow protection featured prominently in this conceptualization. While there is evidence of earlier measures to preserve pasture for cows, it was only in 1805 that King Rana Bahadur Shah introduced Nepal’s first ban on cow slaughter by royal edict (Michaels 1997, 82–86). The order stated:

From today killing cows is prohibited. Inform (everybody) that, if somebody does (cow slaughter), capital punishment will take place and his property will be confiscated. (Michaels 1997, 86)

In the first half of the nineteenth century, new orders were issued with regard to the slaughter of oxen, yaks, and crossbreeds of cows and yaks, and the taxation of communities that consumed *sinu* (i.e., the carcasses of cattle; Michaels 1997, 87–89). It was not just a matter of preserving the life of cows; the command of the king extended to the consumption and use of cow meat and parts by his subjects.

Prime Minister Jang Bahadur Rana eventually consolidated all these rules in the 1854 uniform legal code known as the *Muluki Ain*. After years of factional politics, in 1846 a young aristocrat, Jang Bahadur Kunwar, emerged as Nepal’s undisputed leader. He inaugurated a new phase of Nepali history and devised a different political regime for the kingdom. Jang Bahadur made the office of prime minister hereditary within his family, assumed the regal title “Rana” to allow intermarriage with the royal family, and effectively neutralized the power of the Shah king (Whelpton 1991, 187). Jang Bahadur also elected not to supplant the Shah monarchy, however, and retained the king as the living symbol of the unity of the Nepali state. Thus,

the legitimation of political power in Nepal remained anchored in the ideology of Hindu kingship. Jang Bahadur even reinforced the aura of sanctity of the monarch to strengthen the legitimacy of the new regime as well as to further isolate and control the king by preventing any direct contact with the population (Rose and Fisher 1970, 37). The Ranas continued to use Hinduism to legitimize their political authority but in a different manner from the previous Shah period. Under the Ranas the relationship between Hinduism and state authority acquired a modern connotation: “Jang Bahadur, like Prithvi Narayan Shah, argued that Hindu rulership was a precondition of achieving a real Hindustan. Unlike Prithvi Narayan, however, Jang Bahadur did not aim to make an authentic Hindustan in a subcontinent of less authentic ones. Rather he sought to protect the world’s only Hindu kingdom” (Burghart 1996, 270–71).

Hinduism was also central to the efforts to integrate the different ethnolinguistic groups under Nepali sovereignty, and the law became a crucial instrument to do so. The process of “Hinduization” of the many communities living in Nepal took place both by their bottom-up emulation of upper-caste Brahminical sociocultural practices—essentially what Mysore Narasimhachar Srinivas (1952, 32) had described as Sanskritization—and by top-down imposition by the State. This article solely focuses on the second aspect of the process. The means by which such Hinduization was enforced by the Rana rulers also presented starkly modern features. The most important example of this strategy was the attempt at modern legal codification inspired by the British and French. In fact, in 1850 Jang Bahadur crossed the “dark water” and became the first high-caste Hindu political leader to visit Europe. He went on a journey to England and France as ambassador of King Surendra Shah and was immensely impressed by the wealth and organizational structure of the European nations. In 1851, when Jang Bahadur returned to Nepal, he brought back with him the belief that modern law was an essential tool of effective governance, and a manifestation of Western hegemony. In fact, the *Ain* has been regarded as the result of the impression that the *Code Napoléon*—and the French Emperor—made on him (Whelpton 1991, 218). Jang Bahadur’s travel diary *Belāit Yātrā* (Foreign Journey) records his understanding of law and politics in Europe:

After due consideration, the state has also to instruct and educate everyone, including the King, the nobles, the common people, the army, foreigners, travelers, orphans, the ignorant, the delinquent and the unfortunate. It has to proclaim, teach, educate and give instructions concerning the constitution (*rājnītikō ain*, literally “the law of politics”). (Whelpton 1983, 185–86)

The importance placed on the law in constituting the polity is reflected in Jang Bahadur’s promulgation of the *Ain* in 1854.

The *Muluki Ain* was a legal document codifying traditional social conditions, subsuming the various ethnic groups within the Parbatiya Hindu caste hierarchy, and imposing its rules on them. According to Andras Höfer (1979, 41), the sources of Nepal’s first legal code were the *dharmasāstra* (the traditional Hindu legal texts), the *arthaśāstra*, Mughal legislation, and possibly Anglo-Indian law. The provisions of the *Ain* were more or less limited to the fields of personal and administrative law (Höfer 1979, 40). However, the scope of the *Ain* went beyond the attempt to simply

impose homogeneous socio-legal norms on the entire population under Nepali sovereignty; the process of codification had a clear political rationale. The code was informed by two ideas: the South Asian concept of a “pure Hindu country” where *dhārmik* order and collective purity are protected by law, and the Western idea of the nation state. Ultimately, the 1854 code attempted to legitimize Nepal’s political identity and promote national integration vis-à-vis the menace posed by British and Chinese expansionism. Moreover, by claiming to be a piece of legislation applicable to Nepal’s entire population, the *Ain* represented the first attempt at legal uniformity made by the Nepali state and thus an initial stage in the process of state-building. In this respect, Mahesh Chandra Regmi (1975, 110) claimed that the *Ain* had a quasi-constitutional function. The integration of different social groups through uniform legislation into a single Hindu hierarchy was aimed at devising a top-down policy of homogenization of the various communities inhabiting the country. The *raison d’être* of the code is clearly stated in the preamble:

In the Kaliyuga this kingdom is the only kingdom in the world where cows, women, and Brahmins may not be killed. (Michaels 1997, 80)

The cow played a pivotal role in ensuring the ritual purity of the realm, and its protection corresponded to the extension of royal sovereignty over the territories within the boundaries of the Nepali state. Chapter 66 of the *Ain* on cow protection provided as follows:

1. If a cow has been killed with intent, the offender is to be punished with life imprisonment.
2. Whoever injures a cow deliberately with a weapon, is to be punished by confiscating his property or by reducing him to slavery, according to his caste groups.
3. Whoever kills a cow unintentionally when driving the animal to pasture, etc, obtains absolution after paying a fine of R 1. . . .
5. Whoever witnesses the killing of a cow and fails to report it to the authorities, is fined Rs 50.
6. Whoever beats a cow until it bleeds is to be fined Rs 2. If the cow or water buffalo’s leg is broken, the fine amounts to Rs 10.
7. If someone killed a cow with intent and is thereupon killed himself, his murderer will not be punished. However, he will be punishable as an ordinary murderer if it is proved that the killer of the cow acted unintentionally.
8. Exempt from punishment is an injury of a sick cow, necessitated by an operation: sawing off the horns, removal of insects from a wound, etc. . . .
13. If a cow tied up in the cowshed perishes due to an illness or accident, such as lightning, fire or attack, its owner obtains absolution after payment of a fee.
14. An imbecile person who injures a cow with a weapon, a stick or by throwing stones at it obtains absolution after receiving ten lashes of the whip. (Höfer 1979, 204–5)

Chapter 66 contains a number of exceptions, because it effectively sought to balance the fact that the cow is both a holy and a working animal (Michaels 1997, 91). The Rana regime was also confronted with the difficult issue of enforcing the rules of the *Ain* in the more remote mountainous areas of the country. Often the rules of

cow protection clashed with local customs as many ethnic groups, whether Hindu or not, had longstanding traditions of using cattle meat for rituals and/or consumption (Campbell 1997; Shneiderman 2015). Axel Michaels (1997, 81) argues that the cow as a symbol of the king's political authority over various ethnic groups and remote areas had both an integrative and disintegrative role. I respectfully disagree on the "integrative" aspect of the process as distinguished from coercion. While there was a slow process of Sanskritization, in which the Nepali state by and large did not impose cultural practices on its subjects but rather led by example (Gellner 2005, 1), the imposition of a ban on cow slaughter was a clear exception to this approach and a manifest instance of the exercise of coercive state power through law. The *Ain*, however, also recognized the existence of custom and made an exception to the restrictions on killing animals (aside from cattle) "for certain holidays and particular occasions, in the course of which, following old traditions, animal sacrifices must be performed" (Höfer 1979, 205). The legal regulation of animal treatment is part of the efforts by the rulers to exercise their authority uniformly throughout the country. Importantly, the regulation of cow slaughter in the *Ain* seeks "mainly to protect the life and holiness of the cow for the sake of the king's Hindu orthodoxy and for the sake of a common state ideology (as insisted upon by the rulers), but not for the sake of the animal itself. This has nothing to do with the protection of animals, or with *ahimsa* (non-violence) or vegetarianism" (Michaels 1997, 91).

#### *Nepal's first democratic experiment (1951-1960)*

The Rana regime could not withstand the democratic pressures stemming from the success of the anticolonial movement in India, and in 1951 an alliance of King Tribhuvan Shah with the Nepali underground political parties that had formed in India succeeded in toppling the Rana regime. After a short time, an interim constitution was promulgated in 1951, and negotiations between the king and the political parties began with regard to the drafting of the permanent document. In 1951, King Tribhuvan promised that the new constitution would be drafted by a Constituent Assembly (Tripathi 2002, 25). However, his untimely death and the succession to the throne of his son Mahendra effectively put an end to that disposition.

The new king became progressively more active in political matters and sought to exercise his authority in accordance with Hindu traditions (Dhungel et al. 1998, 24). As a result, King Mahendra continued to ignore demands for the creation of a Constituent Assembly and postponed general elections twice. Then, in early 1958, Mahendra made a resolute move and invited British constitutional expert Sir Ivor Jennings to guide the impending constitution-making process (Malagodi 2016). On February 1, 1958, the king issued a Royal Proclamation to serve as the roadmap for Nepal's constitution-making process and blamed the lack of progress and Nepal's political instability on the political parties (Joshi and Rose 1966, 212-14). He also announced the establishment of a five-member Constitution Drafting Commission to prepare a new document, which was to form the basis for holding the elections of a bicameral parliament. The emphasis placed by the king on the importance of preserving Nepal's national unity implied that the Shah monarchy was to play a central role in the new constitutional edifice. The new constitution was to be

centered on the monarchy operating through a parliamentary system of government within a unitary state.

Jennings completed his work in Nepal in late April 1958; soon afterward the Cabinet approved the draft constitution and submitted it to King Mahendra for promulgation. The king, however, took over eight months to revise the document and promulgated it on February 12, 1959—only a week before the general elections, leaving the political parties unable to put forward any meaningful opposition to the new constitution. The frame of government adopted reflected Jennings's work: the document nominally established a democratically elected parliamentary system under a constitutional monarchy, while the king retained *de facto* ultimate sovereignty. The monarch enjoyed wide discretionary powers and was granted residuary and emergency powers. A perusal of Jennings's third draft reveals that substantive additions were made to the text in the revision phase, most likely by the king and his entourage, with regard to the ethno-cultural elements of the document and the use of Hinduism to legitimize the king's political authority.<sup>5</sup> In particular, the clauses pertaining to the Shah monarchy were expanded to include extensive cultural, religious, and historical references supporting the Shah monarchy. The preamble and article 1 defined His Majesty, for the first time in a Nepali Constitution, as "a descendant of the illustrious King Prithvi Narayan Shah, adherent of the Aryan culture and Hindu religion," and stated that the sovereign powers of the Kingdom of Nepal were vested in the king "in accordance with the traditions and customs of our country and which devolved on Us from Our August and Respected Forefathers."

For the first time in Nepal's constitutional history the notion of Hindu kingship was institutionalized in positivist legal form at the constitutional level. The symbolic elements used to characterize the Shah monarch were matched by material restrictions on religious freedom under article 5 in the chapter on fundamental rights. The freedom of religion was limited by the definition of religion "as handed down from ancient times (*rākhī sanātana dekhi*)." Significantly, the term *sanātana* was employed to characterize religion. *Sanātana dharma* (eternal duty) is the Sanskrit expression originally found in the Vedas, then promoted in nineteenth-century colonial India by revivalist Hindu movements, to define Hinduism in autochthonous terms (the word "Hindu" is instead of Persian origins). During the development of organized Hinduism in late colonial times, the term *sanātana dharma* became a symbol of the orthodox approach to Hinduism adopted by organizations such as the Sanatana Dharma Sabha, in contrast to the sociopolitical attitude espoused by reformist movements such as the Arya Samaj. Later in the 1920s the notion "*sanātana dharma*" formed the ideological basis for the creation of the Hindu nationalist organizations under the rightwing *hindutva* umbrella, such as the Hindu Mahasabha (Zavos 2001, 121). Nepal's institutional turn toward the symbolism of this modern version of orthodox Hinduism entailed patrolling and protecting the identity of the world's last Hindu kingdom. As a result, article 5 also provided that "no person shall be entitled to convert another person to his religion," placing constitutional limits on proselytization in view of limiting the expansion of Christianity and Islam and protecting the "Hindu-ness" of the Nepali state.

The deployment of ethno-national symbols couched in the language of orthodox Hinduism in the 1959 constitution is a clear attempt to legitimize the hegemonic position of the Shah monarchy in the constitutional edifice. While the new dispensation claimed to institute a constitutional monarchy and parliamentary form of government through a “modified Westminster model,” the extent of those “modifications” was such that constitutional restraints on unelected executive power had become almost entirely meaningless. Ultimately, the emphasis on the Hindu character and cultural traditions of the Shah monarchy was inserted to distract from—and to justify—the democratic deficit in the new constitution’s frame of government.

*Nepal’s monarchical panchayat autocracy (1960–1990)*

In 1960, King Mahendra effectively staged a royal coup: he assumed emergency powers, banned all political parties, and suspended the short-lived 1959 constitution. He sought to engineer a brand-new political regime, the Panchayat system, nominally based on Nepal’s traditions as the country’s alternative route to modernization and development (Burghart 1993, 1). After holding absolute power for two years, on December 16, 1962, King Mahendra promulgated a new constitution. The 1962 document established the involvement of the king in every branch of the government, making the principle of separation of powers enshrined in the constitution entirely meaningless (Dhungel et al. 1998, 30). The active leadership of the king in the Panchayat system entailed a complete absence of political opposition, warranted by the outlawing of all political parties.

The autocratic position of the Shah king in the constitutional edifice was legitimized through the deployment of a full-blown ethno-cultural nationalist ideology centered on Hinduism, the dynastic continuity of the Shah monarchy, and the Nepali language (Onta 1996). For the first time in Nepal’s constitutional history, article 3 declared Nepal to be a Hindu kingdom, and article 6(2) introduced a number of “national symbols,” which included the cow (*gāī*) as Nepal’s national animal. The 1962 document retained the connotations of His Majesty as “a descendant of King Prithvi Narayan Shah and adherent of Aryan culture and Hindu religion” in article 20(1). The right to religion under article 14 was again limited. It defined “religion as handed down from ancient times” (*rākhī sanātana dekhi*) and preserved the ban on proselytization. Thus, the emphasis on Nepali traditions became part of the propagandistic rhetoric of the Panchayat system. The 1962 constitution was imbued with the spirit of modern nation-building, which was, Mahendra believed, the ideal strategy to tighten his hold on power and create favorable circumstances for Nepal’s socioeconomic development and modernization. Moreover, the new document fixed the coordinates for the construction of a Nepalese nationalistic discourse: Hinduism, the Shah monarchy, and the Nepali language became the “triumvirate of official Nepali national culture” (Onta 1996, 214).

In 1963, as part of his modernizing efforts King Mahendra promulgated a new *Muluki Ain*, with significant departures from the 1854 document. The new code constituted the keystone of Nepal’s civil and criminal law system until 2018. In Nepal there is no personal laws system like that which exists in India, and the provisions of

the *Ain* are meant to apply to all the citizens of Nepal, irrespective of their religious affiliation. The new code remained anchored in Hindu values and sources, although discrimination on the basis of caste or ethnicity was formally abolished. As Höfer (1979, 204) further explains, contrary to the widespread view, modern legislation has not explicitly abolished the caste hierarchy. Although there is no longer an inequality before the law, based on caste affiliation, the system of relations constituting the caste hierarchy remains unchanged and is tacitly sanctioned.

Significantly, the first line of the preamble of the new code states that the *śāstras* represent an influence on the customs practiced in Nepal. The reference to Hindu legal sources is less direct in the new code but not the influence of Hindu principles, rules, and *Weltanschauung*.

This approach is clearly reflected in the modern criminalization of proselytism contained in the *Ain*. Section 1 of chapter 19 in part 4 on “Decency” (*adal*) provides the following:

1. Within Nepal, no one of the Christian, Islamic, etc. faith shall propagate his or her religion in such manner as to undermine Hinduism nor shall cause Hindus to convert to his or her religion. If a person attempts to do such an act, they shall be liable to imprisonment for a term of 3 years; if a person has already caused others to convert to another religion, they shall be liable to imprisonment for a term of 6 years. If such person is a foreign national, he or she shall also be deported from Nepal after they serve their sentence. A person of the Hindu faith who converts to another religion shall be liable to imprisonment for a term of up to 1 year; if such person is a foreign national, he or she shall also be deported from Nepal after the service of punishment by him or her. If a person attempts to change their own religion they shall be liable to a fine of 100 Rupees. If conversion has already taken place, that person shall convert back to Hinduism (my translation).

The provision was explicit with regard to the fact that the only religion protected by the juridical establishment was Hinduism.

The new *Ain* also retained the ban on cow slaughter but reduced the sentence for the offence. Chapter 7 on quadrupeds provided that:

1. No person shall, with intention to kill, kill, cause another person to kill, attempt to kill, a cow or ox or take a cow or ox to a foreign country or take and sell it in such country, with such intention. . . .
2. Where a cow or ox happens to die as a result of a sudden strike or otherwise when any action is taken for rescue/welfare or when some other thing is done without intention to kill it, it shall be deemed an accidental death. For the purpose of relieving pain on the body and, for welfare, a wound or brand may be made on the body or blood may be extracted from some organ. . . .
4. Where a person sees another person being ready, by taking up a weapon or otherwise, to intentionally kill a cow or ox, the person shall prohibit that other person from killing the cow or ox. Where that other person, rejecting such instruction, uses the weapon also against the person who so prohibits, and the person who strikes, cuts, and kills that other person shall not be deemed to commit offence and be liable to punishment. In cases other than that mentioned above, any person shall not kill but shall arrest and hand over such other person to the office.

5. Where any person hits a cow or ox with a weapon, heavy stick, or stone, and as a result of that pain or suffering, the cow or ox cannot move, becomes confined to its shed, and dies within 21 days, the cow or ox shall be deemed to have died as a result of the wound or pain caused by that person. Where such cow or ox dies after the period of 21 days or dies of another illness or disease after it has started making movement, that person who has so hit it shall be liable to punishment only for the wound caused by him/her. . . .
8. No one shall export, carry, or sell the branded bull (*sandhe*) or old cow or bullock or barren cow (*baila*) in a foreign country. If someone sells, the amount involved in the sale shall be confiscated and such a person shall also be fined at the rate of 100 Rupees for each animal. In cases where a person is arrested in the course of transportation, before reaching a foreign country, he or she shall be fined at the rate of 50 Rupees per animal.
9. No person shall sell or purchase a bullock (*basha*) or branded bull (*sandhe*). If any person so sells or purchases, the amount received from the seller shall be confiscated, and that person shall also be liable to punishment. If the purchaser purchases a bullock (*basha*) or branded ox (*sandhe*) without knowing about the branded mark, such a person shall not be liable to punishment. In such a case the buyer shall be entitled to receive the purchased amount from the seller, and the seller shall also be liable to punishment.
10. Any person who transports a cow, branded bull (*sandhe*), or bullock (*basha*) from the territory of Nepal to a foreign country, and kills or causes another person to kill such an animal; he or she shall be liable to the punishment of imprisonment for a term not exceeding 6 years.
11. If a person knowingly kills a cow or bullock, the person shall be liable to imprisonment for a term of 12 years, and a person who instigates for the same shall be imprisoned for a term of 6 years. A person who kills a yak (*chauri*) shall be liable to a fine of 40 Rupees for each yak.
12. If a person administers poison to a cow or bullock with intention to kill it, the offender shall, despite that such an animal does not die, be liable to the punishment of imprisonment for a term of 6 years; a person who instigates to administer such poisoning shall be liable for the punishment of imprisonment for a term of 3 years; and a person who makes attempt for the same shall be liable to the punishment of imprisonment for a term of 2 years.
13. If a person holds or fastens (*bandhchhadh*) a cow or bullock with intention to cause to kill it with the hand of other person, such an offender shall be liable to the punishment of imprisonment for a term of 6 years.
14. Any person who causes a grievous hurt (*angabhanga*) to a cow or bullock shall be liable to the punishment of imprisonment for a term of 2 years; and any person who causes wound or bloodshed (*ragatpachhe*) to such an animal shall be liable to a fine of up to 200 Rupees. Any person who causes grievous hurt or wound or bloodshed to a yak shall be liable to a fine of up to 20 Rupees.
15. Any person who hits a cow or bullock that belongs to another person and such an animal dies accidentally (*bhabitabaya*), the cost of such an animal shall be recovered, and a fine equal to the cost of such a cow or bullock shall be imposed on such person. . . .

18. No person shall use a bullock or branded ox or cow to plough land. If any person ploughs with the help of such an animal, he or she shall be liable to a fine of up to Twenty Rupees and such an animal shall be set free.
19. If a suit is not filed within 6 months in the case of killing of a cow (*gobadh*) and within 35 days on the matter of other offences, after the date of the cause of action, the suit shall not be entertained (my translation).

Similarly to the old *Ain*, the new *Ain* included criminal provisions to protect cattle other than the cow—ox, bullock, and yak—and to reflect the fact that they are also working animals. Provisions were also added to regulate the treatment of domestic animals other than cattle.<sup>6</sup> Significantly, the code applied uniformly throughout the entire territory of Nepal, and no exceptions were made on the basis of community affiliation. In fact, the incident of Hindu-Muslim violence in Nepal during the Panchayat period occurred in 1971 in the Terai districts of Bara and Rautahat when “a Muslim accused of killing a cow was reportedly murdered by a Hindu from the same village, and riots lasting twelve days followed” (Adamson Sijapati 2011, 55). It is clear that cow protection by legal means played a pivotal role in the modern construction of Hindu Nepal during the Panchayat years and proved to be a resilient institution even after the redemocratization of 1990.

#### *Nepal’s post-Cold War redemocratization (1990–2006)*

As the Panchayat system grew progressively delegitimized, the underground political parties organized themselves and in 1990 launched a pro-democracy movement that succeeded in toppling the regime. A political compromise was eventually reached between King Birendra Shah and the agitating political parties. It entailed the promulgation of a new constitution based on the principles of constitutional monarchy and parliamentary democracy. The 1990 constitution, however, retained that constellation of symbolic provisions that defined the Nepali nation in ethno-cultural terms—a sort of a modern-day adaptation of the concept of Hindu kingship. Significantly, article 27(2) made His Majesty “the symbol of Nepali nationality and unity of the Nepali people,” a provision that was not present even in the nationalist Panchayat constitution. The state was eventually declared Hindu like the monarchy, the cow remained the national animal, and saffron endured as the national color, reflecting the document’s emphasis on Hindu symbolism (Malagodi 2013, 127–79). More substantively, the right to religion under article 19 afforded protection only to religion “as handed down from ancient times” (*sanātana dekhi caliāeko*) and retained the ban on proselytizing.

During the drafting of the 1990 constitution, however, there was an intense debate over the adoption of secularism. The campaign for secularism, launched by the communist forces and the religious minorities, gained momentum in June but was met with strong opposition from Nepal’s Hindu nationalists, who were supported by their Indian counterpart. In fact, on August 11, Lal Krishna Advani, the leader of the Indian Hindu nationalist party Bharatiya Jatana Party (BJP), visited Nepal to pressure the government to retain the constitutional definition of the kingdom as Hindu. The argument put forward was that such a definition did not equate to making Nepal into a confessional state but simply preserved the longstanding tradition of

“unity in diversity” under the tolerant umbrella of Hinduism that has characterized Nepal since its inception (Whelpton et al. 1999, 315–16). This line of reasoning is also manifest in the claim of the Indian political parties and organizations of the Hindu Right that Hindutva is about nationalism and not religion, an astute way of circumventing the constitutional commitment to secularism by appropriating it (Cossman and Kapur 1999). The Indian Supreme Court validated this position, that Hindutva means “Indian culture” and not Hinduism, in the controversial judgment over the election of Hindu Right politicians in Maharashtra handed down in 1996.<sup>7</sup>

Nepal’s 1990 constitution, however, also featured a strong commitment to equality and nondiscrimination, clearly revealing the ideological tensions within the document itself. While recognizing the sociocultural diversity and plural nature of the country’s population, the new constitution allowed for affirmative action measures but did not adopt the “minority approach” featured in the Indian document (Malagodi 2010). In line with the democratic spirit of 1990, the provisions of the *Ain* concerning religious conversion were amended in 1991 to remove any reference to any specific religion. The revised section provides as follows:

1. No one shall propagate any religion in such manner as to undermine the religion of others nor shall cause another to convert anyone to his or her religion. If a person attempts to do such an act, they shall be liable to imprisonment for a term of 3 years; if a person has already caused others to convert to another religion, they shall be liable to imprisonment for a term of 6 years. If such person is a foreign national, he or she shall also be deported from Nepal after they serve their sentence (my translation).

The criminalization of cow slaughter, however, remained unchanged in the *Ain*.

The issue of cow protection returned to the forefront of political engagement in March 1995 when the then minister for Health and Labour in the Communist Party of Nepal (Unified-Marxist Leninist) (UML) government, the Newar activist Padma Ratna Tuladhar, allegedly stated that the ban on cow slaughter violated the human rights of beef-eating minorities. During my interview with him, Tuladhar recounted the incident as follows:

In Bhara district, one human rights organization, HURON (Human Rights Organisation Nepal)—I was one of the founding members and Central Committee member—held a convention. . . . When I spoke at the Convention I wanted to draw attention to the fact that after the 1990 movement, after the restoration of democracy, although there was also the restoration of human rights—but only basic human rights like civic and political rights—other rights, social, economic, and cultural rights, were not there. For instance, Nepal was again declared a Hindu kingdom and the cow was made the national animal. But Nepal is—you see—a country of diversity with so many cultures and religions—we have Christians, Muslims, and indigenous people who have to get beef. So I pointed out that those people should be able to exercise that right. I gave the example of Muslims or Tamang wanting to take beef. As a human rights activist I should say yes, they should have that right to take beef, although the constitution is there with the Hindu kingdom clause. I observed that it could have been amended. It was reported by the opposition’s political friends that Mr. Tuladhar as a minister spoke and said that cows should

be slaughtered. I never used any of these words, “to kill” or “to slaughter.” That made very big news and from all the corners—political, social, and religious—I was attacked and attacked. My head was priced for 50,000. One activist said that Mr. Tuladhar should be cut into pieces. So still we do have this kind of discrimination, although we can say that we have again restored democracy. Nepali people have become sovereign, we are all equal . . . but still.<sup>8</sup>

The minister’s comments were met with such violent protests and indignation from various Hindu groups across the country that the then Prime Minister Man Mohan Adhikari issued a public apology and reassured the public of the government’s full support to the cow’s special status in Nepal (Whelpton et al. 1999, 211).

The criminalization of cow slaughter appears to be a phenomenon predominantly dealt with at district court level.<sup>9</sup> The only case on cow slaughter decided under the 1990 constitution that I could find in the *Nepāl Kanūn Patrika* (NKP), the monthly Law Reporter in which the most important Supreme Court decisions are reported, was the *Prem Bahadur Karki* case.<sup>10</sup> It was a criminal appeal from the lower court. The Supreme Court issued its verdict on December 13, 2002. The legal issue was identified as “use of poison and killing of an ox (*goru māreko*).” The court acquitted the defendant on the basis of the following arguments:

Because informant Nar Bahadur was unable to clearly state that the defendant had fed poison to the dead ox, because defendant Prem Bahadur Karki issued a statement refuting in Court and to the Authorized Officer the crime he had been charged with, because it was not possible to conduct a post-mortem on the corpse of the ox, because it was not possible to ascertain from the report of the National Technology Laboratory whether the death of the ox had taken place because he was fed the poison, because the eyewitness who reportedly saw the defendant feeding poison to the ox, Laxmi Maya, was unable to give a fixed incriminating account of the defendant feeding the poison, because an individual non-specialized official of the Animal Service Center expressed the opinion that the ox died after being fed poison, because to punish and convict the defendant only on the basis of the autopsy report which the [Animal Service Centre] NAPRAS wrote stating that two ox had died because of poison—in a situation in which the prosecution was unable to submit any other evidence—would not be consistent with the recognized principles of criminal justice (*phaujdārī nyāyako*), therefore the accused must be given the benefit of the doubt (*śankāko suvidhā*) (my translation).

The defendant had been acquitted by the District Court of Morang and the Appellate Court in Biratnagar after being charged under Sections 1 and 11 of *Muluki Ain*’s chapter on quadrupeds. Interestingly, in this criminal law case the judges made no reference to the 1990 constitution, not even to article 6(2) on the cow as Nepal’s national animal or article 4(1) on the Hindu connotation of the kingdom. The judgment concentrated on the facts of the case and the principles of criminal procedure called into question, ignoring altogether the debate on the potentially discriminatory nature of the ban on cow slaughter.

The discontent about the 1990 settlement intensified in the mid-1990s. In 1996, the Communist Party of Nepal (Maoist) launched an armed insurgency to capture the Nepali state. The list of demands submitted to the government included the

promulgation of a new constitution drafted by the people's elected representatives, the adoption of secularism, the end of discrimination on the basis of caste, ethnicity, and gender, and so on.<sup>11</sup> The year 2001 represented a turning point in the civil war. The royal massacre took place leaving nine members of the royal family dead, including King Birendra and Queen Aishwarya. As a result, unpopular King Gyanendra ascended to the throne leading to a severe weakening of the position of the monarchy. In November of the same year, the first round of peace talks between the government and the Maoists collapsed, opening the road to the bloodiest phase of the conflict amid the deployment of the army and repeated bouts of emergency and autocratic monarchical rule. As it became apparent that the conflict could not be resolved by military means, in November 2005 a political deal was brokered in India to end the stalemate; the political parties agreed to the longstanding Maoist demand for the abrogation of the 1990 constitution and the promulgation of a new document drafted by a directly elected Constituent Assembly. In April 2006, a pro-democracy movement launched by the mainstream political parties and the Maoists succeeded in bringing to an end King Gyanendra's autocracy.

### Nepal's peace process

Nepal's peace process began in April 2006 and revolved around two main goals: the integration of the Maoist combatants into the Nepal Army and the election of the Constituent Assembly. The constitution-making process was characterized by the mantra of social inclusion and was consequently expected to "build a New Nepal" through a radical program of state restructuring. In order to bring the Maoists into the fold and pave the way for the elections of the Constituent Assembly, it was agreed that an interim constitution would be drafted and the 1990 constitution abrogated. On May 18, the interim parliament issued a proclamation curtailing the powers of the king and declaring Nepal secular, thus undercutting the monarchy's legitimacy.

In January 2007, the interim constitution was promulgated. The document remained silent on the position of the monarchy but removed all the references to the notion of Hindu kingship. The right to religion under article 23, however, remained limited to religion "as handed down to him or her from ancient times," retained the ban on proselytization, and introduced a ban on religious interference ("no person shall act or behave in a manner which may infringe upon the religion of others"). Significantly, the controversial expression *sanātana* was taken out of the article and substituted with the term "*parāpurvā*," a neutral term that indicates "time immemorial" and is not specifically associated with Hinduism. Article 7 on national symbols retained crimson as the national color and the cow as the national animal, still reflecting the Hindu symbolism associated with political authority in Nepal.

Yash Ghai, at the time the UNDP advisor on Nepal's constitution-making process, commented the following:

a state does not need a religion; and in the same way doesn't need a national animal/plant etc., and suggested that having, as in Nepal, the cow as the national animal was unnecessarily divisive. (UNDP/CASU 2007, 18)

Maoist ideologue Baburam Bhattarai, during my interview with him, responded that retaining the cow as Nepal's national animal in the interim constitution was the outcome of the negotiations behind the finalization of the document in which the Maoists sought to transform the country into a republic: "We took the King and we gave the cow."<sup>12</sup> Other political commentators, instead, argued that the Maoists relented on the issue of the cow because they feared that the majority of the Nepali public would have not supported the decision.

The emphasis on inclusion during the early years of the peace process is reflected in the attempts to reform Nepal's legal system in order to amend civil and criminal law provisions that discriminate among Nepalis on the basis of religion, caste, ethnicity, language, gender, region, and so on. The international community in Kathmandu supported these initiatives and a number of reports were compiled on these issues. For instance, the trailblazing joint UK Department for International Development (DFID)–World Bank report *Unequal Citizens* treated the criminalization of cow slaughter as an example of discriminatory legal provisions, because Janajati, Dalit, Muslims, and other groups do not perceive cow slaughter to be a crime, and for many of these groups beef consumption is part of their cultural practices (World Bank 2006, 43). Significantly, the identity of the Adivasi Janajati ("Indigenous Nationalities") groups has historically developed in opposition to the identity of the high-caste Hindus (Guneratne 2002, 89). Riding the wave of inclusion, in 2007 a Janajati lawyer filed a public interest litigation petition in the Supreme Court seeking to have the criminalization of cow slaughter in the *Muluki Ain* declared unconstitutional on the basis that Nepal had become constitutionally secular. The apex court, however, upheld the validity of the ban on cow slaughter on the basis of the special constitutional recognition of the cow as Nepal's national animal and the role of the cow as Hinduism's sacred animal.<sup>13</sup> The decision reveals how sensitive and embattled the issue of cow protection by legal means remains in Nepal.

In fact, the current struggles over the meaning of secularism in the country revolve around the protection of Nepal's national identity through religious symbols. As Chiara Letizia (2012, 81) has clearly illustrated,

legal prohibitions against conversion and cow slaughter are the focal points around which the opposition to secularism is based. "Secularism," for my Hindu interviewees, meant allowing proselytization and cow slaughter, the former understood as the unfair conversion of illiterate people who would be lured by economic advantages (fueled by a "Christian conspiracy") and the latter as non-Hindus asserting their right to eat cows. The most recurrent argument was that secularism, because it gives religious minorities these rights, leads to disrespect and communal violence.

Therefore, cow protection is framed as instrumental to the preservation of Nepal's identity and social order through the imposition of the majority's "appropriate" standards of behavior on "deviant" minority groups. Ultimately, the intervention of the law in the protection of the cow fulfills a dual function: on the one hand, it provides legitimacy to political authority through the modern ideological device of ethno-cultural nationalism; on the other hand, it reinforces the hierarchical nature

of Nepal's status quo steeped in the exclusionary identity politics that has been promoted for centuries by the Nepali state.

The election of the first Constituent Assembly in April 2008 gave birth to Nepal's most representative state body in the country's history. The Maoists gained a relative majority, but no party controlled the Assembly. On May 28, in its first meeting the Constituent Assembly declared Nepal to be a republic. However, the political fragmentation of the body and the profound differences among the main political parties led to a political deadlock in the drafting of the new constitution. Notwithstanding four extensions of the Assembly's term, in May 2012 the body was dissolved, leaving the constitution-making process incomplete, even if the various Thematic Committees had prepared extensive reports and drafts. Significantly, the constitution draft of the chapter on the preliminaries did not feature an article on national symbols, and the definition of religion as "handed down since ancient times" was removed from the article on the right to religion in line with the spirit of inclusion that was to inform the new dispensation.

Fresh elections for the second Constituent Assembly eventually took place in November 2013 and brought a relative majority to the old centrist political parties. With the dissolution of the first Assembly inclusionary reforms progressively fell off the political agenda of the government. Nepal's climate of political stalemate led to what a number of commentators have described as "counter-revolution by stealth." While the second Assembly agreed to pick up from where the first Assembly had left off in terms of constitution-making, it became clear that the profound differences among the key political actors were difficult to resolve, and little progress was made with regard to drafting. In the wake of the devastating earthquakes in April and May 2015, Nepal's political elites vowed to "fast track" the drafting of the new constitution and complete the peace process. However, when the draft document was leaked to press in June amid increasingly violent protests, Seira Tamang pointedly commented that,

"the now officially public draft constitution has confirmed the fears of many. It has veered from the sentiments of the 2006 Jana Andolan and the 2007 Madhes Movement, retracted from the commitments of the interim Constitution and largely written-over the progressive drafts produced by the most-representative elected body in Nepal's history—the first Constituent Assembly" (*The Kathmandu Post* 2015).

The change in Nepal's political climate was also reflected in the Supreme Court's change of attitude. In 2014, an activist Janajati lawyer filed another public interest litigation petitioning the Court to strike down the chapter on quadrupeds in the *Muluki Ain* on the basis that it conflicts with the constitutional provision on secularism and international law instruments to which Nepal is party. Compensation for those who are serving imprisonment and facing prosecution was also requested. In September, the single bench of Justice Govinda Kumar Upadhyaya issued an order to dismiss the petition in the case of Tekam Gharti v Minister of Law and Justice. In a joint urgent communication by the Lawyers' Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP) and the National Coalition against Racial Discrimination (NCARD) to various UN Special Rapporteurs, the activist lawyers reported on the Tekam Gharti case as follows:

Though the petition presented the context of increasing communal tensions in recent times due to prohibition on cow slaughter, the Supreme Court ordered dismissal of the petition on the grounds that the Special Bench had already decided on the issue [in the case of *Om Prakash Aryal*]. Of particular concern is that the order issued by the single bench of Honorable Justice Govinda Kumar Upadhyaya states that despite the legal provision of the existing Chapter on the Quadraped, all Nepalese including Hindus and non-Hindus have lived heartily as flowers of a single garden; in such situation, an order as demanded in the petition is highly likely to devastate the feelings of [the] Hindu community. Also as Court is not the place to resolve such [an] issue but the Legislature-Parliament, the writ petition was not seen to be eligible at the first sight.<sup>14</sup>

Arguably, the Supreme Court thereby indirectly closed its doors to future constitutional cases against the provision of cow slaughter (LAHURNIP 2015). At district court level (i.e., in first instance proceedings), LAHURNIP claimed that a clearly discriminatory pattern emerged in the application of the provisions of the *Ain* criminalizing cow slaughter. Of all the cases monitored between 2011 and 2014 all the defendants were Janajati, with the exception of three cases where the defendants were respectively Dalits, Muslims, and in only one case upper-caste Hindus.<sup>15</sup>

Unsurprisingly in this growing climate of intolerance, the new constitution promulgated on September 20, 2015 backtracked from its commitment to secularism in the 2007 interim constitution and in the reports of the first Constituent Assembly. While defining the state as secular in article 4, it contains an explanation stating that “for the purpose of this article, ‘secular’ means protection of religion and culture being practiced since ancient times, and religious and cultural freedom.” Significantly, the expression *sanātana dekhi caliāeko* was again inserted in the text, going back to a limited conception of religious freedom conflated within the privileged position of Hinduism understood as *sanātana dharma*. The new document also retained the Hindu symbolism of the cow as Nepal’s national animal and saffron as Nepal’s national color in article 9(3). Interestingly, the proposal was put forward for the rhino to become Nepal’s national animal as it is an endangered species, but the proposal was rebuffed (Himalayan News Service 2015). Article 26 on the right to religious freedom removed the reference to *sanātana*, which in any case had been shifted to article 4, and retained the constitutional ban on religious proselytism. With regard to religion, the 2015 constitution presents almost the identical framework of the embattled 1990 document.

Unsurprisingly, in this context the Penal Code of 2018 also retained the criminalization of cow and ox slaughter under section 289, which provides for a sentence of three-year imprisonment for killing a cow or an ox, and six months for mutilation.

## Conclusions

The core argument put forward is that cow protection through legal means represents a useful prism to understand the approach deployed by the Nepali state to manage the profound sociocultural diversity of its people over the last two and

half centuries. These constitutional provisions have played a pivotal symbolic role in the construction of the Nepali nation over the centuries, but they also bore material implications for Nepal's marginalized groups. The analysis has revealed that an ambivalent notion of "the sovereign" has emerged in post-conflict Nepal, a representation of political authority in which the king's head has not yet been cut off. In Nepal, the transition from a notion of "sovereignty from above" centered on the divine notion of Hindu kingship and the subjugation of its subjects to a conception of "sovereignty from below" based on the consent of the people has remained incomplete. Cow protection has come to signify a vision of state authority that privileges the symbols of the majority over the rights of the minority. Two concluding remarks ensue: first, the fact that the majority of Nepal's population is Hindu is a sociological fact that hardly needs reinforcing in the constitutional texts, if at all. Second, if in the context of constitutional democracy national symbols bear no legal implications as it is often argued, then they are redundant and would be better omitted in the interest of legal clarity and certainty; if instead they have material implications as this study has sought to demonstrate, then they should be inclusive.

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#### NOTES

1. The 2011 Census in Nepal has identified that within the total population of 26.5 million there are 125 caste-ethnic groups (where the largest groups constitutes only 16.6 percent of the total population) alongside 123 languages and ten religions (Government of Nepal 2011).
2. *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1535.
3. Article 25, Explanation 2, Constitution of India 1950; S. 2 Hindu Marriage Act 1955.
4. For instance, the incident in Dadhri (BBC 2015a), and the issues of cow slaughter in Kashmir (BBC 2015b).
5. ICS 125/B/xiii/2/iv.
6. The relevant provisions are as follows:
  6. Except the four-footed animals that are restricted to kill, no one shall kill or injure (*khuni*) any other pet animal, even if such an animal causes loss to one's crops. One shall hand over such an animal to the police office, and the owner of crops shall be entitled to recover the loss (amount in question) from the owner of the animal. A person shall not get compensation for a loss of crops if he or she causes injury to the animal. If any animal, except a cow or ox,

is injured, one shall not be liable to punishment. If a person kills such an animal, the person shall pay compensation to the owner of the animal and shall also be liable to punishment.

7. If it seems that a pet animal may cause loss or damage because it is excited or has gone mad or for any other reason, any damage or risk (*jokhimi*) that may be caused by such an animal shall be saved at any cost, and such an animal shall be kept safely from causing any loss to some other person. When the owner of such an animal keeps the animal safely, but some person dies due to strike, bite, or any other act by such an animal, the owner of such an animal shall be dealt with pursuant to the Act regarding *bhabitabaya* (accidental homicide). The animal that kills a person shall be confiscated and shall be cut and its meat shall be auctioned if people eat the meat of such an animal and if people do not eat such meat, the body of such an animal shall be buried. The cow, ox, or other animal that is restricted to be killed, shall be put in the nearest government cattle house (*goth*), stable (*tabela*), or elephant shed (*hattisar*) in such a way that it cannot cause any loss or damage, and information thereof shall be given to the concerned office accordingly. If any animal kills any of the family members of the owner or caretaker of such animal, it shall not be considered to be an offence. Such an animal shall be confiscated (*jafat*) as mentioned above. In cases where such an animal kills any animal of another person, other than a human being, the loss shall be recovered and penalty shall also be imposed as referred to in the Act. In cases where an animal such as an elephant or horse, etc., which is being used as a means of transportation causes any loss or damage, it shall be dealt with in accordance with the concerned law. . . .
  17. If a stray (*chhada*) animal or an animal under the care of a herd (*gothala*) causes a serious injury to a person or another animal due to the negligence on the part of the herd, the owner of animal in the case of a stray animal, and the herd, if he or she is sane and has crossed the age of 16 years, and the owner of the animal, if the herd is below the age of 16 years, shall be liable to a fine of up to 20 Rupees.
7. Manohar Joshi v Nitin Bhaurao Patel AIR 1996 SC 796.
  8. Interview with Padma Ratna Tuladhar, Kathmandu, April 12, 2007.
  9. For instance, the Kripa Bhoteni case received great attention from the international media. On April 3, 2006, the District Court of Sankuvasabha in Western Nepal sentenced the fifty-year-old woman to twelve years of imprisonment for slaughtering a three-year-old cow for meat consumption (see BBC News 2006).
  10. HMG/N v. Prem Bahadur Karki, NKP, 2059/2002, Vol. 44, N. 9/10, p. 697.
  11. The list of the forty-point demands put forward by the Maoists is available at <https://www.satp.org/satporgtp/countries/nepal/document/papers/40points.htm> (accessed March 29, 2021).
  12. Interview with Baburam Bhattarai, Kathmandu, August 16, 2010.
  13. Omprakash Aryal v Prime Minister, NKP, 2008, Vol. 9, p. 1063.
  14. LAHURNIP and NCARD joint communication concerning violations of rights to freedom of religion or belief and cultural rights of indigenous peoples in Nepal (2015). While this was originally available online at [http://www.ncard.org.np/categoryFiles/1426983443nepal\\_cow\\_slaughter\\_communication\\_2015.pdf](http://www.ncard.org.np/categoryFiles/1426983443nepal_cow_slaughter_communication_2015.pdf) (accessed January 10, 2016), unfortunately as at April 2021

the file is no longer available online. Please contact the author directly for access to a copy of this resource.

15. For a sample of prosecutions for cow slaughter in Nepal in 2012–13 see: *Indigenous Issues in Asia*, December 16, 2013.

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